Opinion filed March 23, 2017

In The

Eleventh Court of Appeals

No. 11-15-00040-CR

LORENZO MERAZ DAVILA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 385th District Court
Midland County, Texas
Trial Court Cause No. CR44032

MEMORANDUM OPINION

The jury convicted Lorenzo Meraz Davila of two counts of sexual assault and assessed his punishment at confinement for ten years in the Institutional Division of the Texas Department of Criminal Justice on each count. The jury also imposed a fine of $2,000 on each count. The trial court ordered that Appellant's sentences are to run concurrently. In a single issue, Appellant contends that the trial court erred by admitting hearsay statements of the victim. We affirm.

Background Facts

A.C.L. is the victim in this case. She and her husband moved into Appellant's house in Midland two weeks before the alleged sexual assault. A.C.L. testified that Appellant sexually assaulted her in his house on the morning of August 22, 2014. The occupants of the house drank beer together the night before. Appellant and A.C.L.'s husband apparently got into an argument after A.C.L. went to bed. A.C.L. found out about the argument the next day.

The next morning, all of the men in the house left for work while A.C.L. remained in bed. Appellant subsequently returned to the house that morning and knocked on A.C.L.'s bedroom door. A.C.L. testified that, when she answered the door, Appellant took her by her arm to his room yelling that she was "going to pay" for what her husband had done to him. She testified that Appellant slapped her, cursed her in Spanish, and repeated that she would pay for what her husband had done to him.

A.C.L. testified that Appellant started taking his pants down and that he told her to suck his penis. He grabbed her head and forced her to do it because she did not want to. He then pushed her down on the floor and got on top of her. A.C.L. testified that she attempted to push Appellant off her but that he was too heavy. She was also unable to kick him off her because she had had a total hip replacement. Appellant slapped A.C.L. and told her to shut up. He then put his penis inside A.C.L.'s vagina and engaged in sexual intercourse with her. A.C.L. denied consenting to sexual intercourse with Appellant. Conversely, Appellant gave a statement to the police acknowledging that he had had sexual intercourse with A.C.L. but asserting that it was consensual.

A.C.L. testified that, after Appellant finished having sex with her, he put his pants back on and asked her if she wanted to go get a beer with him. A.C.L. believed that this was an opportunity to seek help, so she agreed to go with him. A.C.L. got into Appellant's car and rode in the passenger seat, and Appellant began to drive to the store. While Appellant was stopped at an intersection, A.C.L. saw a pickup. She jumped out of Appellant's car, approached the pickup, and asked the driver for help.

The driver of the pickup was Michael Starlene Smith. Sometime between 10:00 a.m. and 10:30 a.m., she saw A.C.L. approach her pickup. A.C.L. was "really upset" and was crying. According to Smith, on a scale of one to ten, with ten being the most upset, A.C.L. was "at a ten." A.C.L. was wearing a dirty T-shirt, sweat pants that had been cut off into shorts, and socks with no shoes. A.C.L. told Smith that Appellant had raped her, and she asked Smith to call the police. Smith called 9-1-1. Smith and A.C.L. waited between ten and fifteen minutes for police to arrive.

Midland Police Officer Chane Blandford responded to the 9-1-1 call. When Officer Blandford arrived, he noticed that A.C.L. was "extremely upset" and was crying. She was so upset that she initially could not speak, was repeatedly shaking her head, and was hyperventilating. He observed that A.C.L. was wearing a tattered sweatshirt, shorts, and socks with no shoes and that she had redness on the side of her eye and near her temple. Officer Blandford asked A.C.L. to take slow, deep breaths in order to calm her down "because she was beyond any type of talking to or anything." He successfully calmed A.C.L. down to the point that he was able to ask her about what happened. After the trial court overruled Appellant's hearsay and relevancy objections, Officer Blandford testified that A.C.L. told him that Appellant sexually assaulted her. Officer Blandford also provided some of the details about the sexual assault that A.C.L. told him. Specifically, Officer Blandford testified as follows: "[A.C.L.] said that this morning she was thrown to the ground and that she was beaten repeatedly and that [Appellant] was going to have sex with her whether she wanted to or not and he kept hitting her until she would have sex with him."

