[Cite as *State v. Zaccone*, 2018-Ohio-5340.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2017-T-0070**
- vs -	:	
AMATO PASQUALE ZACCONE,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 2017 CR 00089.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *Gabriel Wildman* and *Ashleigh Musick*, Assistant Prosecutors, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481 (For Plaintiff-Appellee).

Rhys Brendan Cartwright-Jones, 42 North Phelps Street, Youngstown, OH 44503 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, Amato Pasquale Zaccone, appeals from the June 14, 2017 and July 27, 2017 judgments of the Trumbull County Court of Common Pleas, finding him guilty of domestic violence and sentencing him to 36 months in prison following a jury trial. On appeal, appellant asserts the trial court erred in allowing into evidence hearsay

statements from the alleged victim thereby violating his rights under the Confrontation Clause. Finding no reversible error, we affirm.

{¶2} On March 14, 2017, appellant was indicted by the Trumbull County Grand Jury on one count of domestic violence, a felony of the third degree, in violation of R.C. 2919.25(A) and (D)(1) and (4). Appellant was represented by counsel and entered a not guilty plea at his arraignment.

{¶3} A jury trial commenced on June 13, 2017. Appellee, the state of Ohio, presented three witnesses: Georgette Allen (the victim), and Officers Nancy Tipple and Dominic Pagano, with the Hubbard City Police Department. Appellant did not testify and presented no witnesses.

{¶4} Ms. Allen was first called to the stand. However, she invoked her Fifth Amendment right to not testify. The state, through joint stipulation, played a 911 call for the jury. (State's Exhibit 12). Ms. Allen stated in her 911 call that appellant physically attacked her, choked her, tackled her, and threw her to the floor as a result of an argument over money. The state introduced recordings of jail phone conversations between appellant and his sister and between appellant and Ms. Allen. (State's Exhibit 13). The state introduced pictures of Ms. Allen's injuries. (State's Exhibits 1-4). The state introduced pictures of appellant's injuries. (State's Exhibits 8-10). The state introduced pictures of the residence. (State's Exhibits 5-7). The state also introduced a copy of Ms. Allen's written statement immediately following the incident. (State's Exhibit 11).

{¶5} The following facts emanate from the record: appellant, following a drinking binge, physically assaulted Ms. Allen, his live-in girlfriend, on January 27, 2017,

which prompted her to call 911 at 1:53 a.m. Officers Tipple and Pagano were dispatched at 1:54 a.m. to 89 Jacobs Road, Hubbard, Trumbull County, Ohio and arrived at 1:58 a.m. Upon arrival, the officers could see appellant and Ms. Allen inside the residence as the couple continued to verbally argue. Officer Tipple spoke with Ms. Allen in a back bedroom while Officer Pagano spoke with appellant in the living room.

{¶6} Officer Tipple testified that Ms. Allen "appeared to be emotional. She was tearing up, her voice was shaky. She just overall seemed upset, shaky, scared." (Jury Trial T.p. Vol. II, p. 260). Officer Tipple indicated that Ms. Allen reported that she and appellant had argued throughout the evening after drinking all day. Officer Tipple said that Ms. Allen indicated that appellant tackled Ms. Allen, choked her, and slapped her across the face. (State's Exhibit 12). Ms. Allen had scratches on her hands and left arm as well as a scrape across her forehead that was bleeding. (State's Exhibit's 1-4). Ms. Allen also reported to Officer Tipple that she was fighting to get appellant off her and that after managing to escape appellant's hands, appellant followed her and punched a hole in the bedroom door. (State's Exhibit 7). Ms. Allen also provided Officer Tipple with a written version of her oral report. (State's Exhibit 11).

{¶7} Officer Pagano testified that appellant indicated that he and Ms. Allen got into an altercation when he tried to leave the residence. Officer Pagano described appellant as "[v]ery calm and not very forthcoming." (Jury Trial T.p. Vol. II, p. 310). Officer Pagano also observed scratches and marks on appellant's face, neck, and hands. (State's Exhibits 8-10).

{¶8} After obtaining the statements from Ms. Allen and appellant, the officers determined appellant to be the aggressor and placed him under arrest for domestic

violence. Based on appellant's criminal history, he was charged with a third degree felony.

{¶9} Following trial, the jury returned its verdict, finding appellant guilty of domestic violence as charged in the indictment.

{¶10} On July 27, 2017, the trial court sentenced appellant to 36 months in prison. The court further imposed an additional 515 days to be served consecutively to the 36-month sentence for a parole violation as appellant was on post release control in another case, Case No. 15 CR 21, at the time he committed the instant offense. The court also notified appellant that post release control is mandatory for three years. Appellant filed a timely appeal and raises the following assignment of error:

{¶11} "The trial court erred in allowing into evidence hearsay statements from the alleged victim."

{¶12} In his sole assignment of error, appellant argues the trial court erred in allowing into evidence hearsay statements made by Ms. Allen thereby violating his rights under the Confrontation Clause. Specifically, appellant takes issue with the trial court permitting Officer Tipple to testify to the statements made by Ms. Allen during the investigation of the domestic dispute.

