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IN THE
COURT OF APPEALS OF INDIANA

PATRICK JACKSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-1009-CR-1031
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Amy Barbar, Magistrate
Cause No. 49G22-1002-FC-7383

June 7, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Patrick Jackson appeals his conviction for Class C felony battery. Patrick was involved in a domestic dispute with his stepfather and allegedly stabbed him with a knife. Patrick's mother witnessed the melee, ran from the house, and called 911. Patrick fled. Police responded and found the victim incapacitated. Patrick's mother was frantic and told an officer, "Patrick stabbed him." At trial, the officer testified to mother's out-of-court statement. Patrick's mother did not testify. Patrick argues that the trial court erred by admitting his mother's statement via the testimony of the responding officer. He claims that (I) his mother's statement constituted inadmissible hearsay and (II) its admission violated his Sixth Amendment right to confrontation. We conclude that the statement was admissible pursuant to the excited utterance exception to the hearsay rule. We further conclude that the statement was nontestimonial under *Crawford v. Washington*, 541 U.S. 36 (2004), and *Davis v. Washington*, 547 U.S. 813 (2006), and thus did not implicate Patrick's confrontation rights. We find no error and affirm.

Facts and Procedural History

On the night of January 29, 2010, Patrick was at home with his mother Patricia and siblings Peter and Patrice. Also present was Patrick's friend Anthony Turner. Stepfather Jeff Anderson was out playing chess but returned home around 11 p.m.

At some point Patrick and Patricia became involved in an argument. Patricia tried to call the police, but Patrick knocked her cell phone to the floor. Jeff stepped in to diffuse the conflict. Patrick called Jeff an "M.F." and told Jeff he was going to kill him.

Patrick then stabbed Jeff in the chest with a knife. Jeff wrestled Patrick to the floor. Anthony also joined the fracas, striking Jeff and kicking him in the head.

Patricia ran from the home yelling and screaming. She crossed the street and called 911 from a neighbor's residence. Patrick, Anthony, Peter, and Patrice all fled.

Officer Justin Toussing was dispatched in response to the disturbance. He arrived within three or four minutes of receiving the dispatch. As Officer Toussing approached, he encountered Patricia frantic and shoeless. Patricia ran down the street and directed Officer Toussing to the side entrance of her house. She stated repeatedly that her husband had been stabbed.

Officer Toussing entered the home with Patricia and observed Jeff seated in the kitchen. Jeff's face was swollen and bloody. He was staring straight ahead and appeared incoherent and disoriented. Patricia told Officer Toussing that "Patrick stabbed him." Tr. p. 73. Officer Toussing swept the house to make sure no suspects were present. After securing the premises, he obtained a description of Patrick and radioed it to other officers. Patrick was apprehended shortly thereafter. Jeff was transported to the hospital for treatment.

The State charged Patrick with, among other things, Class C felony battery. Patrick waived his right to a jury trial and was tried to the bench.

Patricia did not testify at trial, but Officer Toussing appeared and detailed his emergency response. Officer Toussing relayed Patricia's out-of-court statements, testifying that "[a]s soon as we went inside, I located Jeff off to my left. . . . At which point [Patricia] stated specifically Patrick stabbed him." *Id.* Patrick objected, arguing

that Patricia's statement was hearsay and that its admission violated his Sixth Amendment confrontation rights. The trial court admitted the statement over objection.

The trial court found Patrick guilty of battery. Patrick appeals.

Discussion and Decision

Patrick claims that the trial court erred in admitting Patricia's out-of-court statement that Patrick stabbed Jeff. He argues that (I) the statement constituted inadmissible hearsay and (II) its admission violated his confrontation rights under the Sixth Amendment to the United States Constitution.

I. Hearsay Claim

Patrick first claims that Patricia's out-of-court statement that Patrick stabbed Jeff constituted inadmissible hearsay.

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Ind. Evidence Rule 801(c). Hearsay is not admissible except as provided by law or by other court rules. Ind. Evidence Rule 802.

One exception to the hearsay rule is for "excited utterances." Ind. Evidence Rule 803(2). An excited utterance is a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." *Id.* The rationale behind admitting excited utterances is that startling events and absence of opportunity for reflection vest the statements with reliability and reduce the likelihood of falsification. 13 Robert Lowell Miller, Jr., *Indiana Practice: Indiana Evidence* § 803.102 (3d ed. 2007).

The excited utterance exception contains three foundational requirements: (1) a startling event, (2) a statement made by a declarant while under the stress of excitement caused by the event, and (3) a relation of the statement to the event. *Davenport v. State*, 749 N.E.2d 1144, 1148 (Ind. 2001), *reh'g denied*. In addition, the declarant must have personally witnessed the event about which he speaks. *Carter v. State*, 683 N.E.2d 631, 632 (Ind. Ct. App. 1997), *trans. denied*. "*Participation* by the declarant is not required . . . . [O]ne may be startled by an event in which he is not an actor." Fed. R. Evid. 803 advisory committee's note.

