COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00170-CR

CHRISTIAN VAUGHN WEAR — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM COUNTY CRIMINAL COURT NO. 5 OF TARRANT COUNTY
TRIAL COURT NO. 1420937

MEMORANDUM OPINION[1]

A jury found Appellant Christian Vaughn Wear guilty of assault bodily injury-family member, and the trial court sentenced him to one year's confinement in the county jail, probated for two years, and imposed a $700 fine. The trial court certified that Wear had the right to appeal, and Wear perfected this appeal; he raises one issue claiming that the trial court violated the Sixth

[1]*See* Tex. R. App. P. 47.4.

Amendment's Confrontation Clause by admitting out-of-court testimonial statements. For the reasons set forth below, we will affirm.

Wear complains of the admission of statements made by the victim—Raquel Vargas, with whom Wear had been living for three or four years—to her brother's fiancée, Felecia Aleman, immediately after the incident forming the basis of the assault bodily injury-family member charges against Wear. Felecia testified that Vargas had called her crying and hysterical and had asked to be picked up because she and Wear had gotten into a fight. Felecia located Vargas about ten minutes later on a nearby street corner. Vargas was barefoot and shoeless, was crying, and had a cut on her lip and near her left eye. Vargas told Felecia that Wear had hit her in the face and taken her glasses, that he would not let her leave the apartment, and that she had escaped by "jumping the balcony." Felecia drove Vargas to Vargas's parent's house.

Vargas did not testify at trial; although she was sworn in as a witness at the commencement of trial, she left the courthouse and did not return. Wear objected to the testimony by Felecia concerning what Vargas had said to Felecia—that Vargas and Wear had gotten into a fight, that Wear had hit her in the face, that Wear had taken her glasses, that Wear would not let her leave, and that she had escaped the apartment by jumping the balcony. Wear objected to this testimony as hearsay and as a violation of his confrontation rights because he could not cross-examine Vargas. The trial court overruled Wear's objections

and found that Vargas's statements to Felecia were admissible under the excited utterance exception to the hearsay rule and were not testimonial.

In reviewing on appeal the admissibility of out-of-court statements over hearsay-because-not-an-excited-utterance and confrontation-clause objections, we conduct separate but related inquiries. *Wall v. State*, 184 S.W.3d 730, 742 (Tex. Crim. App. 2006) (citing and quoting *United States v. Brito*, 427 F.3d 53, 60 (1st Cir. 2005)). These inquiries were explained by the court of criminal appeals when it adopted the test set forth in the First Circuit case of *Brito*:

> While both inquiries look to the surrounding circumstances to make determinations about the declarant's mindset at the time of the statement, their focal points are different. The excited utterance inquiry focuses on whether the declarant was under the stress of a startling event. The testimonial hearsay inquiry focuses on whether a reasonable declarant, similarly situated (that is, excited by the stress of a startling event), would have had the capacity to appreciate the legal ramifications of her statement. These parallel inquiries require an ad hoc, case-by-case approach. An inquiring court first should determine whether a particular hearsay statement qualifies as an excited utterance. If not, the inquiry ends. If, however, the statement so qualifies, the court then must look to the attendant circumstances and assess the likelihood that a reasonable person would have either retained or regained the capacity to make a testimonial statement at the time of the utterance.

Id.

Turning to the first inquiry, we examine whether Vargas's statements to Felecia fall within the excited utterance hearsay exception, and we apply an abuse-of-discretion standard of review to the trial court's determination that a statement constitutes an excited utterance. *See Zuliani v. State*, 97 S.W.3d 589, 595 (Tex. Crim. App. 2003). An excited utterance is "[a] statement relating to a

startling event or condition, made while the declarant was under the stress of excitement that it caused." Tex. R. Evid. 803(2). Such excited utterances are not subject to the hearsay rule, irrespective of whether the declarant is available as a witness. Tex. R. Evid. 803. In determining whether a hearsay statement is admissible as an excited utterance, the court considers whether

> (1) the "exciting event" [is] startling enough to evoke a truly *spontaneous* reaction from the declarant; (2) the reaction to the startling event [is] quick enough to avoid the possibility of fabrication; and (3) the resulting statement [is] sufficiently "related to" the startling event, to ensure the reliability and trustworthiness of that statement.

