IN THE SUPREME COURT OF THE STATE OF DELAWARE

HAYWARD M. EVANS,	§	
	§	No. 323, 2003
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court
	§	of the State of Delaware in and
v.	§	Sussex County
	§	
STATE OF DELAWARE,	§	Cr. I.D. No. 0111010136
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: May 11, 2004
Decided: August 3, 2004

Before **STEELE**, Chief Justice, **BERGER** and **JACOBS**, Justices.

O R D E R

This 3rd day of August 2004, upon consideration of the Appellant's brief and the State's response, it appears to the Court that:

(1) Hayward Evans appeals from his convictions by a Superior Court jury of Murder in the First Degree, two counts of Attempted Murder in the First Degree, and related firearm offenses. Those convictions arise from the shooting death of Brian Owens and the wounding of Dania Cannon and Paul Parker on November 11, 2001. Evans appeals on two grounds: first, that the trial court improperly excluded three taped statements given by one of the shooting victims; and second, that the trial court erroneously

denied Evans' motion for a new trial. We find no merit in these claims and, therefore, AFFIRM.

(2) Late on November 10, 2001, Evans and two friends attended a party where Evans fought with Philip Brewer, a youth who was from Laurel, Delaware. Afterwards, Evans, Tehron West, and Darnell Gibbs drove with West's girlfriend, Dominique Harmon, and Dominique's mother, Valerie Johnson, to search for Brewer. The car in which they were riding belonged to Valerie Johnson, but was driven by West. At some point, they encountered a car driven by the victim, Brian Owens. West flashed his headlights, and apparently in response, Owens pulled over. West pulled his car alongside, and Evans got out and fired at least seven shots from his handgun into Owens' car at close range. Four bullets struck Owens in the back, two bullets struck Parker, and one struck Cannon. The two wounded youths, Parker and Cannon, pulled Owens onto the back seat of his car. Cannon then drove to the home of Owens' girlfriend in Laurel, where a bystander called for an ambulance at 12:25 a.m. Owens later died.

(3) After firing the seven shots, Evans re-entered Johnson's car and the five returned to Seaford. Johnson (who by then was driving her car) dropped Gibbs off at his house and left Evans and West at the street corner where she had picked them up. One witness at the trial testified that she had

heard Evans say, “I thought I hit one of [them]” and that she heard West tell Evans to be quiet.

(4) Cannon’s mother drove her wounded son to Beebe Medical Center, where police interviewed him at 4:25 a.m. on November 11, 2001. In that interview, Cannon identified Kinyock Matthews as the shooter. Cannon was then helicoptered to Christiana Medical Center in Wilmington for further treatment. After his admission to Christiana, police officers interviewed Cannon again at 9:40 a.m. that same day. The second interview was recorded on audiotape. Thereafter on November 12, 14, and 21, 2001, the police conducted three additional interviews of Cannon. In all three interviews, Cannon maintained that Kinyock Matthews was the shooter. Cannon also disclosed that he was afraid of Matthews.

(5) Based on Cannon’s identification, Matthews was arrested. On November 15, 2001, however, Johnson and Harmon came forward and reported that they had been in the car with Evans and that Evans admitted to them that he committed the shooting. Evans was later arrested and indicted on murder and other charges.

(6) At trial, Cannon did not appear to testify, despite the earlier issuance of a subpoena and a material witness *capias*, and even though the trial had been continued for four months. Cannon’s first two statements to

the police (implicating Kinyock Matthews as the shooter) were admitted into evidence, nonetheless, under the excited utterance exception to the hearsay rule.[1] The trial court excluded Cannon's other three statements from evidence, ruling that they were not excited utterances (and, therefore, were hearsay), and that they also were cumulative. Evans claims that the trial court's refusal to admit Cannon's remaining three statements to the police (wherein he implicated Matthews) was error.

(7) At trial, Evans relied upon an alibi defense. Evans and two of his female friends all testified that on November 10, 2001, Evans had been with them in an apartment from 9:30 p.m. until the following morning.

(8) Matthews also testified that he was not at the scene of the crime. His testimony was that on the evening of November 10, he was at the Marathon Inn with his son and former girlfriend from 9:30 p.m. until the following morning. Matthews' alibi was corroborated by the hotel manager and by security tapes, which showed Matthews entering his hotel room and not leaving until the following morning.

