[Cite as *State v. Brown*, 2004-Ohio-5600.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 83868

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	JOURNAL ENTRY
	:	
-VS-	:	AND
	:	
HORACE BROWN	:	OPINION
	:	
Defendant-Appellant	:	

Date of Announcement of Decision:	OCTOBER 21, 2004
Character of Proceeding:	Criminal appeal from Court of Common Pleas Case No. CR-438088
Judgment:	Affirmed
Date of Journalization:	
Appearances:	
For Plaintiff-Appellee:	WILLIAM D. MASON Cuyahoga County Prosecutor JULIANNE WEINTRAUB, Assistant Prosecuting Attorney 1200 Ontario Street Cleveland, Ohio 44113
For Defendant-Appellant:	ROBERT L. TOBIK Cuyahoga County Public Defender

PATRICIA KOCH WINDHAM, Assistant
Public Defender
100 Lakeside Place
1200 West Third Street
Cleveland, Ohio 44113

JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant Horace Brown ("defendant") appeals his conviction and claims that the trial court erred when it admitted hearsay evidence under the "excited utterance" exception. For the following reasons, we affirm the decision of the trial court.

{¶ 2} On June 4, 2003, the Cuyahoga County Grand Jury indicted defendant on five counts: two counts of rape, in violation of R.C. 2907.02; two counts of kidnapping, in violation of R.C. 2905.01; and one count of gross sexual imposition, in violation of R.C. 2907.05.

{¶ 3} The charges in this case arose from events that occurred on May 21, 2003. B.W.[1], a 14-year-old girl, was walking home from school when she saw the defendant, whom she knew through a friend, sitting on the front porch of his house. Defendant was 19 years old. Defendant asked B.W. if she wanted to come inside his house and watch some television, and she agreed. B.W. then followed defendant upstairs to his bedroom, where he told her the television was.

{¶ 4} Once inside the bedroom, defendant began kissing B.W., who had been sitting on the bed. B.W. told defendant that she did not want to "mess with [him] like that." Despite B.W.'s instruction, defendant continued to touch and kiss B.W., eventually getting on top of her and pushing her down on the bed. Defendant unbuttoned B.W.'s jeans and inserted his fingers into her vagina. B.W. tried to push defendant off her and told him to stop. Defendant told her to be quiet, removed

[1]The child-victim and all minor witnesses are referred to herein by their initials or title in accordance with this Court's established policy.

his pants, and penetrated her vagina with his penis. After the defendant got off of B.W., she jumped off the bed and ran out of the house as defendant grabbed at her.

{¶ 5} When B.W. got home, she told her godsister, Joy.W., what had happened. B.W. and Joy.W. then went next door to her friend E.J.'s house and told her what happened. Shortly thereafter, B.W. went home and went to bed early.

{¶ 6} The next day, B.W. went to school. While at school, B.W. told her godbrother, Jar.W., that defendant had raped her. B.W. also told her friend M.S. what happened and that she was bleeding. M.S. advised B.W. to see a doctor.

{¶ 7} The next day, M.S. and B.W. skipped class so that B.W. could see a doctor. On the way to the doctor, B.W.'s mother, Terri White, drove by and saw them standing near a bank. B.W. got into her mom's car and told her mother that she had been raped. Terri drove to their house to get the underwear that B.W. was wearing and took B.W. to the police station to make a report. At the police station, B.W. met with Officer Jennifer Robertson of the Cleveland Police Department and made a statement. B.W. then went to the hospital and had a rape examination.

{¶ 8} DNA testing was performed on the underwear worn by B.W. and the defendant. None of defendant's DNA was found on B.W.'s underwear, but both defendant's and B.W.'s DNA was found on defendant's underwear.

{¶ 9} On September 25, 2003, a jury trial began. At trial, B.W. testified about what happened on the afternoon of May 21, 2003. Joy W., E.J., Jar.W., M.S., and Officer Robertson, over objection[2], also testified as to what B.W. had told them regarding the events of May 21, 2003. Defendant testified on his own behalf and said that B.W. came to his house to watch television and

[2]Defendant did not object to M.S.'s or Officer Robertson's testimony during trial.

asked him to perform oral sex on her. He stated that he refused and that B.W. became angry and left his house.