McCarty v. State, 257 S.W.3d 238, 241 (Tex. Crim. App. 2008). The court may also consider the time elapsed and whether the statement was in response to a question. *Salazar v. State*, 38 S.W.3d 141, 154 (Tex. Crim. App.), *cert. denied*, 534 U.S. 855 (2001).

Vargas's phone call to Felecia occurred immediately after she escaped from Wear. She was "crying and hysterical" when she told Felecia that she and Wear had gotten into a fight, and she asked Felecia to come pick her up. Felecia picked up Vargas within about ten minutes. Vargas was barefoot and shoeless, had a torn shirt, appeared to have been hit in the face, and had a cut on her lip and near her left eye. In this condition, Vargas related to Felecia that Wear had hit her in the face, had taken her glasses, and would not let her leave the apartment and that she had escaped by "jumping the balcony." Based on these facts, the exciting event Vargas experienced was startling enough to evoke a

truly spontaneous reaction from her; Vargas's spontaneous reaction, escaping, crying, and appearing hysterical was connected in time with the event sufficiently to avoid the possibility of fabrication; Vargas's statements were directly related to the exciting event sufficiently to ensure the reliability of the statements; and Vargas was still dominated by the emotions, fear, and pain caused by the event when she made the statements to Felecia. *See Zuliani*, 97 S.W.3d at 595–96 (holding trial court did not abuse its discretion by determining that statement made by victim to her sister describing defendant's offense of assault bodily injury was excited utterance); *Davlin v. State*, No. 06-15-00226-CR, 2016 WL 3460790, at *4 (Tex. App.—Texarkana June 24, 2016, no pet.) (holding fireman's testimony concerning statements he overheard woman making in phone call fell within excited utterance hearsay exception); *Juarez v. State*, 461 S.W.3d 283, 295 (Tex. App.—Texarkana 2015, no pet.) (holding police officer's testimony concerning victim's statements fell within excited utterance hearsay exception). We thus hold that the trial court did not abuse its discretion by determining that Vargas's statements to Felecia fell within the exited utterance exception to the hearsay rule.

Applying a de novo standard of review, we next examine whether Vargas's statements were testimonial and therefore violated Wear's Confrontation Clause rights. *See Wall*, 184 S.W.3d at 742. Testimonial statements are inadmissible at trial unless the witness who made them either takes the stand to be cross-examined or is unavailable and the defendant had a prior opportunity to cross-

examine the witness. *Crawford v. Washington*, 541 U.S. 36, 54, 124 S. Ct. 1354, 1366 (2004); *Wood v. State*, 299 S.W.3d 200, 207 (Tex. App.—Austin 2009, pet. ref'd). In determining whether a statement is testimonial, we review the objective purpose of the statement, not the declarant's expectations. *Coronado v. State*, 351 S.W.3d 315, 324 (Tex. Crim. App. 2011). Statements are testimonial when the circumstances objectively indicate that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *Id*. In contrast, statements are nontestimonial when "the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Davis v. Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 2273 (2006).

Vargas's statements here were not made pursuant to police questioning or interrogation; they were not made to police at all but to her brother's fiancée, Felecia, whom Vargas called. The objective purpose of Vargas's statements to Felecia was to obtain assistance, not to establish or prove past events potentially relevant to later criminal prosecution. *See Ohio v. Clark*, 135 S. Ct. 2173, 2180–82 (2015) (recognizing that "[s]tatements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers"); *Avant v. State*, 499 S.W.3d 123, 129 (Tex. App.—San Antonio 2016, no pet.) (explaining that primary purpose of statements of ninety-year-old victim to her daughter was to seek help from daughter, not an attempt to create a substitute

for trial testimony, and holding that statements were thus not testimonial); *Davlin*, 2016 WL 3460790, at *5 (holding statements were not made to police and "thus, could hardly have been said by [the victim] with the idea that they would be used in connection with the certain-to-be forthcoming trial of Davlin"). We hold as a matter of law that Vargas's statements to Felecia were not testimonial.

Having determined that Vargas's statements to Felecia fell within the excited utterance exception to the hearsay rule and that Vargas's statements to Felecia were not testimonial, we hold that the trial court did not abuse its discretion by admitting these statements over Wear's hearsay and violation-of-confrontation-rights objections. Accordingly, we overrule Wear's sole issue and affirm the trial court's judgment.

/s/ Sue Walker
SUE WALKER
JUSTICE

PANEL: WALKER, GABRIEL, and SUDDERTH, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: March 9, 2017