[Cite as *State v. Fown*, 2009-Ohio-5141.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
STATE OF OHIO	:	Sheila G. Farmer, P.J.
	:	John W. Wise, J.
Plaintiff-Appellee	:	Julie A. Edwards, J.
	:	
-vs-	:	Case No. 2008 CA 00157
	:	
	:	
BILLIE FOWN	:	O P I N I O N

Defendant-Appellant

CHARACTER OF PROCEEDING:	Criminal Appeal from Licking County Court of Common Pleas Case No. 2008 CR 00476
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	September 28, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
EARL FROST Assistant Prosecuting Attorney 20 South Second Street Fourth Floor Newark, Ohio 43055	ANDREW T. SANDERSON Burkett & Sanderson, Inc. 21 West Church Street Suite 201 Newark, Ohio 43055

Edwards, J.

{¶1} Defendant-appellant, Billie Fown, appeals his conviction and sentence from the Licking County Court of Common Pleas on one count of felony domestic violence. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On July 11, 2008, the Licking County Grand Jury indicted appellant on one count of felony domestic violence in violation of R.C. 2919.25(A), a felony of the third degree. The indictment alleged that appellant previously had been convicted of two or more prior domestic violence offenses. At his arraignment on August 4, 2008, appellant entered a plea of not guilty to the charge.

{¶3} Subsequently, a jury trial commenced on December 16, 2008. The following testimony was adduced at trial.

{¶4} Debbie Samsal testified that she lived with appellant for almost a year and that she was living with him on June 28, 2008. The two were involved in a relationship with each other.

{¶5} Samsal testified that, on June 28, 2008, sometime between 5:00 p.m. and 7:30 p.m., the two went out to eat and got into an argument. As appellant was driving, he started yelling at Samsal and telling her that he wanted her to get out of the car. According to Samsal, “I just remember he was yelling and I remember him pulling over and the next thing I know I’m sitting on the side of the road and that’s when the two ladies stopped and asked me if I was all right.” Transcript at 90.

{¶6} Samsal, who testified that she had been drinking, provided a signed written statement to the police.[1] In her statement, Samsal indicated that appellant had pulled her from the vehicle. When questioned about such statement, Samsal testified as follows**:**

{¶7} "Q. Now, in your statement did you indicate the Defendant pulled you from the vehicle?

{¶8} "A. Yes, I did write that that day because they were telling me that. I was hysterical and they were saying - - well, I'm sorry - - that they saw that and so I'm - -

{¶9} "MS. PENNINGTON: Objection.

{¶10} "A. Like I said, I wasn't in my right mind at all." Transcript at 94.

{¶11} Samsal, when asked how she got out of appellant's car, testified that she did not know and that she could not say for sure whether appellant had grabbed her in the upper part of her arm and yanked her out of the vehicle.

{¶12} On cross-examination, Samsal testified appellant had never laid a hand on her in a year. She further testified, when asked whether appellant had laid a hand on her on June 28, 2008, that "you'll have to ask Jeremy. He was in the car. He knows. He was in the back seat." Transcript at 107.

{¶13} At trial, Summer Freeman testified that she was driving 50 to 55 miles an hour on 79 South at approximately 8:00 p.m. when she saw a man pull a woman out of the passenger side of a car. According to Freeman, the two were struggling and "he got her out and then she kind of went up in the air and hit the ground and looked to me like she rolled down a hill." Transcript at 120. At the time, Heidi Chism was in the car with Freeman. Freeman testified that she observed the man grab the woman and pull her

[1] The statement was not admitted into evidence at trial.

out of the car by her upper arms and then fling her up in the air at least three feet. Freeman testified that she kept going because she was on the freeway and that she then got off at the exit ramp and returned to the scene. According to Freeman, the woman, who was walking up the ramp, appeared to be upset, was crying and had a scrape on her leg that was bleeding. The following testimony was adduced when Freeman was asked what the woman said to her**:**

{¶14} "A. She said that her and her boyfriend and her boyfriend's daughter and son and the baby were at Dan's restaurant and they had pizza and stuff like that and she wasn't sure what made him upset and all the sudden he just stopped the car and told her she had to get out of the car and she didn't want to get out of the car, and that's when she said that he went around to the other side and pulled her out of the car." Transcript at 126.

