STATE OF LOUISIANA	*	**NO. 2000-KA-1740**
VERSUS	*	**COURT OF APPEAL**
MONTE WHITE	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 391-761, SECTION "H"
HONORABLE CAMILLE BURAS, JUDGE
* * * * * *
JUDGE MICHAEL E. KIRBY
* * * * * *

(Court composed of Judge Steven R. Plotkin, Judge Dennis R. Bagneris, Sr., Judge Michael E. Kirby)

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STATEMENT OF THE CASE:

On September 4, 1997, the defendant was charged by grand jury indictment with one count of first degree murder. La. R.S. 14:30. He was arraigned and pled not guilty September 18, 1997. Trial began before a twelve member jury June 18, 1998. Prior to opening statements, a hearing on a defense motion for the psychiatric examination of a State witness was held and denied. At the conclusion of trial, the defendant was found guilty as charged. The jury could not reach a decision during the sentencing phase of the trial. On July 15, 1998, the trial court sentenced the defendant to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. He filed a motion for appeal.

FACTS:

On July 22, 1997, Mark Lewis and Raymond Smith were shot. Smith died. In response to police questioning in the ambulance as he was being taken from the scene, Lewis said that "Monte" shot him. At the hospital, Detective Richard Williams questioned Lewis; and Lewis said that the perpetrator was named Monte, was twenty years old, drove a four door Cutlass, and lived on Andry Street. The defendant was arrested. On July

25, 1997, Lewis was shown a photographic lineup at the hospital and identified the defendant.

At trial, Lewis said that he knew the defendant and had seen him earlier on the evening of the shooting. Immediately prior to the shooting, Lewis was walking with Smith. The defendant and another man walked up from behind a parked car and began shooting. Lewis identified the defendant at trial. Lewis admitted to convictions for theft and possession of cocaine. He also said he had taken cocaine the day of the shooting.

The defense was misidentification. A friend of the defendant said that he saw him at a movie the night of the crime. The defendant's mother said he had dropped his children off on the way to the movie and picked them up later. A pair of brothers who were neighbors of the defendant said they were driving when they heard the gunshots and saw two people running from the scene, both of whom were too short to be the defendant. The defendant's girlfriend said they were at the movie during the crime.

The defendant took the stand and said he was at the movie. He admitted to prior convictions including crack possession. He said that he had seen Lewis earlier in the evening and that Lewis was looking for drugs.

The defendant's ex-girlfriend and mother of one of his children took the stand and said that she had known the defendant to carry a gun in the

past and that he had shot at her.

ASSIGNMENT OF ERROR ONE:

As noted above, the defendant moved for the psychiatric evaluation of Lewis prior to trial. He attempted to introduce evidence that two weeks prior to trial, Lewis had threatened to stab his mother and infant sister and that he was suicidal. The trial judge denied the motion, and ruled the evidence inadmissible. In particular, the judge stated:

> I have talked to Mr. Lewis in chambers and I'm satisfied that his memory of the events of that evening are not clouded by anything that may have happened subsequent, and I'm also satisfied that the incident in which there was an allegation that there may have been some suicidal tendencies is not in any way related to the events of July 22nd and that incident is completely unrelated to any issue of credibility for this witness to testify today.

The defendant cites La. C.E. art. 607 in support of his argument. The article establishes the right to attack and support credibility. However, the defendant had ample opportunity to cross-examine the witness in this case, and did so. Moreover, there was testimony by three different officers on the scene that Lewis was "in full faculties" and "coherent" in the ambulance; and "conscious, responsive" in the hospital. Lewis himself said he was conscious during both instances. As to his trial identification, the jury heard

ample evidence that Lewis underwent brain surgery and had part of his brain removed as a result of this crime. From a reading of the transcript, Lewis's testimony appears to have been clear and lucid. He was confident of his identification at trial, and confident of his prior identifications. The jury, who was able to witness his demeanor, was free to determine the extent of Lewis's lucidity.

As to the incident regarding the alleged attempted stabbing of Lewis's mother and sister, the judge essentially ruled that evidence irrelevant. La. C.E. art. 401. Clearly, Lewis's alleged attack on his family had nothing to do with the facts of this case.

There was no error. This assignment is without merit.