The event and utterance need not be absolutely contemporaneous, though lapse of time is a factor to consider in determining admissibility. *Holmes v. State*, 480 N.E.2d 916, 918 (Ind. 1985). The heart of the inquiry is whether the declarant had time for reflection and deliberation. *Hardiman v. State*, 726 N.E.2d 1201, 1204 (Ind. 2000). Whether the statements were made in response to inquiries is also a relevant consideration. *Gye v. State*, 441 N.E.2d 436, 438 (Ind. 1982). Regardless, the statement must be unrehearsed and made while still under the stress of excitement from the startling event. *Yamobi v. State*, 672 N.E.2d 1344, 1346 (Ind. 1996).

Whether a statement constitutes an excited utterance is a factual determination subject to a clearly erroneous standard of review. *Davenport*, 749 N.E.2d at 1148; *see also* 21A Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5053.3 (2d ed. 2005) ("The judge determines the preliminary facts regarding the hearsay exceptions in Rule 803 . . . . Most courts agree that all elements of the [excited utterance] exception are for the judge under Rule 104(a) . . . ."); Ind. Evidence

Rule 104(a) ("Preliminary questions concerning . . . the admissibility of evidence shall be determined by the Court . . . .").

Here we conclude that Patricia's statement was hearsay but nonetheless admissible pursuant to the excited utterance exception. Patricia witnessed an altercation and stabbing between her son and husband. She ran from the house yelling and screaming, crossed the street, and called police. Officer Toussing arrived at the scene only three or four minutes after being dispatched. Patricia was frantic when he arrived, notably running barefoot outside in the dead of winter. Patricia spontaneously told Officer Toussing that her husband had been stabbed and that Patrick had stabbed him. Patricia's statements were offered for their truth and thus constituted hearsay. However, the trial court could reasonably have concluded from the attendant circumstances that (1) the stabbing was a startling event, (2) Patricia was still under the stress of excitement caused by the event when she made her statements to Officer Toussing, and (3) Patricia's statements that Patrick stabbed Jeff related to the event. The evidence further supports a finding that Patricia personally observed the stabbing. The trial court was therefore warranted in admitting Patricia's statements pursuant to Evidence Rule 803(2). *See, e.g.*, *Boatner v. State*, 934 N.E.2d 184, 187 (Ind. Ct. App. 2010); *Jones v. State*, 800 N.E.2d 624, 628 (Ind. Ct. App. 2003).

II. Confrontation Claim

Patrick next claims that the admission of Patricia's statement violated his Sixth Amendment confrontation rights.

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The right to confrontation guaranteed by the Sixth Amendment is made applicable to the states by the Due Process Clause of the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 406 (1965).

In *Crawford v. Washington*, 541 U.S. 36 (2004), the United States Supreme Court held that the Sixth Amendment Confrontation Clause bars admission of testimonial hearsay in criminal trials unless the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine him. *Id.* at 68. The *Crawford* majority declined to provide a comprehensive definition of "testimonial," but it identified various formulations of the "core class of 'testimonial' statements": (1) ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; (2) extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; and (3) statements made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. *Id.* at 51-52.

In *Davis v. Washington*, 547 U.S. 813 (2006), the Supreme Court elaborated on the meaning of "testimonial" in the context of police questioning and emergency response. *See id.* at 822. The Court concluded that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively

indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Id.* "Statements are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.* The Court has also since clarified that determining the primary purpose of an interrogation requires an objective evaluation of the circumstances in which the encounter occurs and the statements and actions of the parties. *Michigan v. Bryant*, 131 S. Ct. 1143, 1156 (2011).

Here we conclude that Patricia's statements to Officer Toussing were nontestimonial and therefore did not implicate Patrick's right to confrontation. We first note that Patricia's statements were spontaneous and unsolicited. None was made in response to any actual questioning by law enforcement. Moreover, at the time the statements were made, the victim was seriously injured and in need of medical attention, and neither Patricia nor Officer Toussing knew if the perpetrator was still in the house or vicinity. Together these facts and circumstances sustain a finding that Patricia made her statements for the purpose of helping police resolve an ongoing emergency and not to prove past events with an eye toward prosecution. We thus conclude that the statements were nontestimonial in nature, and their admission did not run afoul of Patrick's Sixth Amendment rights. *See, e.g.*, *Boatner*, 934 N.E.2d at 188.

For the foregoing reasons, we find the trial court did not err in admitting the statements at issue. The court's judgment of conviction is affirmed.

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.