

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002578-MR

DERWIN I. NICKLEBERRY

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 00-CR-00248, 00-CR-00269

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

VACATING AND REMANDING

** ** * * * **

BEFORE: BUCKINGHAM, GUIDUGLI, AND McANULTY, JUDGES.

McANULTY, JUDGE. Appellant Derwin I. Nickleberry appeals his conviction in the Hardin Circuit Court for fourth degree assault. The conviction stemmed from an early morning incident in which appellant's girlfriend, Nicole Graf, was injured by a pot of scalding water. We have reviewed appellant's claims of error at the trial, and we vacate and remand.

Appellant's first claim of error is that the trial court erred in admitting the statements of the victim as excited utterances. Nicole did not testify at trial. The Commonwealth introduced the statements at issue herein primarily through the testimony of Officer Smith. After being injured, Nicole had run to the Brooks Market and asked the clerk to call the police. Officer Smith arrived momentarily. Officer Smith stated at the suppression hearing that he observed the victim was in extreme pain, was shaken and very upset. He asked Nicole what happened and she responded that her boyfriend threw boiling water on her. Officer Smith asked, "Who, Dee?" because he knew appellant, and Nicole responded yes. Officer Smith called an ambulance.

The next statement admitted under the excited utterance exception came several hours later at approximately 10:00 a.m. at the hospital, after Nicole had been treated.¹ Officer Smith testified that Nicole was still in pain, and was fearful of appellant. Officer Smith sought a statement from her. She stated that she and appellant had been fighting over whether she had cheated on him, and he held a knife to her throat. She stated that he told her he would throw the water from a pot on the stove on her if she did not tell the truth. Appellant then threw the water on her after her denials. Appellant tried to smear butter on her burns after that, and

¹ Nicole arrived at the emergency room by ambulance at 7:52 a.m., and was discharged from the hospital at 10:50 a.m.

then led her to the bathroom and put her in the bathtub. Soon he threatened to boil more water if she did not tell the truth, and he returned to the kitchen. Nicole said she got dressed and ran down the street to the Brooks Market.

Appellant argues that these statements were not appropriately admitted under the hearsay exception for excited utterances. KRE 803(2) states that 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" is not excluded by the rules as to hearsay statements. The factors to be considered in determining whether an out-of-court statement is admissible as an excited utterance are:

(i) lapse of time between the main act and the declaration, (ii) the opportunity or likelihood of fabrication, (iii) the inducement to fabrication, (iv) the actual excitement of the declarant, (v) the place of the declaration, (vi) the presence there of visible results of the act or occurrence to which the utterance relates, (vii) whether the utterance was made in response to a question, and (viii) whether the declaration was against interest or self-serving.

Young v. Commonwealth, Ky., 50 S.W.3d 148, 166 (2001)(quoting R. Lawson, The Kentucky Evidence Law Handbook § 8.60B (2d ed. Michie 1984)). These criteria "do not pose a true-false test" for admissibility, but are only guidelines to be used to assess admissibility. Id. Whether a particular statement qualifies as

an excited utterance depends on the circumstances of each case. Id. When the determination is arguable that a statement made was an excited utterance, the decision of the trial court is entitled to deference. Id.

Under these standards, we believe that only one of the statements made in this case could properly be considered an excited utterance. The earlier of the two statements presents an arguable case. Some time had elapsed since the startling event and the arrival of the officer, and the statement was in response to questioning, but we believe the Commonwealth adequately showed that Nicole was still under the excitement of the event. Whether this was an excited utterance was debatable under these circumstances, and so we defer to the discretion of the trial court. Souder v. Commonwealth, Ky., 719 S.W.2d 730, 733 (1986).

