

[Cite as *Cleveland v. Colon*, 2007-Ohio-269.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87824

CITY OF CLEVELAND

PLAINTIFF-APPELLEE

vs.

LUIS COLON

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cleveland Municipal Court
Case No. 2004 CRB 029977

BEFORE: Gallagher, J., Celebrezze, A. J., and Blackmon, J.

RELEASED: January 25, 2007

JOURNALIZED:

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SEAN C. GALLAGHER, J.:

{¶ 1} Appellant, Luis Colon, appeals his conviction and sentence for domestic violence in Cleveland Municipal Court. For the reasons stated below, we affirm and remand the matter for the trial court to lift the stay it imposed on the sentence.

{¶ 2} On September 17, 2004, Colon was charged with domestic violence in violation of R.C. 2919.25. Colon entered a plea of not guilty to the charge, and the case proceeded to a bench trial.

{¶ 3} The transcript of proceedings reflects that on August 28, 2004, at approximately 2:30 a.m., Evelyn Rivera and her husband, Adam Pabon, observed a man beating a woman outside their house. Rivera called 911 to report the incident.

Rivera recognized the victim as a neighbor from down the street. Rivera observed that the victim was bleeding from the mouth and had blood all over her face, had a black and blue eye, and was bruised all over. Rivera identified the defendant as the man she observed hitting the victim.

{¶ 4} Adam Pabon also identified the defendant as the person who was hitting the victim. Pabon stated that he went outside and told the man not to hit the victim any more, but the man continued with his assault on the victim. Pabon told Rivera to call 911. He observed that the victim was bleeding and appeared “beat up.” When the police arrived, Pabon told the police “he’s right here,” and Colon began to run. Pabon spoke to the victim approximately one minute later and described her as “really sad,” hurt, bleeding, and crying. Over objection at trial, Pabon indicated that the victim said that it was her boyfriend who had been beating her.

{¶ 5} Officer Brenda Korber testified that she responded to the scene of the assault and observed the victim sitting on a curb with a bruised and “bloodied face.” The officer also observed the victim’s “clothes were dirty from the ground.” Officer Korber described the victim’s demeanor as being “upset and crying.” Over objection, Officer Korber testified that the victim indicated she was walking home from a club with another man when Colon came up and began assaulting her in the face and head. When Officer Korber asked the victim who had assaulted her, the

victim provided Colon's name and date of birth. The victim also informed the officer that she had lived with Colon and dated him for approximately two years, but that they had not been together for six months.

{¶ 6} The objections made by defense counsel regarding the victim's statements were overruled by the court based on the excited utterance exception to the hearsay rule. Also, a medical report from the emergency room was introduced, in which the chief complaint by the victim was as follows: "assaulted by boyfriend, hit to face, lips swollen." We also note that attempts were made to subpoena the victim to testify as a witness, but she did not appear in court to testify.

{¶ 7} At the close of the city's case, defense counsel made a Crim.R. 29 motion that was denied by the trial court. The trial court found Colon guilty of domestic violence and sentenced him to one hundred eighty days of incarceration, suspending all but thirty days, and imposed a \$1,000 fine, suspending half of the fine. The trial court granted a motion to stay the sentence pending the outcome of this appeal.

{¶ 8} Colon has raised one assignment of error on appeal for our review that provides the following: "Mr. Colon's right to confrontation was violated when the prosecution introduced testimonial hearsay statements from the alleged victim."

{¶ 9} Colon argues that the introduction of the victim's statements through the testimony of other witnesses violated his rights under the Sixth Amendment's

Confrontation Clause. Colon claims that the victim's statements were testimonial in nature and that the trial court erred by admitting the statements as excited utterances.

{¶ 10} We initially address Colon's position that "where evidence is precluded under the Confrontation Clause, the Rules of Evidence cannot render it otherwise admissible." Colon's position is that irrespective of whether the victim's statements were excited utterances, the Confrontation Clause still applies.

{¶ 11} The Sixth Amendment to the United States Constitution provides the following: "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * * ." In *Crawford v. Washington* (2004), 541 U.S. 36, 68-69, 124 S.Ct. 1354, the United States Supreme Court held that "testimonial" hearsay statements may be admitted only where the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness regarding the subject matter of the statements.

