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FILED
Jul 05 2011, 9:18 am
CLERK
of the supreme court, court of appeals and tax court

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IN THE
COURT OF APPEALS OF INDIANA

DURON REESE SMITH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-1012-CR-679
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable John M. Marnocha, Judge
Cause No. 71D02-1008-FC-199

July 5, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Defendant Duron Reese Smith appeals his two convictions for Class C felony Battery.[1] Specifically, Smith contends that the trial court abused its discretion in admitting certain evidence at trial. We affirm.

FACTS AND PROCEDURAL HISTORY

Smith and Shayla Sink became involved in a romantic relationship after meeting in August of 2009. Sink became pregnant during this romantic relationship. On March 18, 2010, Sink received a text message from an unknown caller. Sink asked Smith to call the unknown caller's phone number to determine who it was. When Smith called the number, a male answered. Upon hearing the male voice, Smith became angry and repeatedly struck Sink across the face. Sink suffered swelling and bruising to her face, but did not immediately report the incident to the police.

At some point, representatives of the Department of Child Services ("DCS") came to Sink's home to investigate the cause of her injuries and to remove her three children from her home. Sink initially told the DCS representatives that she had received the injuries during a fight with another woman, but eventually admitted that she had received the injuries when Smith repeatedly struck her face. At the suggestion of the DCS representatives, Sink reported the March 18, 2010 incident to the police. Soon thereafter, Sink received multiple angry and threatening voicemail messages from Smith. In these messages, Smith referred to Sink as a "snitch" and stated that he hoped "that thing in [her] stomach pops … its heart pops." State's Ex. 11.

[1] Ind. Code § 35-42-2-1 (2009).

On April 27, 2010, Sink spent the evening watching movies and eating popcorn at Smith's aunt's apartment with Smith's mother and cousin. Smith was not present at the apartment, and Sink was not expecting to see him that evening. At some point, Sink went to the bathroom. As Sink was exiting the bathroom, Smith appeared and "pushed through the door and attacked her." Tr. p. 223. Smith grabbed Sink by the hair and pulled a substantial amount of hair from Sink's scalp. As a result of Smith's actions, Sink suffered a head wound. Sink was eventually transported to the hospital where she received a staple in her scalp to close the head wound.

On August 26, 2010, the State charged Smith with two counts of Class C felony battery. Pursuant to Indiana Code section 35-42-2-1(a)(8), battery is a Class C felony if it results in bodily injury to a pregnant woman and the defendant knew the victim was pregnant. On November 9, 2010, Smith was found guilty as charged following a two-day jury trial. At sentencing, the trial court imposed an aggregate six-year sentence with three years suspended. The trial court also placed Smith on probation for two years after his release from incarceration. This appeal follows.

DISCUSSION AND DECISION

Smith contends that the trial court abused its discretion in admitting certain evidence at trial. Specifically, Smith claims that the trial court abused its discretion in admitting (1) a tape recording of messages that Smith left on Sink's voicemail after she filed a police report alleging that Smith repeatedly struck her in the face on March 18, 2010; and (2) Sink's statement to the investigating officer immediately after the April 27, 2010 attack.

> When ruling on the admissibility of evidence, the trial court is afforded broad discretion, and Indiana appellate courts will only reverse the ruling upon a showing of abuse of discretion. *Smoote v. State*, 708 N.E.2d 1, 3 (Ind. 1999). An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court. *Stone v. State*, 536 N.E.2d 534, 538 (Ind.Ct.App.1989), *trans. denied*.

Gibson v. State, 733 N.E.2d 945, 951 (Ind. Ct. App. 2000).

A. Messages Left by Smith on Sink's Voicemail

Smith contends that the trial court abused its discretion in admitting a tape recording of messages that he left on Sink's voicemail after she filed a police report alleging that he repeatedly struck her in the face on March 18, 2010. Smith argues that the recording should have been excluded because it was overly prejudicial and contained only cumulative evidence. The State, however, argues that the recording was not overly prejudicial or merely cumulative of other evidence, but rather contained relevant evidence that Smith battered Sink, causing bodily injury, and that he knew she was pregnant.

Indiana Rule of Evidence 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." Relevant evidence, however, is not inadmissible merely because it is prejudicial. *Robinson v. State*, 720 N.E.2d 1269, 1271 (Ind. Ct. App. 1999). In determining whether the prejudicial effect of relevant evidence substantially outweighs its probative value, the trial court must apply a balancing test. *Id*. Moreover, the admission of cumulative evidence does not itself warrant a new trial. *Kubsch v. State*, 784

N.E.2d 905, 923 (Ind. 2003). Rather, the appellant must show that the alleged unfair prejudice flowing from the evidence outweighs its probative value. *Id*.

On March 29, 2010, eleven days after the March 18, 2010 attack, Sink filed a police report in which she alleged that Smith had repeatedly struck her in the face. At some point after Sink filed the police report, Smith called Sink and left her profanity-laced voicemails in which he angrily referred to her as a "snitch" and stated that he hoped "that thing in your stomach pops … its heart pops." State's Ex. 11.