Analysis

In Appellant's sole issue, he asserts that the trial court erred by admitting A.C.L.'s statements to Officer Blandford that Appellant sexually assaulted her. Appellant asserts that these statements were inadmissible hearsay. We review a trial court's ruling on admissibility of evidence for an abuse of discretion. *Coble v. State*, 330 S.W.3d 253, 272 (Tex. Crim. App. 2010). We will uphold the trial court's decision unless it lies outside the zone of reasonable disagreement. *Salazar v. State*, 38 S.W.3d 141, 153–54 (Tex. Crim. App. 2001).

Hearsay is a statement, other than one made by the declarant while testifying at trial, that is offered to prove the truth of the matter asserted. TEX. R. EVID. 801(d); *Tienda v. State*, 479 S.W.3d 863, 874 (Tex. App.—Eastland 2015, no pet.). Hearsay is inadmissible except as provided by statute or the Texas Rules of Evidence. TEX. R. EVID. 802; *Tienda*, 479 S.W.3d at 874. In response to Appellant's hearsay objection, the prosecutor asserted that A.C.'s statements to Officer Blandford constituted excited utterances. Excited utterances are admissible as an exception to the hearsay rule. TEX. R. EVID. 803(2); *Tienda*, 479 S.W.3d at 874. An excited utterance is 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. TEX. R. EVID. 803(2); *Salazar*, 38 S.W.3d at 154; *Tienda*, 479 S.W.3d at 874.

Appellant asserts that A.C.L.'s statements to Officer Blandford were not excited utterances because they were the result of questioning that occurred after A.C.L. calmed down. Appellant contends that A.C.L.'s statements to Officer Blandford lacked the spontaneity required for an excited utterance. Appellant relies on our decision in *Tienda*, as well as the holding in *Hughes v. State*, 128 S.W.3d 247, 253 (Tex. App.—Tyler 2003, pet. ref'd), for the proposition that, when a declarant answers a law enforcement officer's questions in a calm manner, the statements cannot be excited utterances.

Whether a hearsay statement is made in response to questioning is a factor in determining whether that statement is admissible as an excited utterance. *Zuliani v. State*, 97 S.W.3d 589, 595 (Tex. Crim. App. 2003). However, it is not dispositive that the statement is an answer to a question. *Id.* at 596; *McFarland v. State*, 845 S.W.2d 824, 846 (Tex. Crim. App. 1992); *White v. State*, 201 S.W.3d 233, 245 (Tex. App.—Fort Worth 2006, pet. ref'd). "The critical determination is 'whether the declarant was still dominated by the emotions, excitement, fear, or pain of the event' or condition at the time of the statement." *Zuliani*, 97 S.W.3d at 596 (quoting *McFarland*, 845 S.W.2d at 846).

In both *Tienda* and *Hughes*, the declarant gave statements in response to law enforcement questioning. *Tienda*, 479 S.W.3d at 874; *Hughes*, 128 S.W.3d at 250. In both cases, the declarant was giving statements about incidents that occurred days, months, or years before the interview. *Tienda*, 479 S.W.3d at 875–76; *Hughes*, 128 S.W.3d at 250, 254. In both cases, the interview between law enforcement and the declarants took place somewhere other than the scene of the crime. *Tienda*, 479 S.W.3d at 870 (the declarant's high school); *Hughes*, 128 S.W.3d at 249 (the police station). In *Tienda*, the law enforcement officer asked the declarant several leading questions, and many of the declarant's answers were preceded by relatively long pauses. *Tienda*, 479 S.W.3d at 876, 878. In *Hughes*, the declarant knew in advance what the questions would be about, and the law enforcement officer questioned the declarant for an estimated four to six hours. *Hughes*, 128 S.W.3d at 253.

