DIVISION III

ARKANSAS COURT OF APPEALS

No. CACR06-1200

	Opinion Delivered October 24, 2007
ROBERT SINGLETON JOHNSON, JR. APPELLANT	AN APPEAL FROM GARLAND COUNTY CIRCUIT COURT [CR2006-23-1]
V.	HON. JOHN HOMER WRIGHT, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

WENDELL GRIFFEN, Judge

A Garland County jury convicted Robert Johnson, Jr., of second-degree murder. He urges on appeal that: 1) the trial court erred in allowing a tape recording of two anonymous 911 calls to be introduced in violation of his Sixth Amendment right to confrontation, and in allowing the jury to listen to the tapes during its deliberation; 2) the trial court erred in refusing to issue a spoliation instruction regarding evidence that was destroyed by the police; and 3) the trial court erred in denying his motion to suppress three inculpatory statements. We hold that the trial court committed no error and affirm appellant's conviction.

I. Facts

Appellant was charged with the second-degree murder of Wendell Davis following an altercation between the two men on Grove Street in Hot Springs, Arkansas, on January 19, 2006. Appellant does not dispute that he got into an altercation with Davis or that he threw a concrete block that struck Davis in the head, causing Davis to die four days later. However,

in a statement that appellant gave to the police, he insisted that he threw the piece of concrete only after Davis first threw something at him that appellant thought was a brick or a piece of concrete, but was a package of frozen deer meat.

To the contrary, witnesses identified appellant as the aggressor. Vernis Jean Brothers, appellant's cousin, testified that appellant first threw a brick at Davis, that Davis picked up the brick and threw it back at appellant, and that appellant again picked up the brick. Vernis said that Davis was holding a white package (containing deer meat) in an attempt to shield himself. Vernis further testified that Davis retreated as appellant approached him and that Davis never attempted to punch or hit appellant.

Vernis's brother, Jimmy Brothers, testified that he witnessed appellant and Davis arguing as he was on his way to the liquor store. Jimmy said that Davis was carrying a package of ground deer meat. Jimmy then went into the liquor store; when he came out, he said that appellant followed Davis as Davis attempted to back away and that he (Jimmy) left when the two men "squared off on each other."

Officer Tom Winton of the Hot Springs Police Department responded to the scene at approximately 6:30 p.m. When he arrived, he saw appellant pacing on the sidewalk. Several people yelled at Winton that appellant was the culprit. Winton approached appellant and asked, "What happened?" to which appellant responded, "I hit the mother-fucking nigger on the head with a brick." Winton handcuffed appellant, without further questioning him, and walked appellant to the patrol car. At this time, Officer Mike Bingham, a plain-clothes narcotics detective, approached appellant and heard him say, "I hit him, I hit him." Bingham did not hear Winton questioning appellant but Bingham advised appellant of his *Miranda*

rights. After appellant arrived at the police department, Detective Tim Smith *Mirandized* him. Appellant then confessed that he threw a concrete block that struck Davis in the head but insisted that he did it in self-defense because Davis first threw something at appellant that appellant thought was a brick but was frozen deer meat.

Appellant filed a motion to suppress each of his inculpatory statements. The court denied the motion, finding that the first statement was noncustodial, that the second was spontaneous, and that the third was made after he waived his *Miranda* rights.

Four 911 calls were made reporting the incident. Two calls were made by Vernis Brothers. The other two were anonymous. Appellant filed a motion in limine to exclude the 911 calls, arguing that the calls violated his Sixth Amendment right to confront the witnesses against him. At the hearing on the motion to suppress, he limited his argument to the two anonymous calls. The court determined that the tape was admissible; thus, the jury heard the tape, in its entirety, in open court.

In addition, the jury requested to hear the 911 tapes during deliberation. Appellant objected and argued that to allow the jury to do so would be to highlight one piece of evidence over another and would be analogous to allowing the jury to rehear a witness's testimony. The trial court overruled appellant's objection, stating that jury was entitled to review the 911 recording because it was an exhibit.

