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ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR 11-1075

TOM AARON DILLARD APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** February 13, 2013 APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT [NO. 2010-2129-1] HONORABLE WILLIAM A. STOREY, JUDGE AFFIRMED

RITA W. GRUBER, Judge

This case returns to us after we ordered settlement and supplementation of the record, correction of the judgment and commitment order, and rebriefing. *Dillard v. State*, 2012 Ark. App. 503. The record has now been supplemented with a verbatim transcription of a 911 call that was played for the jury; the corrected judgment and commitment order clarifies that the circuit court did not illegally require a condition of incarceration; and appellant's substituted brief comports with the requirements of Arkansas Supreme Court Rule 4-2 (2012).

Tom Aaron Dillard was charged with rape, aggravated robbery, and kidnapping. The crimes were committed in Fayetteville in the victim's car after she ended her shift at a Taco Bell. Dillard was convicted by a jury, which found for purposes of sentence enhancement that he used a firearm in the commission of the crimes, and he was sentenced to terms of imprisonment totaling 792 months.

Dillard now appeals, challenging evidentiary rulings by the circuit court. He contends

that the court abused its discretion by overruling his relevancy objections and allowing evidence that he allegedly told the victim of his plan to go to Russellville to kill someone. He also contends that the court abused its discretion by allowing Fayetteville Police Officer Tim Shepard's hearsay testimony that related a statement that the victim made to him in the hospital. We find no abuse of discretion, and we affirm.

Evidence of Dillard's Plan

Dillard's first point on appeal concerns evidence that he allegedly told the victim of his plan to go to Russellville to kill someone. Dillard argues that this evidence was inadmissible because it was not relevant to the crimes for which he was being tried; alternatively, he argues that the evidence should have been excluded because it was substantially more prejudicial than probative. The evidence was introduced at trial through an audio recording of the victim's 911 call, testimony by a Fayetteville police officer, and testimony by the victim.

The court reporter's transcript of the 911 call includes the victim's words to the dispatcher:

> I just had a man jump in the back of my car when I was leaving work . . . and he made me give him head and he's still around here. . . . He jumped into my backseat and he said, "I need a ride." I said, "I can't help you." I said, "Will you please get out of my car." And that's when he pulled the gun on me. He said, "You don't have a choice." . . . *And he goes, "I need to go to Russellville,*" and like, my gas light was on. And he said, . . . "Well drive over there," . . . towards Highway 62. . . . [H]e jumped out of the vehicle . . . after he made me give him head. . . . But I'm,—*he's, he's apparently gonna kill somebody,* 'cause I begged and I pleaded with him not to kill me.

(Emphasis ours.)

Officer Tim Shepard testified that the victim told him that Dillard stated to her, "I'm not going to kill you. You're not on my list." The victim testified that Dillard told her he

needed to go to Russellville, that he would not shoot her because she was not on his list, and that sometimes people made him so mad he "could kill someone."

Under Arkansas Rule of Evidence 402, relevant evidence is generally admissible and evidence that is not relevant is not admissible. Rule 403 provides an exception to the admission of relevant evidence:

> Although 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, waste of time, or needless presentation of cumulative evidence.

Even though evidence of other crimes by the accused is generally not admissible if it is not charged in the indictment or information and not a part of the same transaction, the res gestae exception allows admission in order to establish facts and circumstances surrounding the commission of the alleged offense. *Gaines v. State*, 340 Ark. 99, 8 S.W.3d 547 (2000). Under the res gestae exception, the State is entitled to introduce evidence showing all circumstances that explain the charged act, show a motive for acting, or illustrate the accused's state of mind if other criminal offenses are brought to light; all of the circumstances connected with a particular crime may be shown to put the jury in possession of the entire transaction. *Id.* Where separate incidents comprise one continuing criminal episode or an overall criminal transaction, or are intermingled with the crime actually charged, the evidence is admissible. *Id.* Res gestae testimony and evidence is presumptively admissible. *Id.*

In *Payton v. State*, 2009 Ark. App. 690, appellant argued that prejudice from his statement to police about his own marijuana use outweighed any probative value of the evidence in his trial for rape. Because it was part of the entire transaction surrounding the

alleged rape, we found no abuse of discretion by the circuit court in refusing to redact appellant's own references to his marijuana use:

> As our supreme court explained in *Thessing v. State*, 365 Ark. 384, 230 S.W.3d 526 (2006), a broad scope of evidence has been determined to be admissible as res gestae evidence under our case law. All of the circumstances intermingled with a particular crime may be shown as part of the res gestae in order to give the jury knowledge of the entire transaction surrounding an alleged offense. *Id.*; see also Ark. R. Evid. 404(b).