{¶15} Freeman testified that she talked to the woman, who she testified was not intoxicated, approximately two minutes after seeing her being thrown out of the car. Truman further testified that she did not see the man's face and was not sure if the man had the same general appearance as appellant.

{¶16} On cross-examination, Freeman testified that she was able to see what was happening even though she did not stop because she slowed down. She further testified that she was able to see what was going on even though she was 60-70 yards away.

{¶17} The next witness to testify was Heidi Chism. Chism testified that she was looking at the newspaper in the front passenger seat while Freeman was driving when she heard Freeman say "Oh, my God, did you just see what happened?" Transcript at

160. Chism testified that she saw a man walking from the passenger side around the front of the car and get into the driver's side. According to Chism, when the two encountered Debbie Samsal, Samsal, was very upset and nervous and had been crying. Freeman and Chism then gave appellant a ride. When asked whether she thought the man was appellant, Chism testified that she did not believe that it was.

{¶18} On cross-examination, Chism testified that Freeman's car was too far for her to see the passenger side of appellant's car. On redirect, she testified that based on her understanding and knowledge of the area, Freeman would have been able to have a clear viewpoint of appellant's vehicle and the passenger side door. She further testified that she did not know if Freeman slowed down as she approached appellant's car, but that she did not think that Freeman did.

{¶19} Officer Art Minton of the Newark Police Department testified that he was dispatched to Jug's Bar in response to a domestic violence complaint. When he arrived there at 9:39 p.m., he found Freeman, Chism and Samsal in a vehicle parked on the side of the bar. The officer testified that Samsal was visibly upset and had an injury to her knee and marks on one of her arms. He further testified that she appeared to be frightened. Officer Minton testified that Samsal told him that appellant had forcibly removed her from his car and tossed her down an embankment. Officer Minton further testified that when he later spoke with appellant, appellant stated that he had pulled Samsal out of the car and had not thrown her out of the same. According to the officer, appellant admitted using force to remove Samsal from the vehicle.

{¶20} After the trial court overruled appellant's Criminal Rule 29 motion for acquittal, the defense called Jeremy Woods to the stand. Woods testified that appellant

was his girlfriend Chelsea's father. Woods and Chelsea have a baby together. Woods testified that on June 28, 2008, he went with Samsal, appellant, Chelsea and the baby out for pizza at a place on 79. According to Woods, Samsal was intoxicated and, after they left the restaurant in appellant's car, was arguing loudly with appellant. According to Woods, appellant stopped the car because of the argument and Samsal started to get out. Woods further testified that appellant went around the car to help her out and that Samsal then fell out of the car. Appellant then sat Samsal on the ground. When asked, Woods testified that he did not see appellant throw or pull Samsal out of the car.

{¶21} At the conclusion of the evidence and the end of deliberations, the jury, on December 16, 2008, found appellant guilty of domestic violence. The jury further found that appellant had previously been convicted of domestic violence on two or more occasions.[2] Pursuant to a Judgment Entry filed on December 17, 2008, appellant was sentenced to five (5) years in prison.

{¶22} Appellant now raises the following assignments of error on appeal:

{¶23} "I. THE TRIAL COURT COMMITTED HARMFUL ERROR IN PERMITTING HEARSAY EVIDENCE TO TAINT THE PROCEEDINGS.

{¶24} "II. THE CONVICTION OF THE DEFENDANT-APPELLANT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE PRESENTED BELOW."