Officer Alan Constant also responded to the emergency call. He seized the concrete block and locked it in the evidence room at the police department. He later returned to the scene, seized the deer meat, and placed it in the evidence room. Smith testified that the deer meat was destroyed after the police spoke with the prosecutor's office and obtained permission

to destroy it. However, a color photograph of the package was admitted into evidence, showing the size and appearance of the meat. In addition, Officers Winston and Constant affirmed the presence and location of the meat via other exhibits.

Because the deer meat was destroyed, appellant requested the court to instruct the jury on spoliation of evidence and proffered a jury instruction regarding spoliation based on a civil instruction, AMCI 106, which would have allowed the jury to infer that the examination of the deer meat would have been unfavorable to the State's case. The trial court accepted the proffer but denied appellant's request to issue the instruction. The jury thereafter found appellant guilty of second-degree manslaughter and sentenced him to serve twenty-years in prison.

II. Motion to Suppress

We first address appellant's suppression argument. He asserts that the trial court erred in denying his motion to suppress each of the inculpatory statements he made. Our standard of review for a trial court's decision to grant or deny a motion to suppress requires us to make an independent determination based on the totality of the circumstances, to review findings of historical facts for clear error, and to determine whether those facts give rise to reasonable suspicion or probable cause, while giving due weight to inferences drawn by the trial court. *See George v. State*, 358 Ark. 269, 189 S.W.3d 28 (2004).

The evaluation of the credibility of witnesses who testify at a suppression hearing about the circumstances surrounding a defendant's custodial confession is for the trial judge to determine, and we defer to the position of the trial judge in matters of credibility. *See MacKool v. State*, 365 Ark. 416, 231 S.W.3d 676 (2006). Conflicts in the testimony are for

the trial judge to resolve, and the judge is not required to believe the testimony of any witness. *Id.* So long as there is no evidence of coercion, a statement made voluntarily may be admissible against the accused. *Id.*

We hold that the trial court did not err in refusing to suppress each of appellant's statements. Appellant's first statement, "I hit the mother-fucking nigger on the head with a brick," was made in response to Officer Winton's question, "What happened?" Appellant has abandoned any suppression argument related to this statement because he argues only regarding the second and third statements. Accordingly, we summarily affirm the denial of his motion to suppress with regard to his first statement but note that appellant's response appears to be an admissible noncustodial statement. *See, e.g., Arnett v. State*, 353 Ark. 165, 122 S.W.3d 484 (2003) (holding that a confession made in response to a police officer asking, "What's up?" was admissible because it was not made in the context of a police interrogation).

After appellant made his first statement, Winton handcuffed him and walked him to the patrol car without further questioning him. At this time, Officer Bingham approached appellant and heard him say, "I hit him, I hit him." Bingham then advised appellant of his *Miranda* rights.

Appellant seems to argue that his second statement was involuntary simply because he was in custody. While appellant was no doubt in custody at that point, that does not end the inquiry because spontaneous statements made while in custody are admissible. *See Arnett, supra.* If a statement is spontaneous, it is irrelevant whether the statement was made before or after *Miranda* warnings had been issued or whether the defendant was in custody. *Id.* A spontaneous statement is admissible because it is not compelled or the result of coercion under

the Fifth Amendment's privilege against self-incrimination. *Id.* On review, we focus on whether the statement was made in the context of a police interrogation, meaning direct or indirect questioning put to the defendant by the police with the purpose of eliciting a statement from him or her. *Id.* (citing *Rhode Island v. Innis*, 446 U.S. 291 (1980)).

Here, Winton testified that after he asked appellant what happened, he did not say anything else to appellant. This testimony was corroborated by Bingham, who testified that as Winton was walking appellant to the patrol car, Winton did not ask appellant any questions. As Bingham approached, he heard appellant say, "I hit him, I hit him."

The fact that Winton did not *Mirandize* appellant is irrelevant. *See Arnett, supra.* The only way we could reverse is to overturn the trial court's apparent determination that Officers Winton and Bingham credibly testified that appellant's second statement was not made in response to police questioning. Deferring to the trial court's credibility assessment, we affirm the admission of appellant's second statement because it was spontaneous.