{¶ 10} On October 2, 2003, the jury returned guilty verdicts on two counts of rape and one count of kidnapping.[3] Defendant was sentenced to four years on each of the three counts, to be served concurrently. Defendant was also found to be a habitual sexual offender.

{¶ 11} Defendant now appeals and raises the following assignment of error:

{¶ 12} "I. Appellant was deprived of his constitutional right to a fair trial when multiple instances of prejudicial hearsay were admitted into evidence."

{¶ 13} In this assignment of error, defendant argues that he was unfairly prejudiced when the trial court allowed hearsay evidence during the trial. Specifically, defendant argues that the testimony of Joy.W., E.J., Jar.W., M.S., and Officer Jennifer Robertson constituted inadmissible hearsay, which was not subject to the hearsay exceptions as contained in Evid. R. 803. We disagree.

{¶ 14} Evid. R. 803(2) allows certain hearsay statements to be introduced at trial as "excited utterances" if certain conditions are met. *State v. Wallace* (1988), 37 Ohio St.3d 87. First, there must be a startling event that produces a nervous excitement in the declarant, which stills reflective capabilities, and makes any statements the unreflective and sincere expression of the actual impressions and beliefs. Id. Second, the statement, even if not strictly contemporaneous with its exciting cause, was made while the declarant was still in a nervous state and before the opportunity to reflect on the startling event. Id. Third, the statement is related to the startling event. Id. Finally, the declarant has personal knowledge of the matters asserted in the statement. Id.

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[3]The trial court dismissed one of the kidnapping charges and the gross sexual imposition charge.

{¶ 15} A trial court has broad discretion in determining whether a child-victim's statement about sexually abusive acts qualify as an excited utterance. *State v. Wagner* (1986), 30 Ohio App.3d 261. Since children are likely to remain in a state of nervous excitement longer than adults would and are less capable of reflective thought, time is not the controlling factor in determining whether a statement fits within the excited utterance exception. *State v. Taylor* (1993), 66 Ohio St.3d 295, 304; *State v. Humphries* (1992), 79 Ohio App.3d 589, 598. Rather, the controlling factor is whether the child made the statement under circumstances that would reasonably show that it resulted from impulse rather than reason and reflection. *State v. Smith* (1986), 34 Ohio App.3d 180, 190.

{¶ 16} Here, Joy.W., E.J., Jar.W., M.S., and Officer Robertson each testified as to statements made by the victim, B.W., which related to the conduct of the defendant. Joy.W. and E.J. testified about statements B.W. made within two hours after the incident with the defendant. Joy.W. testified that B.W. was upset and shaky, with her face red and her eyes watery. E.J. testified that B.W. was upset, not acting like herself, and could not sit still. Next, Jar.W. and M.S. testified about statements made by B.W. the day after the incident with the defendant. Jar.W. testified that B.W.'s eyes were red and that she started crying while they were talking. M.S. testified that B.W. was upset, nervous and shaking. Finally, Officer Robertson testified about statements B.W. made two days after the incident with the defendant. Officer Robertson testified that B.W. was very upset, crying very hard, and that the interview had to be stopped several times so that she could calm down. Officer Robertson also testified that B.W. became hysterical, and began screaming and crying after seeing a photograph of the defendant.

{¶ 17} Upon review of the record, we find that the trial court's decision to admit the statements of Joy.W., E.J., Jar.W., M.S., and Officer Robertson under the excited utterance exception was not unreasonable, arbitrary, or unconscionable. During every disclosure, the child was

upset and nervous, if not crying. Each of the disclosures were also made within two days of the incident. Defendant's sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its 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 Court of Common Pleas 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.

PATRICIA A. BLACKMON, P.J., and
TIMOTHY E. McMONAGLE, J., CONCUR.

JAMES J. SWEENEY
JUDGE