However, we do not believe that the latter statement given at the hospital in any way satisfies the excited utterance criteria. The Commonwealth showed only that Nicole was in pain from the injury and had fear of appellant, but not that she was still under the stress of excitement from the incident. Furthermore, the circumstances under which the statement was given weigh against an excited utterance: several hours had elapsed in which Nicole's injury was treated and she was given pain medication (morphine), she had sufficient time to reflect

on the incident, the pain she felt could have induced fabrication rather than alleviated the incentive to do so, the place was far removed from the scene of the injury, and the entire statement was in response to questioning. Further, the statement cannot be said to be harmless as a repetition of the previous statement because it was embellished with much more detail. Therefore, we must vacate appellant's conviction on this point.

Second, appellant argues the trial court erred in refusing to allow him to read an affidavit given by Nicole nearly six months after the incident in which she stated that her injury was an accident. The trial court denied the admission of the statement as hearsay. Appellant argues that the affidavit should have been allowed either as a statement against interest under KRE 804(b)(3) or a recorded recollection pursuant to KRE 803(5). However, appellant did not argue below that these exceptions were applicable. We review these specific claims only because they will arise again in a retrial.

We agree that the trial court properly determined that no hearsay exception was applicable. The statement does not qualify as a statement against interest under KRE 804(b)(3), which is:

A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far

tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

Appellant does not explain on appeal why he believes the affidavit he secured from the victim qualifies as a statement against interest. Appellant fails to show that the statement was against her interest at the time of its making. Nicole may have been motivated to give the statement by fear of the appellant or by duress, or by a need to gain favor with him for some reason. There are insufficient indicia of reliability to establish that Nicole would not have made the statement except that she believed it to be true. Taylor v. Commonwealth, Ky., 63 S.W.3d 151 (2001). Moreover, we agree with the Commonwealth that the appellant's proffer lacked the showing that the statement was against Nicole's proprietary or pecuniary interests, or that it exposed her to criminal liability.

Further, appellant argues that the statement was admissible as a recorded recollection under KRE 803(5). The affidavit does not fit within that hearsay exception. There is no showing that the declarant lacked knowledge of the facts within the affidavit, or that the statement was made at a time when the incident was fresh within her knowledge. Therefore, the trial court properly excluded it.

Next, appellant argues that the trial court erred in allowing medical personnel to testify that the victim told them that her boyfriend had thrown boiling water on her. Appellant argues that the medical statement exception does not allow for identification of the perpetrator since it is usually not pertinent to medical treatment. At trial, the treating emergency medical technicians and the emergency room nurse testified. According to their testimony, Nicole did not identify the perpetrator by name to the medical personnel, but stated that "her boyfriend" threw scalding water on her. The trial court allowed this evidence under the hearsay exception for statements for purposes of medical treatment or diagnosis. KRE 803(4).

We agree with appellant that Nicole's identification of "her boyfriend" as the source of her injuries was not proper since it did not pertain to her diagnosis or treatment. The general rule is that identifying the name of the wrongdoer is not reasonably pertinent to medical treatment or diagnosis, and so that information may not be divulged as part of the hearsay exception. Edwards v. Commonwealth, Ky., 833 S.W.2d 842 (1992). The Supreme Court in Edwards stated that the identity of the perpetrator was reasonably pertinent to diagnosis and treatment in a child sexual abuse case for the purpose of preventing future harm to the child and to prevent the spread of a sexually

transmitted disease. Id. at 844. In the case at bar, the Commonwealth did not show any purpose for disclosing the information that Nicole named her boyfriend as the source of the injury. The fact that she could identify a perpetrator as the cause of her burns did not affect the treatment for this type of injury. Therefore, we find that the trial court on retrial should not allow medical personnel to testify as to the identification of a wrongdoer and such information should also be redacted from any written medical reports shown to the jury.

Finally, because we are vacating appellant's conviction, we do not find it necessary to review his claims of discovery errors. For all of the foregoing reason, we vacate the judgment of the Hardin Circuit Court and remand for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
APPELLANT:

David T. Eucker
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler, III
Attorney General of Kentucky

N. Susan Roncarti
Assistant Attorney General
Frankfort, Kentucky

ORAL ARGUMENT FOR APPELLEE:

N. Susan Roncarti
Assistant Attorney General
Frankfort, Kentucky