Appellant's main suppression argument concerns his third statement, made after he was twice *Mirandized*, which he argues was inadmissible because his waiver was not voluntary, knowing, and intelligent. A statement made while in custody is presumptively involuntary, and the burden is on the State to prove by a preponderance of the evidence that a custodial statement was given voluntarily and was knowingly and intelligently made. *See MacKool, supra.* In order to determine whether a waiver of *Miranda* rights is voluntary, knowing, and intelligent, the appellate court examines whether the statement was the product of free and deliberate choice rather than intimidation, coercion, or deception. *Id.* To make this determination, we review the totality of the circumstances surrounding the waiver, including

the age, education, and intelligence of the accused; the lack of advice as to his constitutional rights; the length of the detention; the repeated and prolonged nature of the questioning; the use of mental or physical punishment; and statements made by the interrogating officers and the vulnerability of the defendant. *Id.* We will reverse a trial court's ruling on this issue only if it is clearly against the preponderance of the evidence. *Id.*

Here, appellant's third statement was made after being *Mirandized* twice – once by Officer Bingham and once by Detective Tim Smith – after arriving at the police department. Smith described the atmosphere as very cordial. Smith asked appellant if he could read, write, and understand English; appellant indicated "yes" to each question and explained that he had completed the ninth grade. Smith then read the form to appellant and asked if he had any questions; appellant did not indicate that he had any questions, nor did he say that he wanted an attorney. Smith testified that he did not threaten appellant in any way or make any promise in exchange for appellant's statement.

Appellant told Smith that he had consumed forty ounces of beer. Smith testified that he was familiar with people who have ingested a large amount of alcohol. When asked if appellant appeared to be "overly intoxicated," Smith replied, "No." He explained that appellant emitted a slight odor of alcohol but that he was not loud and did not slur his speech. Smith did not recall whether appellant's eyes were red.

Appellant, who had been arrested at approximately 6:30 p.m., signed the waiver form at 7:00 p.m. and then gave an inculpatory statement in which he admitted that he had an argument with Davis the week before because Davis was "spreading rumors" about him. In his statement, appellant further alleged the following:

> [t]he same guy came up on the sidewalk and threw something at me that I thought was a brick. It missed me and I jumped up and started running down the street towards Malvern Avenue. I saw the guy run over and pick up the brick and start chasing me. As I was running, I saw a piece of a concrete block on the ground by a tree. I picked it up and turned to face the guy. We both had our bricks up acting like we were going to throw at each other, like we were timing each other to see when the other one was going to throw. Then I threw my brick at him and hit him. He fell to the ground and was knocked out. When I went over to him I saw that what he had thrown at me was some frozen meat. I only hit him one time with the brick and that was when I threw it at him.

Appellant cites to the following facts to prove that his statement was not voluntary: 1) he had consumed forty ounces of beer and smelled of alcohol; 2) he is disabled; 3) he had only a ninth-grade education; 4) his statement was not recorded, although equipment for doing so was available; and 5) Smith admitted that he did not record appellant's statement verbatim. Appellant asserts that the fact that Bingham said appellant was not "overly intoxicated" must mean that he was, nonetheless, intoxicated, and that fact alone constitutes a sufficient ground to reverse the suppression of his statement.

We disagree. Mere evidence of alcohol consumption does not require suppression; rather, the fact that an accused is intoxicated goes to the credibility of a statement, not its admissibility. *See Kemp v. State*, 324 Ark. 178, 919 S.W.2d 943 (1996). Whether a defendant was too incapacitated due to alcohol to make an intelligent waiver is a question of fact for the trial court to resolve. *See id.* In *Kemp*, the defendant's statement was not suppressed due to intoxication where he had consumed a case of beer in the eleven-to-twelve hour period preceding the statement. Here, appellant had consumed considerably less beer and there is no evidence, such as slurred speech or inability to focus, to indicate that he was intoxicated to the point of incapacity.

