IN THE SUPREME COURT OF THE STATE OF DELAWARE

SAMAI A. NALLEY,	)	
	)	No. 639, 2006
Defendant Below,	)	
Appellant,	)	Court Below: Superior Court
	)	of the State of Delaware in
v.	)	and for New Castle County
	)	
STATE OF DELAWARE,	)	Cr. ID No. 0407025446
	)	
Plaintiff Below,	)	
Appellee.	)	

Submitted: June 13, 2007
Decided: August 6, 2007

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

O R D E R

This 6th day of August 2007, it appears to the Court that:

(1) Appellant-defendant, Samai Nalley, appeals his convictions after trial in the Superior Court.[1] Nalley contends that the trial judge erred when he admitted inadmissible hearsay evidence. He contends that as a result, the trial judge (a) admitted testimony barred by Delaware Rules of Evidence 803(2), and (b) deprived Nalley of his Sixth Amendment confrontation right. After consideration of the record, we conclude that the trial judge acted appropriately within his

[1] His convictions include: Trafficking in Cocaine, Possession with Intent to Deliver a Narcotic Schedule II Controlled Substance, Possession of Drug Paraphernalia, Resisting Arrest, Disregarding a Police Officer's Signal, Failure to Have Registration in Possession, Unattended Motor Vehicle, Driving While License Suspended and No Proof of Insurance.

discretion when he permitted police to testify to a bystander's statement because the statement constituted an excited utterance under Delaware Rules of Evidence 803(2). The trial judge did not violate Nalley's Sixth Amendment confrontation right because the bystander's statement was nontestimonial and constituted an excited utterance under emergent circumstances. Accordingly, we affirm.

(2) On July 29, 2004, the New Castle County Police stopped Nalley while he was driving a red Jeep Cherokee eastbound on Pulaski Highway. Officer Gregory Meyer, who made the traffic stop, advised Officer Ernest Melvin that he needed assistance with the traffic stop. As Melvin crossed the highway median to respond to Mayer's request, Nalley drove away. Melvin testified that the driver was a black male wearing a white t-shirt.

(3) Nalley fled into the Glendale neighborhood, and Mayer and Melvin pursued him. At some point after Nalley entered the neighborhood, the officers lost sight of his automobile "for no more than a minute." Melvin, in his fully marked police cruiser, then located the Cherokee, unoccupied and with the engine still running, a short distance away. As Melvin got out of his cruiser and began to search the area, a neighborhood bystander yelled that the driver had run "between the yards and over towards Cynthia." That bystander also shouted that the individual who left the truck was a black male, wearing a white t-shirt and shorts.

(4) Melvin and other officers set up a perimeter around the neighborhood and began searching for the suspect. A short time later, Officer Meyer saw a black male (later identified as Nalley) come out from the houses, "suspiciously wandering and looking around," and cross the street. Melvin observed this person wearing a blue t-shirt and jeans and carrying a white plastic bag. After making eye contact with Melvin, Nalley began running. Less than five minutes later, the officers caught Nalley and took him into custody. The officers later found the plastic bag between two houses. It contained a pair of jean shorts, a white t-shirt, and a video game. Police also found crack cocaine in Nalley's shorts pockets. A New Castle County grand jury indicted Nalley on various motor vehicle and drug offenses. The trial judge later dismissed two of the charges – Maintaining a Vehicle and Operating an Unregistered Motor Vehicle.

(5) At trial, the trial judge and counsel had a sidebar discussion regarding the admissibility of the bystander's statements:

> Prosecutor: The State doesn't dispute that it's hearsay. We believe it's a present sense excited utterance. At this point what the officer's testimony, as soon as, about a minute after they lost sight of the car they pulled up on the car, that at this point he gets out of his car to begin looking to the person and someone immediately yells to him, I think the driver of the car went that way, and he's wearing such and such.
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> Defense counsel: That is hearsay. And that is a critical matter involving the defense, is it not –

> Prosecutor: I don't dispute that. But I believe it comes in under—it's not something that someone told him after the fact, it's something that someone told him right as this incident is going on and he is, in fact, looking for the defendant at this point. It's an ongoing arrest, attempted arrest.
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> Trial judge: That might be an excited utterance, too.
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> Prosecutor: That's what the State believes it is.
>
> Trial judge: The objection's overruled on that basis.

(6) Over defense counsel's objection, the trial judge permitted Melvin to testify to the bystander's statements:

> Prosecutor: Officer Melvin, at this point what was shouted to you by this individual?
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> Melvin: The direction of travel of the suspect, of the subject that had exited the Jeep Cherokee.
>
> Prosecutor: And what was it, did they shout to you what the direction of travel was?
>
> Melvin: Yes. It was between the yards and over towards Cynthia.
>
> Prosecutor: And at that point did they shout anything else to you?
>
> Melvin: They advised that he was wearing a white T-shirt and shorts, and it was a black male.

(7) A jury found Nalley not guilty of operating a motor vehicle at an unsafe speed, but guilty on all remaining charges. Nalley appeals from these Superior Court convictions. He contends that by admitting the State's hearsay

evidence, the trial judge erroneously (a) allowed testimony barred by Delaware's hearsay rule, and (b) deprived Nalley of his Sixth Amendment confrontation right.