{¶13} "Although we generally review decisions on the admission of evidence for an abuse of discretion, appellate courts apply a de novo standard of review to evidentiary questions raised under the Confrontation Clause." *State v. Edwards*, 11th Dist. Lake No. 2012-L-034, 2013-Ohio-1290, ¶24.

{¶14} The Sixth Amendment to the United States Constitution states: "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him[.]"

{¶15} Evid.R. 801(C) states: "'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."

{¶16} "Thus, whenever the state seeks to introduce hearsay into evidence in a criminal proceeding, the court must determine not only whether the evidence fits within an exception to the hearsay rule, but also whether the introduction of such evidence offends an accused's right to confront witnesses against him or her." *State v. Houston*, 8th Dist. Cuyahoga No. 104752, 2017-Ohio-4179, ¶48.

{¶17} Evid.R. 803(2) provides an exception to the hearsay rule if the out-of-court statement constituted an "excited utterance," i.e., "[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."

{¶18} "Reactive excited statements are considered more trustworthy than hearsay generally on the dual grounds that, first, the stimulus renders the declarant incapable of fabrication and, second, the impression on the declarant's memory at the time of the statement is still fresh and intense." *Houston, supra,* at ¶49, citing *State v. Taylor*, 66 Ohio St.3d 295, 300 (1993).

{¶19} "To qualify as an 'excited utterance' the following four factors must be established: (1) there was an event startling enough to produce a nervous excitement in the declaran(t), (2) the statement must have been made while under the stress of

excitement caused by the event, (3) the statement must relate to the startling event, and (4) the declarant must have had an opportunity to personally observe the startling event. *State v. Boles*, 190 Ohio App.3d 431, 2010-Ohio-5503, * * * ¶34 (6th Dist.), citing *State v. Duncan*, 53 Ohio St.2d 215 * * * (1978). The controlling factor comes down to whether the declaration resulted from impulse as opposed to reason and reflection. *State v. Nixon*, 12th Dist. Warren No. CA2011-11-116, 2012-Ohio-1292, * * * ¶13." (Parallel citations omitted.) *Houston, supra,* at ¶50.

{¶20} "[T]he timing of the statement is not the controlling factor. *State v. Ashford* (Feb. 16, 2001), 11th Dist. No. 99-T-0015, 2001 WL 137595, at 5. See, also, *Taylor* at 303 * * * (observing that 'the passage of time between the statement and the event is relevant but not dispositive of the question'). Rather, '(t)he central requirements are that the statement must be made while the declarant is still under the stress of the event and the statement may *not* be a result of reflective thought.' (Emphasis sic.) *Taylor* at 303 * * *." (Parallel citations omitted.) *State v. Scarl*, 11th Dist. Portage No. 2002-P-0091, 2003-Ohio-3493, ¶59.

{¶21} "Ohio courts have held that '911 calls are generally admissible as excited utterances * * *.'" *State v. Urso*, 195 Ohio App.3d 665, 2011-Ohio-4702, ¶69, quoting *State v. Johnson,* 10th Dist. Franklin No. 08AP-652, 2009-Ohio-3383, ¶22.

{¶22} Appellant argues it was improper for Officer Tipple to testify to oral statements Ms. Allen made to her regarding the domestic incident. We disagree.

{¶23} Ms. Allen, who refused to testify at trial, made oral statements to Officer Tipple during the course of the police investigation and with the primary purpose to enable police assistance. As stated, appellant, following a drinking binge, physically

assaulted Ms. Allen which prompted her to call 911. Officers Tipple and Pagano immediately responded to the residence. They arrived at the scene within five minutes. Upon arrival, the officers could see appellant and Ms. Allen inside the residence as the couple continued to verbally argue. The officers separated the couple to ensure that the fighting did not further escalate. Officer Tipple spoke with Ms. Allen in one room while Officer Pagano spoke with appellant in another.

{¶24} Officer Tipple testified that Ms. Allen "appeared to be emotional. She was tearing up, her voice was shaky. She just overall seemed upset, shaky, scared." (Jury Trial T.p. Vol. II, p. 260). Officer Tipple indicated that Ms. Allen reported that she and appellant had argued throughout the evening after drinking all day. Officer Tipple said that Ms. Allen indicated that appellant tackled Ms. Allen, choked her, and slapped her across the face. Ms. Allen had scratches on her hands and left arm as well as a scrape across her forehead that was bleeding. Ms. Allen also reported to Officer Tipple that she was fighting to get appellant off her and that after managing to escape appellant's hands, appellant followed her and punched a hole in the bedroom door. Ms. Allen also provided Officer Tipple with a written version of her oral report.

{¶25} After obtaining the statements from Ms. Allen and appellant, the officers determined appellant to be the aggressor and placed him under arrest for domestic violence.

