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IN THE
COURT OF APPEALS OF INDIANA

DEMARCUS VERSE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-1012-CR-628
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable John M. Marnocha, Judge
Cause No. 71D02-1008-FD-759

June 21, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Demarcus Verse ("Verse") appeals his convictions for Strangulation, as a Class D felony[1]; two counts of Battery, as Class A misdemeanors[2]; Resisting Law Enforcement, as a Class A misdemeanor[3]; and False Informing, as a Class B misdemeanor.[4] We affirm.

Issues

Verse raises two issues for our review, which we restate as:

I. Whether the trial court abused its discretion when it admitted evidence under the excited utterance exception to the hearsay rule; and

II. Whether there was sufficient evidence to sustain a conviction as to one of the counts of battery.

Facts and Procedural History

We state the facts according to our standard of review.

Late on July 2, 2010, Verse picked up his girlfriend, Shannon Simmons ("Simmons"), from work. The two bought alcohol and went to Verse's South Bend home, where Verse lived with his teenage daughter, D.V.

Sometime near midnight on July 3, 2010, an argument broke out between Verse and Simmons. The argument escalated into a fight, leaving Simmons with bruising on her arms and back and scratches on her neck. D.V. attempted to get Verse and Simmons to stop fighting. Verse struck D.V. in the face, and then choked her until she could not breathe. D.V. also had scratches on her neck.

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[1] See Ind. Code § 35-42-2-9.
[2] See I.C. § 35-42-2-1.
[3] See I.C. § 35-44-3-3.
[4] See I.C. § 35-44-2-2.

Simmons then left Verse's home, but Verse followed her. The two eventually ended up in the open laundry room in the home of Verse's friend, Marcus Briggs ("Briggs"), where their argument continued. Briggs was asleep at the time, but one of his friends, Nathan Easton ("Easton"), was awake and in the home.

While this was going on, D.V. called the South Bend Police Department. Several officers arrived on the scene, including Corporal Randal Goering ("Corporal Goering") and Officer Andrew Witt ("Officer Witt"). Corporal Goering searched Verse's residence and, failing to find him, the officers set out to look for Verse. An unnamed woman told Officer Witt that she had seen a man attacking a woman, and directed him toward Briggs's house.

Officer Witt approached the rear of the house and heard a man and woman arguing; as he approached, a man looked out the window, saw Officer Witt, and quickly closed the curtain. Officer Witt then radioed Corporal Goering and directed him to Briggs's home.

Corporal Goering knocked on the front door of the house. Easton answered the door. Verse then came downstairs and identified himself to Corporal Goering as Briggs, but produced no identification when asked. The officers then left and returned to Verse's home to obtain a photograph or other means to identify him, and D.V. provided a photograph of Verse, whom Corporal Goering immediately recognized as being the same individual as had claimed to be Briggs only moments before.

While Corporal Goering was at Verse's home talking with D.V., Verse pulled Simmons out of the house with him. This was observed by a police officer, who notified Corporal Goering. Corporal Goering and another officer began to pursue Verse, who fled.

Officer Witt joined the pursuit while it was in progress. The officers instructed Verse to stop and attempted to Tase him to stop the pursuit. When this failed and Verse began to approach the police, a third officer, Kyle Dombrowski, was forced to physically subdue Verse. Officer Witt then handcuffed Verse.

On August 5, 2010, Verse was charged with Strangulation, two counts of Battery, Resisting Law Enforcement, and False Informing.

A jury trial was conducted on October 28, 2010, and October 29, 2010. During the trial, both Simmons and D.V. testified that Verse had not been violent with them, instead insisting that each of them was aggressive toward Verse, who had been trying to calm them down. The State introduced the recording of D.V.'s 911 call and Corporal Goering's testimony as to D.V.'s statements to him immediately upon his arrival at Verse's home. Verse objected on grounds that admission of this evidence violated both the Confrontation Clause to the Sixth Amendment of the United States Constitution and the hearsay rule. The trial court found no violation of the Confrontation Clause, found that D.V.'s 911 call and her initial statements to Corporal Goering fell within the excited utterance exception to the hearsay rule, and admitted the evidence over Verse's objection.[5]

At the conclusion of the trial, the jury found Verse guilty on all counts. Also at the conclusion of the trial, the trial court entered judgment on both counts of Battery and on the verdicts for Resisting Law Enforcement and False Informing. On November 22, 2010, the

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[5] In the instant appeal, Verse concedes that there is no Confrontation Clause issue involved in the admission of D.V.'s prior statements. (Appellant's Br. 7).

trial court entered judgment as to Strangulation and sentenced Verse to consecutive sentences of two years imprisonment for Strangulation; one year imprisonment for each count of Battery and for Resisting Law Enforcement; and 180 days imprisonment for False Reporting.

This appeal followed.

Discussion and Decision

Whether D.V.'s Statements were Excited Utterances

Verse seeks a reversal of all his convictions in this case on the ground that the trial court abused its discretion when it admitted D.V.'s statements to police into evidence through 911 tapes and the testimony of Corporal Goering under the excited utterance exception to the hearsay rule. See Ind. Evidence Rule 803(2).