{¶ 12} Prior to *Crawford*, courts examining Confrontation Clause claims focused on the reliability of the testimony as required under the Supreme Court decision in *Ohio v. Roberts* (1980), 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597. Under *Roberts*, the declarant's statement would be admissible only if it contained "adequate indicia of reliability," which could be established by showing that the statement either fell within a "firmly rooted hearsay exception" or had "particularized

guarantees of trustworthiness.” *Id.* Moreover, the *Roberts* rule required the prosecution to show that the declarant was unavailable at trial. *Id.* at 66.

{¶ 13} The United States Supreme Court in *Crawford* overruled *Roberts* as to “testimonial evidence,” holding that “the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.” 541 U.S. at 68. This position was reaffirmed by the Supreme Court in *Davis v. Washington* (2006), U.S. , 126 S. Ct. 2266, 2275, N4, 165 L.Ed.2d 224, wherein the Court noted:

“*Roberts* conditioned the admissibility of all hearsay evidence on whether it falls under a ‘firmly rooted hearsay exception’ or bears ‘particularized guarantees of trustworthiness.’ *Crawford*, 541 U.S., at 60, 124 S. Ct. 1354, 158 L.Ed.2d 177 (quoting *Roberts*, 448 U.S., at 66, 100 S.Ct. 2531, 65 L.Ed.2d 597). We overruled *Roberts* in *Crawford* by restoring the unavailability and cross-examination requirements.”

{¶ 14} Thus, a Confrontation Clause analysis cannot be avoided in instances where a testimonial statement falls within a firmly rooted hearsay exception.

{¶ 15} As the Sixth Circuit Court of Appeals recognized:

“In the wake of *Crawford*, then, it can no longer be said that ‘the judicial inquiry is at an end,’ so long as an out-of-court statement qualifies as an excited utterance or falls within some other ‘firmly rooted’ hearsay exception. Here, if we hold that the district court

properly admitted the out-of-court statements of Defendant's wife as excited utterances, there would remain the further question whether these statements were 'testimonial.' If so, they could not have been properly admitted at trial absent Mrs. Hadley's unavailability as a witness and a prior opportunity to cross-examine her."

United States v. Hadley (6th Cir. 2005), 431 F.3d 484, 495 (Internal citation omitted).

{¶ 16} Pursuant to the above authority, even where an out-of-court statement falls within a firmly rooted hearsay exception, such as an excited utterance, a court must still consider whether the statement nonetheless should have been excluded under the Confrontation Clause as construed in *Crawford*. Since only testimonial statements implicate the Confrontation Clause, we must proceed to consider whether the victim's statements in this case were testimonial or nontestimonial in nature.

{¶ 17} The Supreme Court provided guidance for determining whether a statement is testimonial or nontestimonial in *Davis v. Washington* (2006), U.S. , 126 S.Ct. 2266, 165 L.Ed.2d 224. The Supreme Court held that statements made during police "interrogations" are non-testimonial when they are made "under circumstances objectively indicating that the primary purpose of interrogation is to enable police assistance to meet an ongoing emergency" and are testimonial when "the circumstances objectively 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.” *Id.* at paragraph one of the syllabus.

{¶ 18} Likewise, the Ohio Supreme Court has instructed that statements should be viewed “*objectively* when determining whether they implicate Confrontation Clause protection pursuant to *Crawford*.” *State v. Stahl*, 111 Ohio St.3d 186, 192, 2006-Ohio-5482. In *Stahl*, the Ohio Supreme Court indicated: “For Confrontation Clause purposes, a testimonial statement includes one made ‘under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.’ *Id.* at paragraph one of the syllabus (*Crawford v. Washington* (2004), 541 U.S. 36, 52, 124 S.Ct. 1354, 158 L.Ed.2d 177, followed.)” Additionally, “[i]n determining whether a statement is testimonial for Confrontation Clause purposes, courts should focus on the expectation of the declarant at the time of making the statement; the intent of a questioner is relevant only if it could affect a reasonable declarant's expectations.” *Stahl*, 111 Ohio St.3d at paragraph two of the syllabus.

{¶ 19} In *Stahl*, the court referred to the circumstances in *Davis v. Washington* and *Hammon v. Indiana* (2006), U.S. , 126 S.Ct. 2266, 165 L.Ed.2d 224. The court recognized: “In *Davis*, the court held that a 911 telephone call made to seek protection from immediate danger did not constitute a testimonial statement for Sixth Amendment purposes. In contrast, the court in *Hammon* held as testimonial a

victim's statement to a police officer after the officer arrived at the home in response to a report of domestic disturbance." *Stahl*, 111 Ohio St.3d at 192. We note that in *Hammon*, when the police arrived, the victim told the police she was fine, the police were able to talk to the suspect, and the police interrogation of the victim and the suspect occurred in separate rooms some time after the events had passed. 126 S.Ct. 2266.