{¶26} Based on the facts presented, while Ms. Allen was available to testify but refused to, her oral statements to police, which were reactive, fall within the "excited utterance" exception to the hearsay rule as: (1) there was an event, i.e., a domestic altercation in this case, startling enough to produce a nervous excitement in the

declarant; (2) the statements were made while under the stress of excitement caused by the event; (3) the statements related to the startling event, and (4) the declarant had an opportunity to personally observe the startling event. *See Houston, supra,* at ¶49-50; Evid.R. 803(2). Specifically, Ms. Allen's oral statements are admissible as an excited utterance because they related to the domestic disturbance, i.e., a startling event or condition, and were made while she was under the stress of excitement caused by that event as police immediately arrived at the scene within five minutes of her 911 call.

{¶27} Appellant also takes issue with Ms. Allen's written statement. We find the trial court should not have admitted the written statement as an excited utterance. However, Ms. Allen's oral statements and the 911 and jailhouse recordings, which were stipulated to by both parties, contain the same or substantially similar information as her written statement**.** The state's evidence was further corroborated by the pictures of Ms. Allen's injuries. The state submitted sufficient evidence which if believed, would have permitted a jury to find appellant guilty without the written statement. Thus, any error by the trial court permitting Officer Tipple to testify regarding Ms. Allen's written statement is harmless. *See Scarl, supra,* at ¶63-65 (holding that the introduction of the victim's written statement was harmless error in light of the oral declarations to the police officer, which constituted an excited utterance, and even without the written statement, there was overwhelming evidence of the appellant's guilt.)

{¶28} With the foregoing aspects addressed, we must now determine whether appellant's right of confrontation was violated.

{¶29} "In *Crawford v. Washington*, 541 U.S. 36 * * * (2004), the United States Supreme Court held that the Confrontation Clause bars the admission of 'testimonial statements of witnesses absent from trial.' *Id.* at 59 * * *. The court explained that '(w)here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.' This means that the state may not introduce 'testimonial' hearsay against a criminal defendant, regardless of whether such statements are deemed reliable, unless the defendant has an opportunity to cross-examine the declarant. *Id.* at 53-54 * * *.

{¶30} "However, the *Crawford* court also held that the Confrontation Clause only requires exclusion of 'testimonial' as opposed to 'nontestimonial' evidence. 'It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.' *Davis v. Washington*, 547 U.S. 813, 821 * * * (2006). If a statement is not testimonial, the principles embodied in the Confrontation Clause do not apply. *Whorton v. Bockting*, 549 U.S. 406, 420 * * * (2007).

{¶31} "Although the *Crawford* court did not specifically define the term 'testimonial,' it explained that hearsay statements are implicated by the Confrontation Clause when they are 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' *Crawford* at 52 * * *.

{¶32} "In *Davis* at 822, * * * decided two years after *Crawford*, the court held 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.' By contrast, statements are testimonial when the circumstances 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.' *Davis* at *id.* *See also State v. Siler*, 116 Ohio St.3d 39, 2007-Ohio-5637, * * * paragraph one of the syllabus." (Parallel citations omitted.) *Houston, supra,* at ¶54-57.

{¶33} "Confrontation Clause violations are subject to harmless error analysis. *See State v. Kraft,* 1st Dist. No. C-060238, 2007-Ohio-2247, ¶67, citing *United States v. Summers,* 414 F.3d 1287, 1303 (10th Cir.2005)." *State v. Edwards*, 11th Dist. Lake No. 2012-L-034, 2013-Ohio-1290, ¶27.

{¶34} As stated, Officers Tipple and Pagano immediately responded to the residence following Ms. Allen's 911 call. The officers saw appellant and Ms. Allen inside the residence as the couple continued to verbally argue. The officers separated the couple to ensure that the fighting did not further escalate.

{¶35} Officer Tipple spoke with Ms. Allen and testified that she "appeared to be emotional. She was tearing up, her voice was shaky. She just overall seemed upset, shaky, scared." (Jury Trial T.p. Vol. II, p. 260). Officer Tipple said that Ms. Allen told her that appellant tackled her, choked her, and slapped her across the face following a drinking binge and argument. Ms. Allen had visible physical injuries as a result. Ms. Allen also reported to Officer Tipple that she was fighting to get appellant off her and that after managing to escape appellant's hands, appellant followed her and punched a hole in the bedroom door.

{¶36} We stress that Ms. Allen was not subject to cross-examination by appellant. The statements at issue are testimonial, barred by the Confrontation Clause, and their admission violated appellant's Sixth Amendment rights. *See Edwards, supra,* at ¶35, citing *Crawford* and *Davis, supra.* However, based on the facts of this case, the violation did not prejudice appellant as there was other evidence of his guilt properly before the jury, including the corroborative 911 call and the pictures of Ms. Allen's injuries. Thus, the trial court's error was harmless.

{¶37} For the foregoing reasons, appellant's sole assignment of error is not well-taken. The judgments of the Trumbull County Court of Common Pleas are affirmed.

CYNTHIA WESTCOTT RICE, J., concurs,

THOMAS R. WRIGHT, P.J., concurs in judgment only.