

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO, :
 :
 Plaintiff-Appellee, :
 : No. 107555
 v. :
 :
 HENRY NORMAN, :
 :
 Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: June 6, 2019

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-18-625443-B

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting
Attorney, and Kevin Bringman, Assistant Prosecuting
Attorney, *for appellee*.

Russell S. Bensing, *for appellant*.

RAYMOND C. HEADEN, J.:

{¶ 1} Defendant-appellant Henry Norman (“Norman”) appeals from his
conviction following a jury trial. For the reasons that follow, we affirm.

Procedural and Substantive History

{¶ 2} This appeal stems from an armed robbery that occurred on January 23, 2018. On February 2, 2018, the Cuyahoga County Grand Jury indicted Norman and his codefendant Jamuall Jones (“Jones”) on one count of aggravated robbery in violation of R.C. 2911.01(A)(1) with a one-year firearm specification, a three-year firearm specification, and two forfeiture specifications.

{¶ 3} On June 26, 2018, the state placed a plea offer on the record whereby Norman would plead guilty to an amended count of robbery with a three-year firearm specification. Norman rejected this offer and the matter proceeded to a jury trial that began on July 16, 2018. Jones accepted a plea deal where he pleaded guilty to an amended count of robbery with forfeiture specifications and agreed to testify against Norman at trial.

{¶ 4} On the date of the incident, the victim, Travis Penland (“Penland”) lived in a house at 3607 West 104th Street in Cleveland, Ohio, with his fiancée and two young children. Penland was sick with the flu and had returned home from work and taken a shower. Around 8:40 that night, he went out to his car to retrieve medication he had left there. The car, a 2005 Lexus GS-300, was parked in the street directly in front of Penland’s house. After Penland had retrieved the medication from his car and turned to walk back to his house, he was approached from behind by a man with a gun. Penland saw a gun pointed at him and testified that he saw a man wearing black sweatpants, a grey hoodie, and a mask covering his face. Penland also testified that he heard the man telling him to get on the ground. He obeyed,

getting on the ground and throwing his car keys and medication onto the ground. The man told Penland to stay on the ground, retrieved the car keys, and then left. Penland took this opportunity to run into his house and call the police. At trial, the state called Penland as its first witness. During direct examination of Penland, he relayed the foregoing version of events. He also testified that the gun used during the robbery was black and silver. The state subsequently introduced a black and silver gun into evidence without objection from Norman's counsel.

{¶ 5} The state also called Javier Vargas ("Vargas"), one of Penland's neighbors as a witness. Vargas testified that he came home from work on January 23, at around 8 p.m., and received a call from another neighbor he identified as Ms. Johnson. The following exchange occurred during direct examination of Vargas:

PROSECUTION: Could you tell anything about her voice when you answered the phone?

VARGAS: A little nervous, edgy.

PROSECUTION: Did that — did her voice sound different than normal?

VARGAS: Yes.

PROSECUTION: Your Honor, at this time has the state laid the proper foundation for him to describe the neighbor's excited utterance?

THE COURT: Any objection?

DEFENSE COUNSEL: Yes.

THE COURT: I think it qualifies. Go ahead.

PROSECUTION: And what did Ms. Johnson tell you? What did she say when you picked up the phone?

VARGAS: She said she heard Travis getting robbed and to stay in the house.

In response to this phone call, Vargas testified that he looked out of his front window and saw someone in Penland's car trying to start it. Vargas saw the person get out of the car, run away, and come back minutes later with a second person to again try to start the car.

{¶ 6} Jones also testified at trial, stating that when he was attempting to start Penland's car, he was merely helping Norman.

{¶ 7} The state also called Detective Michael Fallon and police officer James Bellomy ("Bellomy") as witnesses. During direct examination of Bellomy, the state introduced two firearms. State's exhibit No. 41 was a revolver found in the center console of the white sedan in Jones's driveway, and State's exhibit No. 42 was a semiautomatic handgun found on the passenger seat of the white sedan in Jones's driveway.

{¶ 8} On July 20, 2018, the fifth day of trial, the jury returned a verdict of guilty. The court proceeded directly to sentencing, merged the one-year firearm specification into the three-year firearm specification, and ordered that three-year sentence to be served consecutive to an eight-year sentence on aggravated robbery, for a total sentence of 11 years.

Law and Analysis

{¶ 9} On appeal, Norman presents two assignments of error for our review. First, he argues that the trial court erred in admitting a firearm that was not shown

to have been used in the crime he was charged with committing. Second, he argues that the trial court erred in admitting testimony under the “excited utterance” exception to the hearsay rule.

