ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR 08-815

	Opinion Delivered JANUARY 14, 2009
CHAMIKA SHANTA ROGERS APPELLANT	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, FIRST DIVISION, [NO. CR2007-2629]
V.	HONORABLE MARION A. HUMPHREY, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

JOHN B. ROBBINS, Judge

Appellant Chamika Shanta Rogers appeals her conviction for first-degree battery entered by the Pulaski County Circuit Court after a bench trial. Her sole argument on appeal is that she should be entitled to a new trial because the trial court abused its discretion in overruling her hearsay objection to testimony offered by an investigating police officer, who identified her as the person who inflicted injuries on the victim, Seacombe Strong. Strong did not appear at the trial, and the officer was permitted to relate Strong's identification of appellant as the person who hit him in the face with a broken bottle. The State argued that this testimony was admissible as an exception to the hearsay rule as an "excited utterance" pursuant to Ark. R. Evid. 803(2). The trial judge agreed, and appellant argues that this ruling constitutes an abuse of discretion. We disagree with appellant and affirm.

The circuit court has wide discretion in making evidentiary rulings, and we will not reverse its ruling on the admissibility of evidence absent an abuse of discretion. *See Brunson v. State*, ___ Ark. ___, ___ S.W.3d ___ (Dec. 14, 2006). Arkansas Rule of Evidence 803 provides hearsay exceptions that render statements potentially admissible, regardless of the availability of the declarant. Among those is the exception for an excited utterance, which is defined in the Rule at subsection (2) as "[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."

It is for the circuit court to determine whether a statement was made under the stress of excitement. *See Davis v. State*, 362 Ark. 34, 207 S.W.3d 474 (2005). There are several factors to be considered when determining if a statement is an excited utterance. *See id.* The lapse of time, the age of the declarant, the physical and mental condition of the declarant, the characteristics of the event, and the subject matter of the statement are all factors to be considered. *See id.* Furthermore, for the exception to apply, there must be an event that excites the declarant. *See id.* It must appear that the declarant's condition at the time was such that the statement was spontaneous, excited, or impulsive rather than the product of reflection and deliberation. *See id.* The statements must be uttered during the period of excitement and must express the declarant's reaction to the event. *See id.* The general rule is that an utterance following an exciting event must be made soon enough thereafter that it can reasonably be considered a product of the stress of the excitement rather than of

intervening reflection or deliberation. *Id.* *See also Peterson v. State*, 349 Ark. 195, 76 S.W.3d 845 (2002); *Warner v. State*, 93 Ark. App. 233, 218 S.W.3d 330 (2005).

In this bench trial, the prosecutor called the responding police officer to the stand to testify. Officer Rozado stated that he had worked in the North Little Rock police department for six years and had responded within minutes to a disturbance call on May 12, 2007, to a house at 718 North Olive. Rozado was "very familiar" with the victim, Seacombe Strong, due to previous calls to the police on domestic disturbances. Rozado said that Strong was barely recognizable on sight because Strong was bleeding so profusely from his face, which was seriously cut, and that blood also covered Strong's legs. Rozado recognized Strong's voice, stating that Strong was "very intoxicated . . . upset and belligerent." Three color photographs were entered into evidence to show the severity of injury. Rozado stated he told Strong that "you two are going to kill each other." Rozado said Strong told him who did this, which drew a hearsay objection. The prosecutor offered the statement as an excited utterance.

In laying a foundation for the argument that this fit a hearsay exception, the prosecutor elicited further testimony from Rozado that appellant and Strong had "this ongoing thing . . . taking out no contact orders." Rozado then explained that Strong, known to have a drug and alcohol problem, was "very upset, visibly upset." Rozado stated that he had so many dealings with Strong that he knew when Strong was excited, which he was that night. The officer agreed that when he described Strong as belligerent, this was Strong's demeanor pretty much all the time.

The prosecutor argued to the trial judge that the officer's hearsay comment, identifying appellant as the perpetrator, came within minutes of the call to police, when the victim was covered in blood from a severe gouging of his face and while the victim was very upset. The prosecutor contended that the statement fit within the excited utterance exception. The defense counsel resisted, but the trial court decided to allow the statement. Appellant was ultimately found guilty of first-degree battery, and this appeal followed.

On appeal, appellant reasserts her argument, contending that while the victim was upset and bleeding, there was no indication that Strong was acting under anything other than behavior typical to him, which was belligerence and intoxication. Therefore, appellant argues that the trial court abused its discretion in allowing the hearsay testimony of Officer Rozado identifying appellant as the person who caused Strong's injuries. We disagree.

This statement came from the victim of a violent crime, minutes after the police were summoned, and the victim was "visibly upset," injured, and "excited." *Compare Wright v. State*, 368 Ark 629, 249 S.W.3d 133 (2007); *Barrett v. State*, 354 Ark. 187, 119 S.W.3d 485 (2003); *Fudge v. State*, 341 Ark. 759, 20 S.W.3d 315 (2000). On this evidence, we cannot conclude that the trial judge abused his considerable discretion in making this evidentiary ruling.

Affirmed.

BAKER, J., agrees.

HART, J., concurs. BAKER, J., joins.

HART, J., concurring. The declarant did not testify at trial. Rather, the declarant's statements were introduced through a police officer's recitation of what he was told by the declarant, which the circuit court found to be an excited utterance made by the declarant. Though not done here and not argued on appeal, parties in future, similar cases should parse the reasons why a declarant has made a statement to police.

According to the abstract, the officer told the declarant that "you two are going to kill each other . . . because every time either you're hurting her or she's hurting you." Also, the officer further testified that the declarant "was upset by what he felt was a lack of action by law enforcement." As recently stated in *Jones v. Currens*, ___ Ark. App. ___, ___ S.W.3d ___ (Dec. 17, 2008), in considering whether a statement falls within the excited-utterance exception to the hearsay rule, the circuit court should consider whether the declarant's condition at the time was such that the statement was spontaneous, excited, or impulsive rather than the product of reflection and deliberation. Based on the above-quoted testimony, one could argue that the declarant's statements were not excited utterances, but were made in response to police interrogation and were geared to encourage police action.

Furthermore, in instances where a declarant is making statements to police, parties should also consider whether the statements may be introduced without offending the Confrontation Clause of the United States Constitution. Statements are considered nontestimonial when made in the course of police interrogation and under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency, but are testimonial if circumstances objectively

indicate that there is no ongoing emergency and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *Davis v. Washington*, 547 U.S. 813, 822 (2006). Testimonial statements, however, may not be admitted unless the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004). One could argue here that the declarant's statements were testimonial, as the statements proved past events relevant to later criminal prosecution.

Nevertheless, considering the arguments presented on appeal, I agree with the majority that this case must be affirmed.

BAKER, J., joins.