ASSIGNMENT OF ERROR TWO:

The defendant argues the trial court impermissibly allowed hearsay testimony in violation of La. C.E. art. 801. Specifically, the defendant complains of the statements Lewis made to the police officers identifying the defendant in the ambulance and again at the hospital.

"Hearsay" is a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted. Exceptions to the hearsay rule are set out in La.

C.E. art. 803. The statements in this case were allowed in under the excited utterance exception setout in La.C.E. art. 803(2): "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."

This court has stated on the issue of the time span between the event and the utterance:

> [The excited utterance exception] requires an occurrence or event sufficiently startling to render the declarant's normal reflective thought processes inoperative. State v. Reaves, 569 So.2d 650 (La. App. 2nd Cir. 1990), writ den., 576 Do.2d 25 (La. 1991). Furthermore, the statement of the declarant must have been a spontaneous reaction to the occurrence or event and not the result of reflective thought. State v. Henderson, 362 So.2d 1358 (La. 1978).
>
> In determining whether the declarant was under stress of an excited event, the time span between the event and the statement is considered the most important factor. State v. Reaves, supra. The trial court must determine whether the interval between the event and the statement was of sufficient duration to permit a subsidence of emotional upset and a restoration of a reflective thought process. State v. Henderson, supra.
>
> Other factors which may indicate that a statement was the result of a reflective thought, but which do not automatically justify exclusion, are (1) evidence that the statement was self serving or made in response to an inquiry; expansion of the excited utterance beyond a description of the event and into past or future facts; and proof that,

> between the event and the statement, the declarant performed tasks requiring reflective thought processs. Id. at 1331

In this case, the statements made in the ambulance were made immediately after the witness had suffered five gunshot wounds: two to the head and one to the neck. The statements made in the hospital were made immediately after the doctor and the police officer told the witness that he would not live. The wounds were so grave that at the time of trial, the witness remained paralyzed on his left side and unable to feed himself. Thus, in both situations, when the witness made the complained of statements, he was aware of his impending death; and his statements were properly admitted because they were made after an event sufficiently startling to render his normal reflective thought processes inoperative.

The trial court did not err in admitting the statements.

This assignment is without merit.

ASSIGNMENT OF ERROR THREE:

The defendant argues the trial court allowed the state to introduce impermissible evidence of other crimes in violation of La. C.E. art. 404. The defendant complains that the court should not have admitted evidence that 1) he had been arrested for crack in the past and 2) had shot at an ex-girlfriend.

In neither case did the defense object, precluding raising the issue for the first time on appeal. La. C.Cr. P. art. 841.

Even if the defendant had objected, the evidence was properly admitted. The defendant admitted on direct examination that he saw Lewis on the day of the crime, and that he told him, "I don't do nothing no more." He also admitted on direct to possession of a "dangerous" substance. The defendant therefore put evidence of his past drug involvement before the court. Thus, the State was entitled to elicit testimony from him regarding these events. The defendant explained his direct testimony on cross when he said that he had sold crack in the past but had changed his life, and that was the reason he did not have drugs on him when Lewis asked him for some.

As to the incident involving the ex-girlfriend, the defendant testified that he had never possessed a gun, and that the only time he had ever held one was in a pawn shop. The State was thus entitled to refute this testimony.

This assignment is without merit.

ASSIGNMENT OF ERROR FOUR:

The defendant argues the trial court improperly overruled the defense's objection to improper closing argument by the State in violation of La. C.Cr.P. art. 771.

During the defense's closing argument, counsel argued that the State should have tested for powder burns. In rebuttal, the State argued that it is not required to show powder burns and pointed out that the defendant was arrested the day after the crime when powder burns would have no longer been present. The State continued to argue, over the defense's objection, that the defense had put forth no evidence that the police could have found powder burns the day after the crime. The defendant now argues that the State shifted the burden of proof.

La. C.Cr.P. art. 774 provides in pertinent part: "The State's rebuttal shall be confined to answering the argument of the defendant." In this case, the State was properly arguing in rebuttal an issue the defense raised in closing: that is, the State was under no obligation to present evidence of powder burns. The argument was totally proper.

This assignment is without merit.

CONCLUSION:

For the foregoing reasons, we affirm the conviction and sentence.

AFFIRMED