THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
SOUTHERN DISTRICT

SUPERIOR COURT
04-S-1560

STATE OF NEW HAMPSHIRE

V.

STEPHEN MANN

ORDER ON MOTION IN LIMINE RE: 911 TAPE

LYNN, C.J.

The defendant, Stephen Mann, is charged with one count of first degree murder for the alleged shooting death of his wife. Presently before the court are the parties' motions in limine regarding the admissibility of an audio recording of a 911 call made to the police by the defendant's daughter. The State's seeks admission of the recording; the defendant seeks its exclusion from evidence. I conclude that a portion of the recording must be redacted but that, as redacted, the recording is admissible whether or not the daughter testifies at trial.

I.

For the purposes of this motion, I find the pertinent facts to be as follows. The defendant is charged with causing the death of his wife by shooting her in the head with a firearm. In the early morning hours of July 18, 2004, the defendant's oldest daughter, Ashley Mann, telephoned 911 after discovering her mother's body. At the time, Ashley was 12 years old. After dialing the 911 operator, Ashley initially hung up before speaking to the operator. The operator telephoned Ashley back and received no response. The operator then reported the hang up telephone call to the police,

indicating the call originated from 3 Essex Street, Nashua, a location listed as the residence of Stephen and Kelly Mann. Moments thereafter, Ashley again telephoned 911. The 911 operator asked Ashley what her emergency was and, in response, Ashley stated, "My Dad killed my Mom." She asserted that her mother was bleeding, and that her mother could not move or breathe. Further, Ashley reported that her father had a gun, that he had left the residence driving a black Mustang GT, and that he had tried to get her and her sisters (ages 9 and 1) to go with him. Throughout portions of the conversation, Ashley was crying and screaming.

II.

The State seeks to admit the audio recording of the 911 telephone call, arguing that Ashley's statements qualify as "excited utterances" and thus are admissible as an exception to the hearsay rule under New Hampshire Rule of Evidence 803(2). Further, the State maintains that Crawford v. Washington, 541 U.S. 36 (2004) does not bar admission of the audio recording because Ashley's statements are not testimonial in nature. Finally, the state asserts that under New Hampshire Rule of Evidence 403, the probative value of the audio recording is not substantially outweighed by the danger of unfair prejudice.

Hearsay is an out-of-court statement "offered in evidence to prove the truth of the matter asserted." N.H. R. EVID. 801(c). "In general, such extrajudicial statements, which are not made under oath or subject to cross-examination, are less trustworthy than those made in court." State v. Cole, 139 N.H. 246, 249 (1994) (citation omitted). Consequently, "hearsay is inadmissible unless it falls within an exception to the general rule barring its admission in court." Id.

The "excited utterance" exception to the hearsay rule is based upon the theory that the declarant's statements must be true because the declarant, caught up in a startling event, lacks "the capacity of reflection, thereby producing utterances free of conscious fabrication." Id. (citation omitted); see also N.H. R. EVID. 803(2). Under this exception, the declarant's statements must be made spontaneously "while the declarant was under the stress of excitement caused by the event or condition." N.H. R. EVID. 803(2); see also Cole, 139 N.H. at 249 (declarant's deliberate statement excluded regardless of proximity to startling events). "That an out-of-court statement is self-serving does not render it inadmissible." Cole, 139 N.H. at 249 (citation omitted).

In this case, Ashley recited to the operator the facts she observed upon witnessing her mother's body. Further, she reported that her father had left the residence and that she did not want him to return. Throughout the conversation, she is emotional and distraught, at times crying and screaming. Although the majority of Ashley's statements were made in response to questions by the 911 operator, it is clear that they were made while "under the stress of excitement caused by" witnessing her mother's body and her father leave the home with a gun. N.H. R. EVID. 803(2). Ashley's discovery of her mother's bloody, breathless body constitutes a significantly startling event. Consequently, the circumstances under which Ashley made her initial statements to the 911 operator indicate that such statements were no more than spontaneous responses to general informational questions posed by the 911 operator in an effort to respond to Ashley's call. At the time Ashley initially made the telephone call, she was under the stress of an extremely startling event and lacked "the capacity of reflection, thereby producing utterances free of conscious fabrication." Cole, 139 N.H.

at 249 (citation omitted). This is precisely the sort of situation which Rule 803(2) contemplates.

