SJC-12188

COMMONWEALTH vs. SHAWN A. BALDWIN.

Evidence, Spontaneous utterance.

April 21, 2017.

The defendant, Shawn A. Baldwin, is awaiting trial in the District Court on charges involving alleged domestic violence. Both the Commonwealth and the defendant filed motions in limine concerning the admissibility of a recording of a 911 call placed by the six year old son of the defendant and the alleged victim. The Commonwealth argued that the boy's statements -- including, "my dad just choked my mom" -- were admissible as nontestimonial excited utterances. The defendant asserted that the statements were not excited utterances and that their admission would violate his right of confrontation. After a hearing at which the recording was played, the judge ordered that the recording be excluded on the ground that the boy's voice appeared "calm," and that the statements on the recording therefore were not "excited" utterances.

A single justice of this court granted the Commonwealth's petition for relief pursuant to G. L. c. 211, § 3, vacated the judge's order excluding the recording, and remanded the case to the District Court for further proceedings.[1] The defendant appeals. We affirm.

[1] The Commonwealth's G. L. c. 211, § 3, petition sought relief from the District Court judge's orders denying the Commonwealth's motion in limine to admit the 911 recording and her order allowing the defendant's motion to exclude the recording. The single justice's intent to vacate both orders is implicit to her decision.

When a single justice has granted relief under G. L. c. 211, § 3, "we will not disturb the judgment absent an abuse of discretion or clear error of law."[2] Commonwealth v. Narea, 454 Mass. 1003, 1004 (2009). See Commonwealth v. Lucero, 450 Mass. 1032, 1033 (2008) (affirming single justice's grant of relief on Commonwealth's G. L. c. 211, § 3, petition, where judge improperly entered required finding of not guilty). In this case, the single justice, citing Commonwealth v. Alcantara, 471 Mass. 550, 558 (2015), correctly concluded that the motion judge erred because, although the "degree of excitement displayed by the declarant is one factor suggestive of a spontaneous reaction, it is not the only factor." Because it appears that the motion judge failed to consider other factors relevant to the determination whether an out-of-court statement qualifies as an excited utterance, her order relative to the 911 recording must be vacated.

A statement meets the test for admissibility as an excited utterance if "(1) there is an occurrence or event 'sufficiently startling to render inoperative the normal reflective thought processes of the observer,' and (2) if the declarant's statement was a 'spontaneous reaction to the occurrence or event and not the result of reflective thought.'" Alcantara, 471 Mass. at 558, quoting Commonwealth v. Santiago, 437 Mass. 620, 623 (2002). See Commonwealth v. McLaughlin, 364 Mass. 211, 222-223 (1973). While the degree of excitement exhibited by the declarant is one factor relevant to that determination, see Commonwealth v. Beatrice, 460 Mass. 255, 258-259 (2011), the essential issue is whether the statement was made under the stress of an "exciting event and before the declarant has had time to contrive or fabricate the remark, and thus . . . has sufficient indicia of reliability." Commonwealth v. Zagranski, 408 Mass. 278, 285 (1990). See Commonwealth v. Mulgrave, 472 Mass. 170, 179 (2015) (applying spontaneous utterance exception to written text message). In addition to demeanor, our cases

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[2] Pursuant to G. L. c. 211, § 3, the single justice reviewed the substantive merits of the Commonwealth's petition. She was within her discretion to do so. See Commonwealth v. Hernandez, 471 Mass. 1005, 1006-1007 (2015). "A single justice, in his or her discretion, may also properly decline to employ the court's extraordinary power of general superintendence where exceptional circumstances are not present." Commonwealth v. Narea, 454 Mass. 1003, 1004 n.1 (2009). See, e.g., Commonwealth v. Yelle, 390 Mass. 678, 686-687 (1984) (G. L. c. 211, § 3, should not be invoked simply to second guess trial court judge's interlocutory evidentiary rulings).

have identified other factors relevant to the inquiry, such as whether the declaration is made in the same location as the traumatic event, Zagranski, supra at 284-286; the circumstances of the statement, including its temporal proximity to the event, Mulgrave, supra at 177; the young age of a 911 caller, Commonwealth v. Guaman, 90 Mass. App. Ct. 36, 42 (2016); and the degree of spontaneity demonstrated by the declarant, Commonwealth v. Joyner, 55 Mass. App. Ct. 412, 416-417 (2002). In short, the question is not simply whether the declarant shows any particular form of "excitement," but rather whether the declarant was acting spontaneously under the influence of the incident at the time the statements were made, and not reflexively. See generally Commonwealth v. Crawford, 417 Mass. 358 (1994) (hours after killing, four year old child remained under stress of event).

We therefore affirm the judgment of the single justice, vacating the orders denying the Commonwealth's motion in limine and allowing the defendant's motion. On remand, the motion judge must consider, as the single justice indicated, whether, based on all the circumstances, the statements on the 911 tape have sufficient indicia of reliability to meet the foundational requirements for admission and, if so, whether their admission would violate the defendant's right to confrontation under the Sixth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights. See Commonwealth v. Middlemiss, 465 Mass. 627, 632-636 (2013). We express no view as to how these questions should be answered; that is for the motion judge to decide in the first instance.

Judgment affirmed.

Suzanne L. Renaud for the defendant.
Ronald E. DeRosa, Assistant District Attorney, for the Commonwealth.