(8) We review a Superior Court judge's decision to admit or exclude evidence based on hearsay for abuse of discretion.[2] An "excited utterance" is a firmly rooted exception to the hearsay rule.[3] Thus, evidence which fits within that category also satisfies the requirements of U.S. Const. amend. VI.[4] Therefore, the critical issue becomes whether the bystander's statements were admissible under the Delaware Rules of Evidence.

(9) Under the Delaware Rules of Evidence, an unavailable declarant's statement may be admitted as an excited utterance if the statement is made while declarant is under the stress of a startling event and the statement relates to that event.[5] We have held that for a statement to be admissible under Delaware Rules of Evidence 803(2), the statement must satisfy the following three requirements: "(1) the excitement of the declarant must have been precipitated by an event; (2) the statement being offered as evidence must have been made during the time

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2 *Keith v. State*, 781 A.2d 694, *2 (2001) (Table).

3 *White v. Illinois*, 502 U.S. 346, 356 (1992).

4 *Id.*

5 Delaware Uniform Rules of Evidence 803 *Hearsay exceptions; availability of declarant immaterial (2) Excited utterance* provides: 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. D.R.E. 803(2).

period while the excitement of the event was continuing; and (3) the statement must be related to the startling event."[6]

(10) The present case is similar to *United States v. M.A.*,[7] where a resident, who had just seen the defendant run past his house, volunteered what he had seen and indicated the direction of the defendant's flight. Minutes later police officers in full pursuit came to that location. The defendant argued both that the resident's statements were inadmissible under hearsay grounds and that admitting the statements deprived him of his constitutional right to confront the witnesses against him. The United States Court of Appeals for the Ninth Circuit held that the trial court did not abuse its discretion in admitting the resident's statements as an excited utterance.[8]

(11) In the present case, the bystander observed an automobile drive into the residential neighborhood at high speed and then stop suddenly. He then observed Nalley jump from the automobile while it was still running and flee on foot. A short time later, a marked patrol car arrived on the scene. At that time, the officers heard a bystander who "came out and was yelling." The bystander unsolicitedly and voluntarily informed the officers of Nalley's appearance and

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6 *Culp v. State*, 766 A.2d 486, 489-490 (Del. 2001), *citing Gannon v. State*, 704 A.2d 272, 274 (Del. 1998).

7 5 F.3d 542 (9th Cir. 1993) (Table).

8 *Id.*

clothing, as well as Nalley's flight path. Because it is clear that the bystander's statements met our criteria for admission pursuant to DRE 803(2), we conclude that the trial judge did not abuse his discretion by admitting the bystander's statements as an excited utterance exception under Delaware Rule of Evidence 803(2).

(12) Nalley also contends that the trial judge deprived him of his Sixth Amendment confrontation right when he permitted Melvin to testify to the bystander's statements because the declarant (bystander) was unavailable and Nalley did not have an opportunity to cross examine him.

(13) We review *de novo* a claimed infringement of constitutional rights.[9] In this case, Nalley's counsel moved to exclude the bystander's statements because the statements were inadmissible hearsay. Nalley now argues, for the first time on appeal, that the trial judge erroneously deprived him of his Sixth Amendment confrontation right when he permitted Melvin to testify to the bystander's statements. Therefore, we must evaluate Nalley's constitutional claim under the plain error standard of appellate review,[10] under which "the error complained of

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9 *Washington v. State*, 836 A.2d 485, 487 (Del. 2003).

10 *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[11]

(14) U.S. Const. Amend. VI states that: "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[12] In *Crawford v. Washington*, the United States Supreme Court held that this provision bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."[13] More recent United States Supreme Court decisions have begun clarifying what constitutes "testimonial" statements. In *Davis v. Washington*, the Court wrote that a person "speaking about events as they were happening, rather than 'describ[ing] past events,'" need not be cross examined, for the statement to be admissible hearsay.[14] Here, as well, the "primary purpose [of the statement] was to enable police assistance to meet an ongoing emergency."[15]

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11 *Id.*

12 U.S. Const. amend. VI. (Confrontation Clause).

13 541 U.S. 36, 53-54 (2004).

14 *Davis v. Washington*, 126 S.Ct. 2266, 2276 (2006).

15 *Id.* at 2277.

(15) *Davis* further clarified "nontestimonial" statements to police explaining "officers called to investigate . . . need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim."[16] In the present case, Melvin was assessing the situation and determining any possible danger.

(16) In *State v. Ayer*, the Supreme Court of New Hampshire held that a police officer in the course of apprehending a suspect may rely upon a witness's statement.[17] In *Ayer*, a witness made statements to police while in a crowd, and the Court held the statements to be excited utterances and nontestimonial under the *Davis* standard. Similarly, in the present case, a person hurriedly fleeing from a car in a neighborhood followed by police officers at night could reasonably prompt an excited utterance from local residents. Therefore, we find the bystander's statements to be nontestimonial excited utterances that are admissible in accordance with the holding in *Davis.*

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[16] Id. at 2279 (quoting *Hiibell v. Sixth Judicial Dist. Court of Nevada*, 124 S. Ct. 2451 (U.S.Nev. 2004).

[17] *State v. Ayer*, 917 A.2d 214 (N.H. 2006)

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

BY THE COURT:

/s/ Myron T. Steele
Chief Justice