However, further along in the conversation the 911 operator began asking Ashley questions regarding her father's last name and the home telephone number. At this time, Ashley's statements lost their spontaneous nature; she is no longer crying and screaming, but rather is responding to direct questions in a deliberate manner. As such, I determine that Ashley's statements in the 911 telephone call up to the point, beginning on page 4 of the transcript, where she begins answering questions regarding her father's last name, constitute excited utterances which are admissible under Rule 803(2). The remainder of the recording after this point is not admissible and must be redacted before the tape is played for the jury.

Having found that the majority of Ashley's statements on the 911 audio recording constitute "excited utterances," I must now determine if such statements are testimonial in nature and thus inadmissible under Crawford. The State anticipates that Ashley will testify at trial, but could not represent as much with certainty at the time of the hearing. However, the State argues that the 911 tape is admissible whether Ashley testifies or not. Accordingly, I will first consider whether Crawford bars admission of the 911 tape if Ashley does not testify at trial, and then analyze its admissibility if she does testify.

In Crawford, the United States Supreme Court reconsidered the meaning of the Confrontation Clause of the Sixth Amendment for the first time since Ohio v. Roberts, 448 U.S. 56 (1980). In doing so, the Court examined the historical background behind the Sixth Amendment's Confrontation Clause. See Crawford, 541 U.S. at 42-50. The Court stated that

> the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner; by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.

Id. at 61 (citations omitted). The Court "reject[ed] the view that the Confrontation Clause applies of its own force only to in-court testimony," and found that it may apply to out-of-court statements as well. Id. at 50-51 (quotations and citations omitted). It further noted that the Clause "applies to witnesses against the accused--in other words, those who bear testimony." Id. at 51 (quotations and citations omitted).

Ultimately, the Court determined that before certain out-of-court statements may be admitted into evidence, two criteria must be established: (1) the declarant must be unavailable to testify; and (2) the defendant must have had a prior opportunity for cross-examination of the declarant. See Crawford, 541 U.S. at 68. However, the Court noted that not all hearsay statements implicate such heightened concern. See id. at 51. Specifically, the Court emphasized that the Confrontation Clause is most concerned with statements that are "testimonial" in nature. Id. While the Court did not delineate the parameters of declarations that are "testimonial," it "noted three formulations of core testimonial evidence: (1) ex parte in-court testimony, including affidavits, custodial examinations, and prior testimony not subject to cross-examination; (2) extrajudicial statements contained in formalized material such as depositions; and (3) statements made under circumstances that would cause a reasonable witness to believe they could be used at trial." United States v. Brun, 416 F.3d 703, 706 (8th Cir. 2005) (citing Crawford, 541 U.S. at 51-52).

The New Hampshire Supreme Court has not addressed the issue of whether Crawford bars admission of a 911 telephone call. However, other state and federal "courts have concluded that statements made by a person seeking protection from immediate danger which also report a crime are categorically nontestimonial." State v. Wright, 701 N.W.2d 802, 810 (Minn. 2005) (citations omitted); see also People v. Coleman, 791 N.Y.S.2d 112 (2005); Massey v. LaMarque, 2005 WL 1140025 (9th Cir); Brun, supra; State v. Byrd, 828 N.E.2d 133 (Ohio App. 2005); People v. Moscat, 3 Misc.3d 739, 777 N.Y.S.2d 875 (2004); Leavitt v. Arave, 383 F.3d 809 (9th Cir. 2004). In contrast, several courts have found that such calls are categorically testimonial and must be excluded from trial. See United States v. Arnold, 410 F.3d 895 (6th Cir. 2005); People v. Cortes, 781 N.Y.S.2d 401 (2004). However, "[m]ost courts that have directly addressed this issue have elected to analyze the circumstances of a given 911 call on a case-by-case basis in order to reach a conclusion about whether the statements made during that call are testimonial or nontestimonial." Wright, 701 N.W.2d at 811; see also State v. Davis, 111 P.3d 844 (Wash. 2005).