On the record before us, it appears that appellant presented no evidence at the hearing

on the motion to suppress that he was disabled. Rather, appellant's counsel merely asked Bingham if appellant said that he was disabled and Bingham said that appellant did not. This does not support that appellant was disabled, much less disabled to the degree that it precluded him from voluntarily, knowingly, and intelligently waiving his *Miranda* rights. Similarly, there was no evidence offered at the suppression hearing to counter Smith's testimony that appellant was literate and indicated that he understood the waiver form.

Further, the fact that appellant's statement was not recorded or videotaped would simply go to the weight to be given the statement by the jury, not to its admissibility. *See State v. Sheppard*, 337 Ark. 1, 987 S.W.2d 677 (1999). Finally, appellant's argument that Smith did not transcribe appellant's confession word-for-word seems disingenuous, given that he argued self-defense and that his third statement provided the only real evidence that he acted in self-defense. Appellant does not explain how the statement was incorrect or misleading.

On these facts, we hold that the trial court did not err in denying appellant's motion to suppress his third statement, which was made after he voluntarily, knowingly, and intelligently waived his *Miranda* rights.

III. 911 Calls

Appellant's next two arguments involve the anonymous 911 telephone calls. He first argues the trial court's admission of the recordings of the anonymous calls denied him his Sixth Amendment right to confront the witnesses against him.[1] His second argument is that

[1]Appellant did not raise a hearsay argument below and thus, to any extent that he appears to raise a hearsay argument on appeal, that argument is barred.

the trial court erred in allowing the jury to replay the recordings during its deliberation. We are not persuaded by either argument; thus, we affirm the trial court's admission of the 911 calls and its decision to allow the jury to hear the 911 calls during deliberation.

A. Sixth Amendment Confrontation Right

Generally, out-of-court statements that are testimonial in nature may not be admitted against a defendant unless the defendant had the opportunity to confront and cross-examine the person who made the statement. *See Crawford v. Washington*, 541 U.S. 36 (2004). However, statements taken by police officers in the course of an interrogation are "nontestimonial," and thus, are not subject to the Confrontation Clause, when they are made under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. *See Davis v. Washington,* 547 U.S. ___ (2006). Statements taken by police officers in the course of interrogation are "testimonial," and thus, are subject to the Confrontation Clause, when the circumstances objectively indicate that there is no ongoing emergency and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to a later criminal prosecution. *Id.*

We address only the admissibility of the two anonymous calls, as appellant failed to preserve his arguments regarding the admissibility of the calls made by Vernis Johnson.[2] The

---

[2]Appellant's attorney argued below that the *anonymous* calls contained "factual errors," such as the allegation that a gun was fired and that Davis was being attacked by three men. However, those allegations were made in the second and third calls, which were made by Vernis Johnson. Appellant *now* argues that Vernis's statement should have been suppressed due to those factual errors. However, appellant objected only to admission of the anonymous calls at the hearing on the motion to suppress. In any event, because Vernis testified and was subjected to cross-examination, the admission of his 911

transcript of the two anonymous calls is as follows:

Call Number 1:

DISPATCHER: 911. What's your emergency?

MALE CALLER: Hey, Robert Singleton Johnson [sic] done hit a man in the face with a brick on Grove Street. Come get him. He beat him in the face with a brick. Come get him.

DISPATCHER: Where at, sir?

MALE CALLER: On Grove Street. Right by the liquor store. Come get him.

DISPATCHER: Grove?

MALE CALLER: Yeah.

DISPATCHER: And what was his name?

MALE CALLER: Robert Singleton Johnson, known as HumpDump. He's still hollering at him and beatin', he's still here. Come get him, right now. The man's laying right here in the street. HumpDump. Come get him.

DISPATCHER: Is the man hurt, sir?

MALE CALLER: Yes. The man ain't movin'. Send an ambulance. Y'all need to hurry up.

DISPATCHER: Yes, sir. We'll get it right there.

Call Number 4:

DISPATCHER: 911. What's your emergency?

FEMALE CALLER: The man is not moving down here on the ground, down by the liquor store on Malvern. And the guy's still running around

---

calls was not in error. *See, e.g., Brown v. State*, 96 Ark. App. 66, ___ S.W.3d ___ (2006) (holding the admission of a child victim's interview with police did not violate the Sixth Amendment's confrontation clause because the victim appeared as a witness at trial and could have been recalled by the defense and questioned about the interview).

hollering over him and probably hittin' him with bricks still.