I

{¶25} Appellant, in his first assignment of error, argues that the trial court committed harmful error in introducing, over objection, the out-of-court statements attributed to Debbie Samsal by Officer Minton. As is stated above, the Officer testified

[2] On December 16, 2008, the parties filed a stipulation that appellant had twice previously been convicted of domestic violence.

that Samsal told him that appellant had forcibly removed her from his car and tossed her down an embankment. Appellant notes that Samsal, when she was on the stand, claimed that she was intoxicated on the night in question and had no recollection of the events.

{¶26} Appellant cites *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, in support of his argument that Officer Minton's above testimony is impermissible hearsay admitted in violation of appellant's right of confrontation.

{¶27} In *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, the Supreme Court rejected the practice of allowing the use of an unavailable witness's out-of-court statement if it had sufficient indicia of reliability, reasoning that the practice violated the accused's right to confront the witnesses against him. *Crawford* held that a testimonial statement from a witness who does not appear at trial is inadmissible against the accused unless the witness is unavailable to testify and the defendant had a prior opportunity to cross-examine the witness. *Id.* at 59, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177.

{¶28} In the case sub judice, Debbie Samsal was available at trial and did testify. Further, appellant had the opportunity to, and did in fact, cross-examine her during trial. Appellant was not denied his right to confront the witness.

{¶29} We note that appellant contends that he was denied a meaningful opportunity to cross-examine Samsal because she claimed no recollection of the events in question. However, as noted by the court in *State v. Bryant*, Warren App. No. 2007-02-024, 2008-Ohio-3078, "Previous decisions of the [United States Supreme] court, which *Crawford* neither overruled nor called into question, have explained that 'the

Confrontation Clause guarantees only 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' *United States v. Owens* (1988), 484 U.S. 554, 558-559, 108 S.Ct. 838. See, also, *In re Kitzmiller,* Licking App. No. 2006-CA-00147, 2007-Ohio-4565, ¶ 40-44. Therefore, 'a witness' inability to 'recall either the events that are the subject of an extra-judicial statement or previous testimony or recollect the circumstances under which the statement was given, does not have Sixth Amendment consequences.' " *Owens* at 558-559, adopting Justice Harlan's concurrence in *California v. Green* (1970), 399 U.S. 149, 188, 90 S.Ct. 1930. '[T]he traditional protections of the oath, cross-examination, and opportunity for the jury to observe the witness' demeanor satisfy the constitutional requirements.' *Id.* at 560.'" Id at paragraph 50.

{¶30} We find, therefore, that appellant was not denied his right to confront Samsal.

{¶31} Furthermore, *Crawford's* holding only applies to "statements that are, in fact, hearsay,[3] and that are not subject to common-law exceptions to the hearsay rule, such as excited utterance or present sense impression." *State v. Banks,* Franklin App. No. 03AP-1286, 2004-Ohio-6522 at paragraph 18.

{¶32} Pursuant to Evid.R. 803(2), a hearsay statement is admissible if it is an "excited utterance." 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." Further, the statement must concern "some occurrence startling enough to produce a nervous excitement in the declarant," which occurrence the

[3] Hearsay is defined as a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted. Evid. R. 801(C).

declarant had an opportunity to observe, and must be made "before there had been time for such nervous excitement to lose a domination over his reflective faculties" *State v. Huertas* (1990), 51 Ohio St.3d 22, 31, 553 N.E.2d 1058, quoting *Potter v. Baker* (1955), 162 Ohio St. 488, 124 N.E.2d 140, paragraph two of the syllabus.

{¶33} In *State v. Duncan* (1978), 53 Ohio St.2d 215, 373 N.E.2d 1234, the Ohio Supreme Court emphasized, " * * * an appellate court should allow a wide discretion in the trial court to determine whether in fact a declarant was at the time of an offered statement still under the influence of an exciting event." *Id.* at 219. "[A]s the time between the event and the statement increases, so does the reluctance to find the statement an excited utterance." *Id.,* quoting McCormick on Evidence (2 Ed.972) 706, Section 297.

