FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-1609

JOSH RANDALL WRIGHT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Duval County.
Steven B. Whittington, Judge.

December 23, 2019

PER CURIAM.

AFFIRMED.

ROWE and WINOKUR, JJ., concur; B.L. THOMAS, J., concurring in result only with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

B.L. THOMAS, J., concurring in result only.

I concur in result. Although the State declined to make an argument that even if the ruling was error, the error was harmless, we are obligated to consider whether any ruling below was harmless. § 924.051(7), Fla. Stat. (2017); *Goodwin v. State*, 751 So. 2d 537, 545 (Fla. 1999); *Heuss v. State*, 687 So. 2d 823 (Fla. 1997). I conclude that if error occurred, it was harmless.

Facts

The Appellant was convicted of one count of attempted second-degree murder by discharging a firearm causing great bodily harm, one count of attempted second-degree murder by discharging a firearm, one count of possession of a firearm by a felon, and one count of shooting into an occupied vehicle. He was sentenced to a mandatory term of life in prison under the state's 10-20-Life statute for count one, a term of thirty years in prison for the second count of attempted murder, with both sentences including a mandatory prison term of thirty years under the Prison Releasee Reoffender Act, and mandatory prison terms of fifteen-years in prison for shooting into an occupied vehicle and possession of a firearm by a felon under the Prison Releasee Reoffender Act, as Appellant committed the crimes within three years of his release from a prior prison sentence for a violent felony.

This case involved a drug transaction where Appellant provided twenty-dollars' worth of heroin at no charge to the two victims, a man and woman, and expected them, or at least the female victim, to spend time with Appellant and his girlfriend in exchange for the drugs. When the victims declined the invitation, the evidence proved that Appellant shot five times at the victims' vehicle in anger as it left Appellant's property. The male victim positively identified Appellant as the shooter and described the gun, and no evidence established that Appellant's girlfriend shot a firearm other than her anger at the victims because the female victim would not stay with Appellant.

One of those bullets Appellant shot entered the female victim's skull, where it remains, causing a severe, near-fatal brain injury. The victim's mother testified that her daughter "will never

be the same" and requires constant care. The force of the gunshot almost pushed the female victim out of the car.

As Appellant was shooting into the victims' car, the male victim managed to drive away. The female victim did not remember anything after hearing Appellant's girlfriend say, "Do it Josh" to Appellant, and then hearing the male victim telling the female victim, "I can't believe he done that," while assuring her he had called an ambulance. This latter statement relayed by the female victim at trial was admitted over Appellant's hearsay objection.

Appellant argues that because the victim lost consciousness after she was shot, the State could not prove how much time had elapsed between the shooting and the statement, citing *Deparvine v. State*, 995 So. 2d 351 (Fla. 2010), and thus, the statement could not qualify as an exception under section 90.803(1), Florida Statutes (2017). The State, however, argues that the statement was admissible under the excited-utterance exception. § 90.803(3), Fla. Stat. The State asserts that the timing is not dispositive under the excited-utterance exception, relying on *Hayward v. State*, 24 So. 3d 17, 29 (Fla. 2009) *as revised on reh'g*, and other authorities. The State notes the supreme court stated in *Hayward*, "[i]t is not necessary that the statement illustrate the startling event; it is enough that the statement relate to the event." *Id.*

Appellant argues that the erroneous admission of the statement was not harmless, as the two victims were drug-dependent, the shooting occurred at night in a dark area, and no evidence disproved the theory that Appellant's girlfriend did not shoot at the victims. I disagree. I am convinced beyond a reasonable doubt that the statement did not contribute to the verdict. The male victim testified that he saw Appellant firing the gun because he was illuminated by the flash from the gunfire. No evidence linked Appellant's girlfriend to the shooting, despite her anger at the female victim. She testified that the gunshots came from behind her, where Appellant was standing. She began screaming that Appellant had shot the female victim.

Both victims testified that they previously saw Appellant with a firearm. In addition, all recovered firearm "jackets and bullets" were identified as fired by the same gun, which shot five times,

including the shot that wounded the female victim. In addition, when law enforcement officers surrounded the trailer in which Appellant and his girlfriend lived, and where the shooting occurred, Appellant's girlfriend testified that he said he would kill her if she surrendered, which she ultimately did, before Appellant came out of the trailer.

Furthermore, the statement that "I can't believe he (Appellant) done it," was not emphasized at all in the State's closing argument. The State relied on the male victim's identification of Appellant as the shooter, the lack of evidence that Appellant's girlfriend could be the shooter, and the fact that of those two possible shooters, all the evidence pointed to Appellant.

Thus, even without deciding the trial court erred in admitting the statement, the error was harmless. Therefore, Appellant's conviction is properly affirmed.

Andy Thomas, Public Defender, and Kevin Steiger, Assistant Public Defender, Tallahassee, for Appellant.

Ashley Moody, Attorney General, and Sharon S. Traxler, Assistant Attorney General, Tallahassee, for Appellee.