In contrast, Officer Blandford questioned A.C.L. shortly after the alleged sexual assault occurred and moments after A.C.L. escaped from Appellant's vehicle. Officer Blandford questioned A.C.L. at the intersection where he responded to the 9-1-1 call, which was a few blocks from the apartment where A.C.L. was sexually assaulted. According to both Smith and Officer Blandford, A.C.L. was extremely upset and was wearing a tattered or dirty shirt with no shoes. Officer Blandford also noticed that A.C.L. had redness on her face and head. *See Zuliani*, 97 S.W.3d at 596 (declarant was wearing a robe, wore no makeup, had a cut on her scalp, and had not been separated from her assailant since the time of the alleged assault); *see also Oveal v. State*, 164 S.W.3d 735, 740–41 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (the fact that the declarant had a swollen face, cuts on her body, and blood on her shirt and arm were appropriate factors to be considered when determining whether she was still dominated by the emotions, excitement, fear, or pain of the event).

Appellant additionally contends that A.C.L.'s statements cannot be excited utterances because she calmed down before answering Officer Blandford's questions. As discussed above, shortly before speaking with Officer Blandford, A.C.L. had suffered a sexual assault and had escaped from her attacker. Officer Blandford had to calm her down in order to obtain any information from her. The critical determination in regard to the excited utterance exception is whether the declarant was still dominated by the emotions, excitement, fear, or pain of the event or condition at the time he or she made the statement. *See Zuliani*, 97 S.W.3d at 596. Ultimately, we must determine whether the statements were made under such circumstances as would reasonably show that they resulted from impulse rather than reason and reflection. *See id.* Given the evidence presented to the trial court, it could have inferred that A.C.L. was still dominated by fear, excitement, or pain from the sexual assault and her escape from Appellant when she responded to Officer Blandford's questions.[1] Therefore, we cannot say that the trial court's decision to admit Officer Blandford's statements fell outside the zone of reasonable disagreement and constituted an abuse of discretion.

[1]Although it was not a part of the evidence before the trial court at the time Officer Blandford testified, Detective David Olvera subsequently testified that A.C.L. was "upset," "crying," and "just very emotional" after Officer Blandford transported her to the hospital for a SANE examination.

Moreover, even if the trial court committed error by allowing A.C.L.'s statements to Officer Blandford, such error would have been harmless. Under Texas Rule of Appellate Procedure 44.2(b), we must disregard nonconstitutional error that does not affect a defendant's "substantial rights," i.e., if upon examining the record as a whole, there is a fair assurance that the error did not have a substantial and injurious effect or influence in determining the jury's verdict. TEX. R. APP. P. 44.2(b); *Garcia v. State*, 126 S.W.3d 921, 927 (Tex. Crim. App. 2004). The error of admitting hearsay will not result in reversal when other such evidence was received without objection, either before or after the complained-of ruling. *Leday v. State*, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998); *see Anderson v. State*, 717 S.W.2d 622, 628 (Tex. Crim. App. 1986) ("Inadmissible evidence can be rendered harmless if other evidence at trial is admitted without objection and it proves the same fact that the inadmissible evidence sought to prove."); *Montgomery v. State*, 383 S.W.3d 722, 727 (Tex. App.—Houston [14th Dist.] 2012, no pet.) ("Although the trial court may have initially excluded this evidence, the later admission renders harmless any possible error.").

A.C.L. subsequently testified without objection to the details of Appellant sexually assaulting her. Considering all of the evidence presented, Officer Blandford's testimony about the brief details of the incident that A.C.L. reported to him likely had little influence on the jury's verdict. Therefore, even if the admission of A.C.L.'s statements to Officer Blandford was error, it was harmless error. Accordingly, we overrule Appellant's sole issue.

This Court's Ruling

We affirm the judgment of the trial court.

JOHN M. BAILEY
JUSTICE

March 23, 2017

Do not publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Wright, C.J.,
Willson, J., and Bailey, J.