The defendant maintains that Ashley's statements on the 911 telephone call are testimonial in nature. The defendant argues that the statements were not merely made to secure assistance but also to obtain evidence for trial. I find this argument unpersuasive. "A 911 call for help is essentially different in nature than the testimonial materials Crawford tells us the Confrontation Clause was designed to exclude." Moscat, 3 Misc.3d at 745. Such a call is normally "initiated not by the police but by the victim of a crime." Id. The basis for a 911 call is not to seek evidence for the police or prosecution at trial. See id. "[R]ather, the 911 call has its genesis in the urgent desire

of a citizen to be rescued from immediate peril." Id. In most circumstances, a 911 call "is undertaken by a caller who wants protection from immediate danger." Id. By contrast, "[a] testimonial statement is produced when the government summons a citizen to be a witness." Id. Accordingly, statements made on a 911 tape are not made under "circumstances that would cause a reasonable witness to believe they could be used at trial." Brun, 416 F.3d at 706 (citing Crawford, 541 U.S. at 51-52).

Here, Ashley telephoned 911 shortly after she witnessed her mother's body and saw her father leave the residence with a gun. When she informed the 911 operator that her father had left, she stated that she did not want him to come back. During the initial portion of the 911 tape, Ashley was screaming and crying. Her statements are readily distinguishable from those at issue in Crawford, in which the State sought to introduce the declarant's tape-recorded responses to structured police questioning regarding the alleged crime. See Crawford 541 U.S. at 39-40. Thus, based on Ashley's demeanor, "the temporal proximity to the incident, and the nature of the dialogue between [Ashley] and the 911 operator," I find and rule that Ashley's initial statements on the 911 tape do not constitute testimonial evidence that would trigger the specific concern of the Confrontation Clause. See Wright, 701 N.W.2d at 811.

Of course, if Ashley does testify at trial the Confrontation clause issue disappears. In Crawford, the Court emphasized that "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of [her] prior testimonial statements. … The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." Crawford, 541 U.S. at 59 n. 9 (citations omitted).

In ruling on admissibility, I also must engage in a balancing of the probative value of the tape against its potential for unfairly prejudicing the defendant. Under New Hampshire Rule of Evidence 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." See also State v. Pelkey, 145 N.H. 133, 135 (2000). However, even 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." N.H. R. EVID. 403.

> Evidence is unfairly prejudicial if its primary purpose or effect is to appeal to a jury's sympathies, arouse its sense of horror, provoke its instinct to punish, or trigger other mainsprings of human action that may cause a jury to base its decision on something other than the established proposition in the case. Unfair prejudice is not, of course, mere detriment to a defendant from the tendency of the evidence to prove his guilt, in which sense all evidence offered by the prosecution is meant to be prejudicial. Rather, the prejudice required to predicate reversible error is an undue tendency to induce a decision against the defendant on some improper basis, commonly one that is emotionally charged.

State v. Jordan, 148 N.H. 115, 117-118 (2002) (quotations and citations omitted).

Relying primarily on State v. Yates, ___ N.H. ___ ___ (May 23, 2005), the defendant argues that the probative value of the statements made by Ashley in pages 1-4 of the 911 call transcript are substantially outweighed by the danger of unfair prejudice. Further, the defendant maintains that if Ashley testifies at trial, the tape becomes cumulative and will not add anything of significance to the State's case.

In Yates, the court examined whether the trial court erred in allowing the State to play a 911 tape where the caller offered an opinion "that she could not have offered as a witness testifying at trial, namely that the victim appeared to have been sexually

abused" and the 911 operator referred to the victim as being "sexually abused" and asked the caller if the "attacker" was close by. Yates, ___ N.H. at ___ (slip op. at 3-4). The court found that the record did not indicate the 911 tape was "highly probative," and that the unfair prejudice of admitting such portions of the 911 tape was substantial. See id. at 5-6 (citation omitted). As to the unfair prejudice, the court stated that it resulted "not from the emotional nature of the call, . . . but from the content of the discussion between [the caller] and the 911 operator." Id. at 6.