{¶34} The *Duncan* Court set forth a four-part test to determine whether a statement qualifies as an excited utterance under Rule 803(2). The Court held testimony as to statements or declarations may be admissible under the excited utterance hearsay exception, where the trial court reasonably finds: (a) there was some occurrence startling enough to produce a nervous excitement in the declarant, which was sufficient to still his reflective faculties and thereby make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs, and thus render his statement or declarations spontaneous and unreflective, (b) the statement or declaration, even if not strictly contemporaneous with its exciting cause, was made before there had been time for such nervous excitement to lose a domination over his reflective faculties, so that such domination continued to remain sufficient to make his statements and declarations the unreflective and sincere

expression of his actual impressions and beliefs, (c) the statement or declaration related to such startling occurrence or the circumstances of such startling occurrence, and (d) the declarant had an opportunity to observe personally the matters asserted in his statement or declaration. *Id.* at syllabus.

{¶35} In the case sub judice, after the prosecutor asked Officer Minton what Samsal had told him, defense counsel objected, arguing that the same was hearsay. The prosecutor then argued that the same fell within the excited utterance exception to the hearsay rule. Defense counsel next argued that the excited utterance exception did not apply because "I believe that this witness stated that he arrived at 9:39 p.m. Ms. Samsal testified that the events occurred at 7, 5:30 p.m. to 7:00 p.m. That's two and a half hours' difference. I don't believe that is reasonable time to still be considered an excited utterance." Transcript at 191.

{¶36} However, as is stated above, Summer Freeman testified that the incident involving Samsal and appellant occurred around 8:00 p.m. Moreover, Officer Minton testified that when he initially encountered Samsal, she was visibly upset, complained of pain and appeared to be afraid or frightened. The statement made to the officer by Samsal related to the startling occurrence in this case, which was the domestic violence committed on Samsal by appellant. Based on the foregoing, we find that the trial court did not abuse its discretion finding that Samsal was, at the time of an offered statement, still under the influence of an exciting event.

{¶37} Appellant's first assignment of error is, therefore, overruled.

II

{¶38} Appellant, in his second assignment of error, argues that his conviction for domestic violence was against the manifest weight of the evidence. We disagree.

{¶39} On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed. The discretionary power to grant a new hearing should be exercised only in the exceptional case in which the evidence weighs heavily against the judgment." *State v. Thompkins,* 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N .E.2d 541, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. Because the trier of fact is in a better position to observe the witnesses' demeanor and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, syllabus 1.

{¶40} Appellant contends that Summer Freeman was not a credible witness because her allegation that she saw appellant throw Samsal three feet into the air was "incredible" and because, while Freeman testified that she slowed her car when she was passing the scene, her passenger, Heidi Chism, said that she did not. Appellant also emphasizes that while Freeman testified that Samsal was not intoxicated, both Samsal and Woods testified that she was. Appellant also notes that Freeman's testimony that she saw appellant toss Samsal out of the car was refuted by Debbie Samsal and Jeremy Woods.

{¶41} However, upon our review of the entire record, we cannot say that the jury lost its way in convicting appellant of domestic violence. As is stated above, Summer Freeman, who was a disinterested witness, testified that she saw appellant toss Samsal out of the car. Officer Minton testified that Samsal told him that appellant had forcibly removed her from his car and tossed her down an embankment and also that appellant admitted using force to remove Samsal from his car. Moreover, while appellant emphasizes that Jeremy Woods testified that he did not see appellant throw or pull Samsal out of the car, appellant is the father of Woods' girlfriend, Chelsea. Clearly, the jury found Summer Freeman to be the more credible witness.

{¶42} Appellant's second assignment of error is, therefore, overruled.

{¶43} Accordingly, the judgment of the Licking County Court of Common Pleas is affirmed.

By: Edwards, J.

Farmer, P.J. and

Wise, J. concur

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JUDGES

JAE/d0723

[Cite as *State v. Fown*, 2009-Ohio-5141.]

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
BILLIE FOWN	:	
Defendant-Appellant	:	CASE NO. 2008 CA 00157

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Licking County Court of Common Pleas is affirmed. Costs assessed to appellant.

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JUDGES