(9) The jury found Evans guilty of Murder in the First Degree and all the remaining counts, on March 14, 2003.

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[1] DEL. UNIF. R. EVID. ("D.R.E.") 803(2).

(10) Two weeks after Evans' trial had concluded, Cannon was returned to State custody on the outstanding material witness *capias*. Evans then filed a Motion for New Trial based on newly discovered evidence, namely, Cannon's availability to testify. The trial court's denial of Evans' motion is his second ground for appeal. This Court addresses each of Evans' claims of error in turn.

(11) Evans first claims that the trial court erred by excluding from evidence Cannon's last three statements to the police. This Court reviews a trial court's ruling on the admissibility of evidence for abuse of discretion.[2]

(12) D.R.E. 802 provides that hearsay evidence is not admissible unless it falls under specified exceptions in the Rule. Rule 803(2), the "excited utterance" exception to the rule against hearsay, provides that an out-of-court statement that relates to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition, is not excluded hearsay.

(13) The trial court correctly admitted Cannon's first two out-of-court statements under the excited utterance exception. Both statements were made within hours of the shooting and while Cannon was under the stress of excitement caused by that event. Cannon's three other statements,

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[2] *Williamson v. State*, 707 A.2d 350 (Del. 1998).

made one, three and ten days after the event, respectively, were properly excluded because the time that had elapsed since the shooting negated the requirement that the "excited utterance" be made "while the declarant was under the stress of excitement caused by the event or condition."[3] Those statements were also properly excluded under D.R.E. 403, as “needless presentation of cumulative evidence,” because the relevant parts of those statements that Evans sought to introduce (that Matthews was the shooter) were included in the two admitted statements. Accordingly, we find no abuse of discretion in the trial court's exclusion of the three statements.

(14) Evans’ second claim of error concerns the trial court’s denial of his motion for a new trial. This Court reviews the denial of a motion for new trial for an abuse of discretion.[4]

(15) To grant a new trial on the ground of newly discovered evidence, the trial court must conclude that the newly discovered evidence satisfies three criteria:

> (1) The evidence must have been newly discovered; i.e., it must have been discovered since trial, and the circumstances must be such as to indicate that it could not have been discovered before trial with due diligence;

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[3] D.R.E. 803(2).

[4] *Swan v. State,* 820 A.2d 342 (Del. 2003).

> (2) The new evidence must be of such a nature that it would have probably changed the result if presented to the jury; and
>
> (3) The evidence must not be merely cumulative or impeaching.[5]

(16) The opportunity to present testimony of a live witness instead of the witness' recorded statements constitutes newly *available* evidence, but in certain circumstances, such evidence may properly be regarded as newly *discovered* evidence.[6] Assuming without deciding that Cannon's post-trial availability to testify was newly discovered evidence, to warrant a new trial, the two remaining criteria must also be satisfied. Here, they were not.

(17) Evans has not established that the "new" evidence, (*i.e*, Cannon's live testimony) if presented to the jury, would likely have changed the result of the trial. First, when asked by the trial court what his testimony would have been had he appeared in person at Evans' trial, Cannon responded that he was "not sure" that Matthews was in fact the shooter. Second, the State had already impeached Cannon's hearsay statements with evidence that Cannon had a possible motive to implicate Matthews falsely. Third, Matthews' alibi was corroborated by videotape evidence and the testimony of the hotel manager, who was an independent witness.

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[5] *Lloyd v. State,* 534 A.2d 1262, 1267 (Del. 1987).

[6] *Id.*

Accordingly, Cannon's proposed testimony was weak and would have had little effect, particularly when weighed against the overwhelming incriminating evidence against Evans, such as the eyewitness testimony of two of his friends. Thus, there was no showing that Matthews' testimony, if presented live, would probably have changed the result. Finally, assuming (contrary to fact) that even if Cannon's live testimony would have been entirely consistent with his recorded statement(s), that testimony would still have been "merely cumulative." Accordingly, for these reasons, the trial court did not abuse its discretion in denying Evans' motion for a new trial.

NOW, THEREFORE, IT IS ORDERED that the decision of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Jack B. Jacobs
Justice