DISPATCHER: Okay. Do you know who it is?

FEMALE CALLER: Yeah, Robert Singleton Johnson. They call him HumpDump and you can, he's still out here walking around. He ain't leaving. And this man's just laying on the ground. Hurry.

DISPATCHER: Okay, we've got the police on the way.

FEMALE CALLER: Okay. Thank you – ambulance, too.

DISPATCHER: Ambulance is on the way.

FEMALE CALLER: Okay. Thank you.

DISPATCHER: All right.

In his opening brief, appellant cites a law review article and insists that 911 calls are the equivalent of "dial-in testimony"; in his reply brief, he cites cases from other jurisdictions that do not further his argument. We affirm because the anonymous statements were not testimonial in nature.

The 911 calls in this case are similar to the calls found admissible in *Davis*, *supra*, where the victim made the call while the event was happening, identified her assailant, told the police why he had come to her house, and told the police that the assailant was fleeing. The *Davis* court held that these statements were not testimonial in nature because: 1) they were clearly made as they were actually happening, rather than describing past events; 2) they were describing an ongoing emergency and were not elicited to simply learn what had happened in the past; and 3) viewed objectively, the statements provided information, including the defendant's identity, that was necessary to help the dispatched officers learn whether they were encountering a violent felon. *See Davis*, *supra*. The same is true of the 911 calls made in this

case, which were clearly made as the events were unfolding and which were clearly made to assist the police and emergency personnel in resolving the situation. Thus, we hold that the trial court's admission of the anonymous calls did not violate appellant's Sixth Amendment confrontation right.[3]

B. Jury Deliberation

Appellant further argues that the trial court erred in permitting the jury to replay the 911 tapes during its deliberation because the calls contained erroneous and highly prejudicial statements, because allowing the jury to rehear the tapes improperly emphasized one piece of evidence over another, and because pursuant to Ark. Code Ann. § 16-89-125(e) (Repl. 2005), the jury should have been recalled into open court when the tape was replayed.

While appellant did not specifically raise the statutory argument below, the trial court's decision was consistent with recent case law interpreting § 16-89-125(e). Section 16-89-125(e) provides that, if there is a disagreement among the jury as to any part of the evidence after the jury retires for deliberation, the jury must be brought into open court and the information must be given in the presence of or after notice to counsel of the parties. In *Flanagan v. State*, 368 Ark. 143, __S.W.3d __ (2006), and *Anderson v. State*, 367 Ark. 536, __ S.W.3d ___ (2006), the Arkansas Supreme Court affirmed the defendants' convictions where the juries were allowed to replay tape recordings during their respective deliberations because

---

[3]Even if the anonymous calls were erroneously admitted, the error was harmless. Appellant does not challenge the sufficiency of the evidence supporting his conviction. Further, given appellant's three inculpatory confessions, the two eyewitness's testimony, and the other two 911 calls, we conclude beyond a reasonable doubt that the anonymous calls did not contribute to the verdict. *See Baird v. State*, 357 Ark. 508, 182 S.W.3d 136 (2004).

§ 16-89-125(e) does not prohibit a jury from receiving and considering all exhibits, even tape recordings. While appellant maintains that this case is more akin to *Davlin v. State*, 313 Ark. 218, 853 S.W.2d 882 (1993), the *Davlin* court reversed and remanded for a new trial due to its concern that the jury considered *new* evidence during its deliberation that was not presented at trial. Here, as there was no possibility that the jury heard new evidence during the replaying of the recordings, the trial court did not err in allowing the jury to listen to the 911 tapes during its deliberation.

IV. Spoliation Instruction

Appellant also argues that the trial court erred in not issuing the jury an instruction on spoliation of evidence, in reference to the deer meat that was destroyed.[4] He argues that the State's destruction of the deer meat violates his due process rights to have access to the evidence against him.