Payton, 2009 Ark. App. 690, at 5.

Here, similarly, Dillard's statements of his alleged plan to kill someone revealed a reason that he jumped into the victim's car and demanded to be driven to Russellville, why he was carrying a gun, and what his intent was with regard to possibly shooting her. This was part of the entire transaction, and the circuit court did not abuse its discretion by admitting the evidence.

Hearsay Statement

At issue in Dillard's second point on appeal is Officer Shepard's testimony about Dillard's acts against the victim as she related them to the officer in the hospital emergency room. Shepard testified that he responded to the 911 call and went to the Taco Bell, where he made contact with the female caller but was unable to make sense of her statements. He described her as visibly upset, shaking, teary-eyed, and "very excited in her mannerisms"—exhibiting "a lot of hand gestures, rapid speech, deep breathing." He explained that he could not get a clear picture of what had happened because of a "jump" in the sequence of events she related. Shepard said that he transported her to Washington Regional Medical Center and was able to speak with her again in the emergency room; he

described her as still upset but "able to calm down a little bit" with the curtains closed and a female nurse present. Shepard testified that many of the victim's statements were the same that she had given at Taco Bell, but he was able to put her hospital statements in sequence and get a clear picture of what had happened.

Hearsay is generally inadmissible under Arkansas Rule of Evidence 802. Among the exceptions to the hearsay rule, however, are these:

> (1) Present Sense Impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
>
> (2) Excited Utterance. 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.

Ark. R. Evid. 803. The circuit court allowed Shepherd's statement as an excited utterance and present-sense impression.

Factors to consider when determining if a statement falls under the excited-utterance exception are the lapse of time, the age of the declarant, the physical and mental condition of the declarant, the characteristics of the event, and the subject matter of the statement. *Davis v. State*, 362 Ark. 34, 207 S.W.3d 474 (2005). For the exception to apply, there must be an event that excites the declarant. *Peterson v. State*, 349 Ark. 195, 199, 76 S.W.3d 845, 847 (2002). In addition,

> "it must appear that the declarant's condition at the time was such that the statement was spontaneous, excited or impulsive rather than the product of reflection and deliberation." *Fudge* [*v. State*, 341 Ark. 759, 768, 20 S.W.3d 315, 320 (2000)]. The general rule is that an utterance following an exciting event must be made soon enough thereafter that it can reasonably be considered a product of the stress of the excitement rather than of intervening reflection or deliberation. However, . . . the

trend is toward expansion of the time interval after an exciting event.

Peterson, 349 Ark. at 199–200, 76 S.W.3d at 847 (2002). (Some internal citations omitted.) Continuing emotional or physical shock, unabated fright, and other factors may also prolong the time, making it proper to resort to Rule 803(2). *Id.* at 200, 76 S.W.3d at 847.

The basis of the excited-utterance exception is that a person who experiences a startling event and is still under the stress of the excitement of it when statements are made will not make fabricated statements and their utterances are therefore trustworthy. *Tackett v. State*, 12 Ark. App. 57, 670 S.W.2d 824 (1984). In these situations the court must find that there was a startling event and that at the time the utterance is made the declarant is still under the stress of excitement resulting from that event when the utterances are made. *Id.* Although the excited utterance must be made close in time to the startling event, the length of elapsed time is only one factor to be considered in determining whether the stress of the excitement has continued. *Id.*

Here, the victim's account of the crimes that she told Officer Shepard in the hospital was made shortly after the crimes occurred and while she was under the stress of excitement they caused. He testified that she was upset when he talked to her at Taco Bell—shaking, teary-eyed, and "very excited in her mannerisms," as shown by hand gestures, rapid speech, and deep breathing—and that he could make little sense of what she was trying to say about the incident. He transported her from Taco Bell to the hospital. With the curtains drawn and a female nurse present, the victim was still upset but calmed down a bit and was able to give a more coherent statement.

We hold that the circuit court did not abuse its discretion in admitting the victim's hospital statement to the officer as an excited utterance. In light of this holding, we need not decide if the statement was also a present-sense impression.

Additionally, we note that evidence of the crimes was presented through the 911 recording, the victim's testimony, and Shepherd's statement, and that Dillard points to nothing in Shepherd's statement that resulted in prejudice. The appellate court will not presume that prejudice results from an evidentiary error, nor will it reverse a trial court's ruling unless the appellant demonstrates prejudice. *Dixon v. State*, 2011 Ark. 450, 385 S.W.3d 164.

Affirmed.

HARRISON and WYNNE, JJ., agree.

Paul M. Gehring, for appellant.

Dustin McDaniel, Att'y Gen., by: *Karen Virginia Wallace*, Ass't Att'y Gen., for appellee.