[Cite as *State v. Bateman*, 2011-Ohio-3028.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 10AP-763
v.	:	(C.P.C. No. 08CR 10-7361)
Brian M. Bateman,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 21, 2011

Ron O'Brien, Prosecuting Attorney, and *John H. Cousins*, *IV*, for appellee.

Yeura R. Venters, Public Defender, and *Paul Skendelas*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Defendant-appellant, Brian M. Bateman ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas, which ordered that he be committed to a mental health care facility. For the following reasons, we affirm.

{¶2} Appellant was indicted on one count of burglary for trespassing into Wilma Riffle's home and exposing himself to her. After appellant pleaded not guilty, the trial

court found that he was not competent to stand trial, and ordered him to be treated at a mental health care facility so that his competency could be restored. He was unable to be restored to competency within the time frame allowed by law, however, and plaintiff-appellee, the state of Ohio ("appellee"), filed a motion for the trial court to retain jurisdiction over him so that he would remain committed to a mental health care facility up to the maximum amount of time he could be imprisoned for burglary.

{¶3} The trial court held a hearing on the motion. At the hearing, the prosecution introduced testimony from witnesses to establish that appellant is mentally ill and subject to hospitalization by court order. In addition, the prosecution introduced testimony to show that appellant committed burglary, a factor to be proven in order for the court to retain jurisdiction over appellant. See R.C. 2945.39(A)(2)(a). Wilma's son, Thomas Riffle, provided that testimony because Wilma had passed away. Thomas testified as follows.

{¶4} On September 29, 2008, Thomas received a phone call from his mother, who was 91 years old. Thomas went to his mother's house and found appellant in the yard. Wilma did not want appellant there, and Thomas chased him away. As soon as Thomas returned home, about a mile away, he received another call from his mother. Over the defense's objection, Thomas testified that his mother told him that appellant entered her house through the back door, "dropped his drawers, and started playing with hi[m]self." (Tr. 51.) She "was scared to death" and said that, though she lived in a bad neighborhood, she had never been so scared in her life. (Tr. 51.) She wanted Thomas to come back to her house. He immediately returned, but appellant was gone.

He calmed his mother down and went to talk to appellant's grandparents about the incident.

{¶5} Following the hearing, the trial court issued a written decision retaining jurisdiction over appellant and ordering that he remain committed to a mental health care facility. Appellant appeals, raising the following assignment of error:

> The trial court erred in admitting hearsay testimony under the excited utterance exception, as set forth in Evid.R. 803(2), where there was insufficient proof to establish that the declarant was in a state of nervous excitement that was sufficient to still her reflective faculties and thereby make her statements and declarations spontaneous and unreflective.

{¶6} In his single assignment of error, appellant contends that the trial court abused its discretion by allowing Thomas to testify concerning Wilma's statement that appellant trespassed into her home and exposed himself. We disagree.

{¶7} The admission of evidence is a matter within the discretion of the trial court and will not be disturbed absent an abuse of that discretion. *State v. Robb*, 88 Ohio St.3d 59, 68, 2000-Ohio-275. An abuse of discretion connotes more than an error of law or judgment; it entails a decision that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶8} Appellant argues that Wilma's out-of-court statement about his burglary was inadmissible hearsay. Under Evid.R. 801(C), 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. Hearsay is generally inadmissible unless it falls under an exception to the hearsay rule or as otherwise provided by law. Evid.R. 802.

{¶9} Appellant contends that the rules of evidence apply in a hearing pertaining to whether a trial court is permitted to retain jurisdiction over a defendant whose competence to stand trial has not been restored and that no exception would apply to allow the admission of Wilma's out-of-court statement. Without conceding that the rules of evidence do apply to such a proceeding, appellee responds that, even if the rules apply, Wilma's statement was nevertheless admissible under the excited utterance exception to the hearsay rule in Evid.R. 803(2). We agree.

{¶10} 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 statement must concern " 'some occurrence startling enough to produce a nervous excitement in the declarant,' " and must be made " 'before there had been time for such nervous excitement to lose a domination over [the declarant's] reflective faculties.' " *State v. Taylor* (1993), 66 Ohio St.3d 295, 300-01, quoting *Potter v. Baker* (1955), 162 Ohio St. 488. Excited utterances are considered more trustworthy than general hearsay for two reasons: " '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.' " *Taylor* at 300, quoting 1 Weissenberger's Ohio Evidence (1992), Section 803.16.

{¶11} Appellant argues that the prosecution laid no foundation for the excited utterance exception to apply to Wilma's out-of-court statement. We conclude, however, that proper foundation has been made because the record establishes that when Wilma

told Thomas about the burglary, she was still under stress from the incident and had no opportunity to regain control over her reflective faculties or fabricate.

{¶12} In particular, the elderly Wilma was so startled when appellant trespassed into her home and exposed himself to her that she called Thomas about it and asked him to come over. Wilma told Thomas about the incident soon after it occurred, and she had no opportunity to recover from the stress of it before talking to her son. Thomas testified that Wilma was "scared to death" when she talked to him, and she said that she had never been more scared in her life. (Tr. 51.) Likewise, given that Thomas had to calm his mother down when he went back to her house, the record shows that Wilma's stress and excitement had not dissipated until well after her phone call to her son.

{¶13} For these reasons, we conclude that, even if the rules of evidence applied to the proceeding, there was no error. Wilma's out-of-court statement to Thomas about appellant's burglary falls under the excited utterance exception to the hearsay rule, and the trial court did not abuse its discretion by admitting the statement into evidence. Accordingly, we overrule appellant's single assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and CONNOR, JJ., concur.