After the case concluded, appellant proffered an instruction modeled on AMCI 106, which stated:

> If you find that a party intentionally destroyed deer meat with the knowledge that its contents may be material to a pending claim, you may draw the inference that the contents of the deer meat or an examination of it would have been unfavorable to the State. When I use the term "material" I mean evidence that could be a substantial factor in evaluating the merit of a claim or defense in this case.

The trial court accepted the proffer but denied appellant's request to issue the instruction to the jury, stating, "I don't think materiality has been shown."

We hold that the court did not err in refusing to issue the instruction. The State is

---

[4]Throughout appellant's brief, the term "spoilation" is used. The correct spelling is "spoliation." *See* BLACK'S LAW DICTIONARY 1437 (8th ed. 2004).

required to preserve only evidence that is expected to play a significant role in a defendant's defense, and then only if the evidence possesses both (1) an exculpatory value that was apparent before it was destroyed, and (2) a nature such that the defendant would be unable to obtain comparable evidence by other reasonably available means. *See California v. Trombetta*, 467 U.S. 479 (1984); *Wenzel v. State*, 306 Ark. 527, 815 S.W.2d 938 (1991). Additionally, the defendant must show bad faith on the part of the police in destroying the evidence. *Id*; *Wenzel, supra.*

Here, despite the State's contrary assertion, the exculpatory nature of the deer meat *was* apparent, as appellant asserted in his statement that he acted in self-defense because what he thought was a brick turned out to be a package of frozen deer meat. Nonetheless, the spoliation instruction was not warranted because appellant had access to comparable evidence and because there was no bad faith shown on the part of the police in destroying the deer meat.

Although the package itself was destroyed, the jury was still informed of its existence and placement at the scene via the testimony of Officers Winton and Constant, the photograph, and a map depicting the crime scene. From the photograph, the jury was able to see the appearance of the package. It was approximately seven inches long, as indicated by the ruler placed in front of it, and appears to be a few inches longer than it is wide. The encasing white butcher paper is torn, revealing what appears to be frozen meat. Additionally, as explained by Officers Winton and Constant, the deer meat was marked on the map as "D.M." and the map showed the meat's location relative to the victim. Thus, the jury was presented with sufficient comparable evidence of the deer meat by which it could assess

whether appellant's theory of self-defense had merit.

Additionally, the spoliation instruction was not warranted because there was no bad faith on the part of the police in destroying the deer meat. An instruction on spoliation is designed to remedy litigation misconduct. *See Rodgers v. CWR Construction, Inc.*, 343 Ark. 126, 33 S.W.3d 506 (2000). Appellant argues that bad faith is demonstrated by the fact that the police destroyed the deer meat without informing him and without obtaining a court order. However, he cites to no authority requiring the police to do so. A bare assertion of bad faith without supporting facts does not demonstrate bad faith. *See Lee v. State*, 327 Ark. 692, 942 S.W.2d 231 (1997).

There was no misconduct or bad faith in this case. To the contrary, Officer Constant made a *second* trip to the crime scene to secure the meat. The police then photographed the meat and measured it and the photograph was admitted into evidence. Given the fact that meat will spoil, the police later contacted the prosecutor's office and obtained permission to destroy the evidence.[5] The deer meat was not subjected to any tests, and appellant does not assert that he was denied access to the exhibits that proved its existence and appearance. In short, the destruction of the deer meat did not allow the State to present any evidence to which appellant was not also privy. On these facts, appellant cannot demonstrate bad faith. *See, e.g., Arizona v. Youngblood*, 488 U.S. 51 (1988)(holding that the police did not act in bad faith in failing to refrigerate the victim's clothing and failing to perform tests on semen samples, where none of this information was concealed from the defendant at trial, and where the evidence that was preserved was made available to the defendant's expert, who declined

[5]No one argued that the deer meat could have been placed in cold storage.

to perform any tests on samples).

Finally, the court acted properly in denying the request to issue the spoliation instruction because to have issued the instruction on the facts of this case would have permitted appellant to raise an improper inference against the State. *See Youngblood, supra* (reversing where the court instructed the jury that if it should find that the State had destroyed or lost evidence, it might "infer that the true fact is against the State's interest").

Affirmed.

BIRD, J., agrees.

HART, J., concurs.