Smith acknowledges that the recording indicates that he knew that Sink was pregnant, but argues that the recording should have been excluded because it was cumulative of other evidence that he knew Sink was pregnant and was overly prejudicial. Smith claims that the tape recording was overly prejudicial because it was laced with profanity and does not contain an admission that he struck Sink. The State, on the other hand, claims that the recording was relevant because by calling Sink a "snitch," Smith effectively admits that Sink's allegation that he struck her was true. Thus, the State argues that the probative value of the recording outweighed any potential prejudicial effect that the recording may have had on the jury. We agree.

Upon review, we find it notable that the recording indicates that upon learning that Sink had filed a police report alleging that Smith had repeatedly struck her, Smith did not accuse Sink of lying, but rather called her a "snitch," which is commonly recognized as a slang term for an informer. *See* Oxford English Dictionary Online, *available at* http://oed.com/view/Entry/183315?rskey=BViPw9&result=1#eid (last visited June 13, 2011).

Smith's angry reference to Sink as a "snitch" is particularly relevant to his consciousness of guilt, and the trial court was within its discretion to consider this evidence highly probative on that point. While Smith's statements may have been profane, such profanity would not appear to be overly prejudicial in the context of allegations that he repeatedly beat a pregnant woman. Furthermore, with respect to Smith's claim that the recording contained merely cumulative evidence that he knew Sink was pregnant, we conclude that the evidence was not cumulative, but rather provided direct corroborating evidence to Sink's testimony that Smith knew that she was pregnant because he went with her on pregnancy-related appointments at a woman's clinic. As such, we conclude that the recording was not more prejudicial than probative.

B. Sink's Statement to the Investigating Officer

Smith also contends that the trial court abused its discretion in admitting Officer Kelly's testimony regarding Sink's statement to him immediately following the April 27, 2010 attack. Specifically, Smith argues that Officer Kelly's testimony was inadmissible hearsay.

> Hearsay is an out-of-court statement offered in court to prove the truth of the matter asserted. *Jones v. State*, 800 N.E.2d 624, 627-28 (Ind. Ct. App. 2003) (citing Ind. Evidence Rule 801(c)). As a general rule, hearsay evidence is inadmissible. *Id*. (citing Ind. Evidence Rule 802). One exception to the hearsay rule is the "excited utterance" exception contained in Evidence Rule 803(2). This rule provides that "[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" is not excluded by the hearsay rule, even if the declarant is available as a witness. Ind. Evidence Rule 803(2).

Boatner v. State, 934 N.E.2d 184, 186 (Ind. Ct. App. 2010).

> In order for a hearsay statement to be admitted as an excited utterance, three elements must be present: (1) a startling event has occurred; (2) a statement was made by a declarant while under the stress of excitement caused by the event; and (3) the statement relates to the event. *Jones*, 800 N.E.2d at 627-28. This is not a mechanical test, and the admissibility of an allegedly excited utterance turns on whether the statement was inherently reliable because the witness was under the stress of the event and unlikely to make deliberate falsifications. *Id*. (citing *Jenkins v. State*, 725 N.E.2d 66, 68 (Ind. 2000)). "The heart of the inquiry is whether the declarant was incapable of thoughtful reflection." *Id*. (citing *Marcum v. State*, 772 N.E.2d 998, 1001 (Ind. Ct. App. 2002)).

Id. Although the amount of time that has passed is not dispositive, a statement that is made long after the startling event is usually less likely to be an excited utterance. *Id*. (citing *Gordon v. State*, 743 N.E.2d 376, 378 (Ind. Ct. App. 2001)); *see also Yamobi v. State*, 672 N.E.2d 1344, 1346 (Ind. 1996) (noting that while courts have found hearsay declarations made fifteen minutes after an auto accident inadmissible, courts have also found declarations made hours after the startling event to be admissible).

At trial, Officer Kelly testified that when he arrived at Smith's aunt's apartment, Sink was very distraught, crying, covered in blood, and shaking. About four or five minutes later, Sink, who was still visibly upset, calmed down to the point that she could tell Officer Kelly what happened. Sink told Officer Kelly that Smith "pushed through the door and attacked her." Tr. p. 223.

In challenging the trial court's determination that Sink's statement to Officer Kelly was an excited utterance, Smith does not specifically dispute that Sink was injured as a result of a startling event, *i.e.* a physical attack, or that her statement to Officer Kelly related to this attack. Smith rather argues that Sink's testimony did not demonstrate that she made the

statement to Officer Kelly while under the stress of excitement caused by the attack. Officer Kelly's testimony, however, demonstrated that when he arrived, Sink was distraught, crying, covered in blood, and shaking. After approximately four or five minutes, Sink calmed down to the point that she could speak with Officer Kelly. Although Sink had calmed down to the point that she was able to speak to Officer Kelly, she was still visibly upset when she told Officer Kelly about the attack. We conclude that Officer Kelly's testimony is sufficient to prove that Sink gave the challenged statement to Officer Kelly while under the stress of excitement caused by the attack. Moreover, Smith's request that we reverse the trial court's decision to admit Sink's statement to Officer Kelly based on Sink's testimony regarding her mental state after the attack effectively amounts to a request that we reweigh the evidence, which we will not do. *Yamobi*, 672 N.E.2d at 1348. Accordingly, the trial court did not abuse its discretion in admitting Sink's statement to Officer Kelly under the excited utterance exception to the hearsay rule.

The judgment of the trial court is affirmed.

BAKER, J., and MAY, J., concur.