I find Yates readily distinguishable from the present case. Unlike the 911 caller in Yates, who telephoned 911 approximately fifty-four minutes after the alleged sexual assault had occurred, Ashley telephoned 911 almost immediately after observing her mother's body. Further, the caller in Yates did not witness the incident but "was only able to describe what she observed after the fact of an alleged assault." Id. at 5. In this case, however, Ashley first heard several "slapping sounds" coming from her parents bedroom; then immediately observed the defendant leaving the bedroom with a gun; and only a few moments later, entered the bedroom and found her mother's body. Furthermore, in Yates the caller "and at least three other witnesses testified about the victim's appearance at the scene based upon observations they made either at the same time, or only minutes after, [the caller] called 911." Id. at 5-6. Here, Ashley is the only witness who the State anticipates may testify concerning the immediate circumstances surrounding her mother's death and, as noted above, it is not certain that Ashley will in fact testify.[1] As was the case in Jordan, the 911 tape here "is as

[1] Ashley's two younger sisters were also present in the residence during the time of the alleged murder. Based upon a review of the transcript of the 911 call, it appears that, at the time, one of Ashley's sisters was nine, and the other sister was one. At this point, there is no indication that they will testify at trial.

contemporaneous an account of the events as they occurred as possible." Jordan, 148 N.H. at 118 (quotations omitted).

Arguably, if Ashley does testify, the State has less need for the 911 tape and, to that extent, the tape losses some weight on the "probativeness" side of the admissibility scale. However, even in that circumstance, the tape still constitutes the most contemporaneous evidence of the murder. Moreover, if Ashley does testify, her live recitation of the events in front of the jury will itself undoubtedly be quite emotional, and the tape is unlikely to have any incremental adverse effect on the jurors. "[T]he prosecution, with its burden of establishing guilt beyond a reasonable doubt, is not to be denied the right to prove every essential element of the crime by the most convincing evidence it is able to produce." Jordan, 148 N.H. at 118 (quotations and citations omitted).

Nor is the tape's probative value substantially outweighed by the danger of unfair prejudice to the defendant. I acknowledge the emotional nature of the tape; however, given the basic underlying facts of this case, "the tape is not so unduly emotional as to inflame a jury." Id. Further, unlike in Yates, where the caller gave the 911 operator her opinion that the victim was "sexually abused," here Ashley provided the operator with information that she personally observed regarding her mother's condition and her father leaving the residence with a gun.[2] Yates, ___ N.H. at ___ ,slip op. at 5.

[2] While it is true that Ashley's very first statement on the tape, "My Dad killed my Mom," is, strictly speaking , a conclusion – since she was not actually in the room when the shooting occurred -- the chain of inferences on which this conclusion is based is far shorter and far more compelling than was the case in Yates. As stated in the text, while Ashley did not witness the actual shooting, she did have personal knowledge of the facts that (1) her mother and father were in the room together; (2) she heard three "slapping sounds" come from the room; (3) immediately thereafter, the defendant left the room with a gun in his belt, tried to get his children to go with him, and then fled the residence; and (4) momentarily thereafter she found her mother in the room bleeding and not breathing. While it of course would be preferable if Ashley had described only these pure "facts" to the 911 operator in the manner I have just delineated, the reality is that people do not speak with such deliberativeness in an emergency situation.

III.

For the reasons stated above, I hold that the portion of the 911 tape from its beginning through the first question reflected on page 4 of the transcript may be admitted at trial. Prior to playing the tape or presenting the transcript before the jury, the State shall redact the tape and the transcript accordingly.

So ordered.

October 21, 2005

_____
ROBERT J. LYNN
Chief Justice

The important point here is that the "conclusion" Ashley drew is one rationally drawn by her based upon her own immediate perceptions at the time of the events. As such, her statement "My Dad killed my Mom" does not run afoul of the personal knowledge requirement of N.H.R.Evid. 602. Rather, it is an opinion or inference which is "(a) rationally based on the perception of [Ashley] . . ., and (b) helpful to . . . the determination of a fact in issue." N.H.R. Evid. 701. See State v. McCue, 134 N.H. 94, 107 (1991) (officer permitted to opine that impressions at crime scene were "drag marks"); Heath v. Joyce, 114 N.H. 620, 622 (1974) (lay witness allowed to testify that noise of vehicle sounded "like an engine running at fairly high speed").