STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0011

State of Minnesota,
Respondent,

vs.

Russell Terry Johnson,
Appellant.

Filed December 17, 2012
Affirmed
Worke, Judge

Ramsey County District Court
File No. 62-CR-11-3482

Lori Swanson, Attorney General, St. Paul, Minnesota; and

John Choi, Ramsey County Attorney, Kaarin Long, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Worke, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

WORKE, Judge

Appellant challenges his second-degree-assault conviction, arguing that the district court committed reversible error by admitting a statement that the victim made to a police officer and by excluding a statement that a witness overheard from an unidentified bystander. We affirm.

D E C I S I O N

A jury found appellant Russell Terry Johnson guilty of second-degree assault with a deadly weapon for stabbing S.O., the general manager of a grocery store. Appellant challenges two of the district court's evidentiary rulings. "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. . . . [A]ppellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted).

Victim's statement

Appellant argues that the district court erred by admitting statements that S.O. made to a police officer at the hospital following the assault. Generally, hearsay is inadmissible unless it qualifies as an exception under Minn. R. Evid. 803. *State v. Bauer*, 598 N.W.2d 352, 366 (Minn. 1999); Minn. R. Evid. 802. One qualifying exception is an excited utterance. Minn. R. Evid. 803(2). An excited utterance is an exception to the general inadmissibility of hearsay because it is believed that the excitement caused by an

event eliminates the reflective time necessary for conscious fabrication, ensuring the trustworthiness of the statement. *State v. Daniels*, 380 N.W.2d 777, 782 (Minn. 1986).

For a statement to be admitted as an excited utterance, "there must have been a startling event or condition, the statement must relate to the event or condition, and the statement must be made under the stress caused by the event or condition." *State v. Gates*, 615 N.W.2d 331, 337 (Minn. 2000), *overruled on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004). It is within a district court's discretion to admit such evidence if it determines that the declarant was sufficiently under the "aura of excitement" when the statement was made to ensure the statement's trustworthiness. *State v. Edwards*, 485 N.W.2d 911, 914 (Minn. 1992). In making this determination, a district court considers all relevant factors, including the length of time elapsed, the nature of the event, the physical condition of the declarant, and the declarant's motive to falsify. *Daniels*, 380 N.W.2d at 782-83.

Appellant claims that too much time elapsed between the assault and S.O.'s making the statements at the hospital. Appellant stabbed S.O. after appellant was dissatisfied with S.O.'s assistance as the store's general manager following appellant's failed attempt at a fast-lane transaction. Appellant became disruptive, prompting S.O. to escort appellant out of the store. While walking in front of S.O. toward the exit, appellant abruptly turned around and stabbed S.O.

Soon after, Officer Heather Teff arrived to the store and attempted to calm S.O. and control his bleeding until medics arrived. Officer Teff described S.O. as being "in shock." She explained that S.O. was "pacing back and forth," was speaking loudly, had a

"lot of nervous energy," and had difficulty processing her instructions. Officer Teff followed the medics and S.O. to the hospital. She testified that approximately ten minutes passed between her initial contact with S.O. and his arrival at the hospital. When medical staff permitted Officer Teff to speak with S.O., she described his demeanor as the same as that displayed at the store.

The district court allowed Officer Teff to testify about the statements that S.O. made to her at the hospital. S.O. told Officer Teff that he was asked to speak to appellant about an issue. Appellant became angry and swore at S.O., resulting in S.O. asking appellant to leave the store. As appellant was leaving, he turned around "wielding" and stabbed S.O.

The district court did not abuse its discretion by admitting S.O.'s statements as exited utterances. Officer Teff testified that medics arrived shortly after she responded to the stabbing and that it took "under ten minutes" to transport S.O. to the hospital. Officer Teff spoke with S.O. immediately after he received medical attention. Officer Teff testified that S.O. behaved at the hospital as he did following the assault when she made initial contact. There was a short span of time between the attack and when the statements were made, and S.O. remained in the agitated condition demonstrative of an ongoing mental state related to the stabbing.

But even if the district court abused its discretion by admitting the statements as exited utterances, appellant fails to show prejudice. *See State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994) (stating that erroneously admitted evidence is prejudicial if it significantly affected the verdict). S.O.'s testimony about the attack was consistent with

his statements to Officer Teff. The only difference was that the officer used the word "wielding" and S.O. could not recall using that word. Appellant's attorney cross-examined S.O. and Officer Teff on this minor discrepancy. Because S.O.'s testimony was consistent with Officer Teff's testimony, appellant fails to show prejudice.

Unidentified customer's statement

Appellant also argues that the district court abused its discretion by refusing to allow appellant to elicit testimony from the security guard, T.A., who intervened after the assault, regarding what he heard a customer say. Appellant claims that this statement should have been admissible as an excited utterance, a state-of-mind statement, and as impeachment evidence. Appellant has the burden of showing that the district court abused its discretion by excluding this evidence and that he was prejudiced as a result. *Amos*, 658 N.W.2d at 203.

T.A. testified that he tackled appellant after he observed appellant strike S.O. Appellant's attorney asked T.A. about a statement he made to a defense investigator regarding hearing a female customer say something after witnessing T.A. tackle appellant. T.A. testified that he heard someone say, "Oh, my God, I can't believe you're treating [appellant] like that." The district court determined that the statement was not an exited utterance because the speaker was unidentified.

The district court did not abuse its discretion by excluding this statement because it is irrelevant. *See* Minn. R. Evid. 401 (defining relevant evidence as having the "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence").

Irrelevant evidence "is not admissible." Minn. R. Evid. 402. It is not a fact of consequence that T.A. admittedly tackled appellant after the assault. That a customer reacted to observing T.A. tackle appellant has no bearing on whether appellant assaulted S.O. unprovoked or in self-defense as appellant claimed.

Further, even if this statement qualified as an excited utterance, the startling event is irrelevant. As stated earlier, an excited utterance is "[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." Minn. R. Evid. 803(2). The district court did not admit the evidence because the declarant was unidentified. While the language of rule 803(2) does not require that the declarant be identified, it is within the district court's discretion to determine whether the statement was given when the aura of excitement was sufficient to ensure the statement's trustworthiness. *See Daniels*, 380 N.W.2d at 782. The district court concluded that "there is no way to establish [that the statement] was an excited utterance." The statement may have been in response to a startling event—T.A. tackling appellant—but the event is irrelevant. Appellant also argues that the statement was a then-existing emotional condition of the declarant, under Minn. R. Evid. 803(3). But, again, it is irrelevant that T.A. tackled appellant.

Finally, appellant argues that the statement should have been admissible to impeach T.A. because T.A. testified that he made the statement to a defense investigator, but the officer who interviewed T.A. could not recall T.A. reporting the statement to him. It is unclear how the statement would be useful impeachment evidence. T.A. admittedly tackled appellant. That he later reported hearing a witness declare disbelief in the way

that T.A. treated appellant does not contradict the fact that he tackled appellant. Therefore, the district court did not abuse its discretion by refusing to admit this irrelevant evidence.

Further, appellant again fails to show prejudice. *See Post*, 512 N.W.2d at 102 n.2 (stating that an error is prejudicial if it significantly affected the verdict). Appellant claims that he acted in self-defense and that had T.A. been impeached with this evidence, the jury may not have seen appellant as the aggressor. But T.A.'s tackling of appellant after the assault had no bearing on appellant's self-defense claim. Appellant's self-defense claim was premised upon his interactions with S.O., not T.A. Therefore, appellant fails to show that the verdict would have been different had the jury heard how a customer reacted to T.A. tackling appellant after appellant assaulted S.O.

Affirmed.