We review a trial court's ruling on the admission of evidence for an abuse of discretion. Lindsey v. State, 916 N.E.2d 230, 238 (Ind. Ct. App. 2009), trans. denied. We reverse only if the trial court's decision is clearly against the logic and effect of the facts and circumstances. We do not reweigh evidence and evaluate conflicting evidence in favor of the trial court's ruling, but consider all uncontested evidence in favor of the defendant. Id.

Here, Verse challenges the admission of evidence under an exception to the hearsay rule. 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." Evid. R. 801(c). Generally, evidence which constitutes hearsay may not be admitted except as provided by the rules of evidence. Evid. R. 802. One such exception exists for excited utterances, which are "statement[s] related to a startling event or condition made while the

declarant was under the stress of excitement caused by the event or condition." Evid. R. 803(2). Excited utterances may be admitted into evidence without regard to whether the individual making the statement is available to testify at trial. Evid. R. 803.

> For a statement to be admitted as an excited utterance, the following elements must be shown: 1) a startling event occurs; 2) a statement is made by a declarant while under the stress of excitement caused by the event; and 3) the statement relates to the event. Gordon v. State, 743 N.E.2d 376, 378 (Ind. Ct. App. 2001). The heart of the inquiry is whether the statement was "inherently reliable because the witness was under the stress of an event and unlikely to make deliberate falsifications." Id. The amount of time that has passed between the event and the statement is relevant but not dispositive. Noojin v. State, 730 N.E.2d 672, 676 (Ind. 2000). Moreover, the focus is on whether the declarant is still under the influence of the excitement engendered by the startling event. Lieberenz v. State, 717 N.E.2d 1242, 1246 (Ind. Ct. App. 1999).

Kimbrough v. State, 911 N.E.2d 621, 632-33 (Ind. Ct. App. 2009).

In Kimbrough, Kimbrough sought to exclude from testimony his victim's statements to a police officer who responded to a 911 call regarding Kimbrough's attack. The victim's statement to police came "only three minutes after the 911 call," while Kimbrough's victim was still bleeding from the attack and was "upset, hurt, angry, and under the stress of the incident" when the police arrived. Under these circumstances, this court held that the police officer's testimony about the victim's hearsay statements were admissible as an excited utterance. Id. at 633.

The same holds true here. Corporal Goering arrived at Verse's house and spoke with D.V. within five or ten minutes after D.V. called 911. Corporal Goering characterized D.V. as being "very upset" (Tr. 189) and "in tears, scared … very shaken up" and "frightened" as

though she had been through a "pretty traumatic experience." (Tr. 173.) In short, the circumstances in which D.V. first spoke to Corporal Goering are indicative of the type of uncoached and unlikely fabricated statements made admissible by the excited utterance exception. Cf. Kimbrough, 911 N.E.2d at 632-33.

Though the trial court had before it D.V.'s testimony that she lied during the 911 call and could not remember what she told Corporal Goering, these are of no event in our analysis, as we do not reweigh evidence when reviewing an evidentiary ruling. Lindsey, 916 N.E.2d at 238. We therefore conclude that the trial court did not abuse its discretion when it admitted Corporal Goering's testimony and the 911 recording into evidence.

Sufficiency of the Evidence of Battery upon Simmons

Verse separately challenges one of his convictions for Battery, namely, that count which alleged that he battered Simmons. He rests his challenge on Simmons's testimony that he inflicted no harm upon her, which contradicted Simmons's earlier statements to police officers.

When reviewing the sufficiency of the evidence, we consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). We do not assess the credibility of witnesses or reweigh evidence. Id. We will affirm the conviction unless "no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." Id. (quoting Jenkins v. State, 726 N.E.2d 268, 270 (Ind. 2000)). "The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict." Id. (quoting Pickens v. State, 751 N.E.2d 331, 334 (Ind. Ct. App.

2001)).

To convict Verse of Battery, as a Class A misdemeanor, the State was required to prove beyond a reasonable doubt that Verse knowingly touched Simmons in a rude, insolent, or angry manner, thereby resulting in injury to Simmons. Ind. Code § 35-42-2-1(a)(1)(A); App. 27.

Here, Verse contends that there was insufficient evidence that the battery upon Simmons ever occurred. During her testimony at trial, Simmons was confronted by the State with her prior statements to police regarding Verse's attack on her that night; she denied the prior account, insisting that she had been the aggressor on July 3, 2010. Yet numerous photographs of Simmons were entered into evidence, with different pictures documenting different injuries, including bruises on her arms and redness and scratches on her neck. In addition, Simmons's clothing was torn. Simmons's only explanation for her injuries was that Verse had been restraining her for her own good because she was drunk, angry, and was trying to walk home alone at night.

Given the evidence before it, the jury could properly disregard as unreliable Simmons's testimony at trial, and there was sufficient evidence for a reasonable jury to conclude that Verse battered Simmons. We cannot reweigh evidence or reassess the credibility of witnesses, Drane, 867 N.E.2d at 146, and we will not do so here.

Conclusion

The trial court did not abuse its discretion when it admitted the recording of D.V.'s 911 call and Corporal Goering's testimony regarding D.V.'s statements to him upon his

arrival at Verse's home. There was sufficient evidence to support Verse's conviction for Battery.

Affirmed.

FRIEDLANDER, J., and BROWN, J., concur.