{¶ 20} Following the above authority, we find that under the circumstances of this case, the victim's statements were nontestimonial in nature. Unlike the circumstances in *Hammon*, the incident had just concluded when the officer arrived, the defendant had just fled the scene and had not been secured by the police, and the victim was hurt, bleeding and crying. The circumstances objectively indicate that the primary purpose of the interrogation was to enable the police to assist the victim in an ongoing emergency.

{¶ 21} This court recently reached a similar result in *State v. Brown*, Cuyahoga App. No. 87651, 2006-Ohio-6267. In *Brown*, the police officers who responded to an assault dispatch observed the victim was bleeding and holding his side and was still excited from what had happened. *Id.* When the police went to the victim's aid, he told the police that his girlfriend had stabbed him and pointed to a vehicle up the street in which his girlfriend was located. *Id.* This court found the primary purpose of the interrogation was to assist the victim in an ongoing emergency, not to

establish or prove events potentially relevant to criminal prosecution. *Id.* Accordingly, the statements were found to be nontestimonial and properly admitted. *Id.*

{¶ 22} In another case, *State v. McKenzie*, Cuyahoga App. No. 87610, 2006-Ohio-5725, the responding officer observed the victim running out of an apartment waving her arms and yelling. The victim identified a man walking down the street as the person who had just hit her. *Id.* After the suspect was placed in the police car, the officer conducted a further interview with the victim. *Id.* This court found that the statements of the victim identifying the defendant as the person who had just hit her were primarily intended for police assistance and were admissible. *Id.* However, the statements made after the suspect had been detained in the police car were found inadmissible since there was no longer an immediate threat to the victim. *Id.* Thus, only statements that were made after the suspect was in custody and the emergency of the situation had concluded were found to be inadmissible.

{¶ 23} The facts in this case objectively indicate that at the time the statements were made, the police officer was assisting the victim with an ongoing emergency. The suspect had just left the scene after beating the victim, the victim was bleeding from the face, and she was upset and crying. Additionally, the victim made the statements with the primary purpose of enabling the police to “meet an ongoing emergency,” i.e., to apprehend the person involved. We also note, as discussed

below, that the statements made by the victim were excited utterances. We are cognizant that the rationale for admitting hearsay statements pursuant to the excited utterance exception is that the declarant is unable, because of the startling event, to reflect on the statement sufficiently to fabricate it. *State v. Wallace* (1988), 37 Ohio St.3d 87, 88. We do not believe that the statements made by the victim were under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. Accordingly, we find that the statements were nontestimonial in nature.

{¶ 24} Where a hearsay statement is found to be nontestimonial, we must continue to evaluate the declaration under the Ohio Rules of Evidence. See *State v. McKenzie*, supra; see, also, *Crawford*, 541 U.S. at 68 (reasoning that “[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law--as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether”). For purposes of our analysis, we must consider whether the statements were inadmissible hearsay or fell within the excited utterance exception to the hearsay rule.

{¶ 25} Evid.R. 803(2) defines an “excited utterance” as “[a] statement relating to a startling event or condition made while the declarant was under the stress or excitement caused by the event or condition.” For an alleged excited utterance to be

admissible, four prerequisites must be satisfied: (1) an event startling enough to produce a nervous excitement in the declarant, (2) the statement must have been made while still under the stress of excitement caused by the event, (3) the statement must relate to the startling event, and (4) the declarant must have personally observed the startling event. See *State v. Brown* (1996), 112 Ohio App.3d 583, 601.

{¶ 26} In this case, the evidence reflects that the victim was still under the excitement of a startling event in which she personally was assaulted and the statements were intended to help apprehend the alleged perpetrator of the crime. We find the statements had the requisite guarantees of trustworthiness and were excited utterances.

{¶ 27} Because the statements were excited utterances and nontestimonial in nature, they were properly admitted by the trial court.

{¶ 28} Colon's sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cleveland Municipal Court to carry this judgment into execution. The defendant's

conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, JUDGE

FRANK D. CELEBREZZE, JR., A. J., and
PATRICIA ANN BLACKMON, J., CONCUR

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