{¶ 10} A trial court’s decision to admit or exclude evidence is reviewed for abuse of discretion. *Ramadan v. MetroHealth Med. Ctr.*, 8th Dist. Cuyahoga No. 93981, 2011-Ohio-67, ¶ 12, citing *State v. Lyles* 42 Ohio St.3d 98, 99, 537 N.E.2d 221 (1989). The term “abuse of discretion” connotes more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 11} In his first assignment of error, Norman argues that there was not a sufficient connection established to link either of the firearms to the crime. Specifically, Norman asserts that the only attempt to link the guns to the crime was when Penland testified that one of the exhibits was a gun. Neither firearm was tested for fingerprints or DNA evidence.

{¶ 12} Norman is correct in his assertion that the admission of a firearm is improper where the firearm is not connected to the crime charged. The Ohio Supreme Court has held that evidence of weapons that “leads only to inferences about matters that [are] not properly provable in [the] case” is inadmissible. *State v. Thomas*, 152 Ohio St.3d 15, 2017-Ohio-8011, 92 N.E.3d 821, ¶ 41, quoting *Walker v. United States*, 490 F.2d 683, 684-685 (8th Cir.1974). This reasoning does not

apply to the instant case. Norman was charged with aggravated robbery, in violation of R.C. 2911.01(A)(1), which provides that:

No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:

(1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it.

Further, the state's theory of the case was that Norman attempted to steal Penland's car after robbing him of his car keys at gunpoint. Penland testified that he was approached from behind and a gun was held to his head; he described the gun as black and silver and went on to testify that he recognized State's exhibit No. 42. Therefore, the firearms that were found by law enforcement in the vehicle in which Norman attempted to flee the scene were admissible to show that Norman used a firearm in the commission of the offense as charged. Norman's assertion that the firearms were introduced in the absence of any definitive evidence that either was used in the commission of a crime lacks merit. His first assignment of error is overruled.

{¶ 13} In his second assignment of error, Norman argues that the trial court erred by allowing inadmissible hearsay evidence in the form of Vargas's testimony as to what his neighbor Ms. Johnson told him over the phone. Because a trial court's decision to admit hearsay testimony is an evidentiary decision, this assignment of error is reviewed for abuse of discretion.

{¶ 14} The testimony in question here is Vargas’s testimony that his neighbor, Ms. Johnson, told him that she heard Penland getting robbed. This testimony was admitted as an excited utterance over defense objection. Evid.R. 801(C) defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Hearsay is generally not admissible at trial, but Evid.R. 803 provides exceptions to the hearsay rule. One such exception is an excited utterance, which Evid.R. 803(2) defines as “[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.” The Ohio Supreme Court laid out four factors for a trial court to consider in evaluating the admissibility of an excited utterance:

(a) that there was some occurrence startling enough to produce a nervous excitement in the declarant, which was sufficient to still his reflective faculties and thereby make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs, and thus render his statement or declaration spontaneous and unreflective, (b) that the statement or declaration, even if not strictly contemporaneous with its exciting cause, was made before there had been time for such nervous excitement to lose a domination over his reflective faculties, so that such domination continued to remain sufficient to make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs, (c) that the statement or declaration related to such startling occurrence or the circumstances of such startling occurrence, and (d) that the declarant had an opportunity to observe personally the matters asserted in his statement or declaration.

State v. Taylor, 66 Ohio St.3d 295, 301, 612 N.E.2d 316 (1993), quoting *Potter v. Baker*, 162 Ohio St. 488, 501, 124 N.E.2d 140 (1955). The excited utterance

exception “derives its guaranty of trustworthiness from the fact that declarant is under such state of emotional shock that his reflective processes have been stilled.” *Id.* at 300, quoting McCormick, *Evidence*, Section 297 (2d Ed.1972).

{¶ 15} Here, the startling occurrence was the robbery of Penland. The foundation for admitting the statement as an excited utterance is Vargas’s testimony that the declarant sounded “a little nervous, edgy” and that her voice sounded different than normal. This is insufficient to qualify the statements as excited utterances under Evid.R. 803(2). As the Ohio Supreme Court held in *Taylor*, merely being upset does not clearly meet the standard for admissibility. *Taylor* at 303. Similarly, we decline to hold that mere nervousness is the kind of “state of emotional shock” that qualifies a statement as an excited utterance. However, even if this statement was admitted erroneously, we find that this constitutes harmless error.

{¶ 16} Crim.R. 52(A) provides that “[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.” In light of the significant evidence of Norman’s guilt, a single erroneous admission of hearsay did not affect his substantial rights. In fact, our review of the record shows that the remainder of Vargas’s testimony was likely more persuasive evidence of Norman’s guilt than the hearsay statement. Vargas testified that after speaking with his neighbor, he looked out his window and observed individuals trying to start Penland’s car. Vargas went on to describe the two individuals, and this description corresponded with other witness testimony introduced at trial. Therefore, we overrule Norman’s second assignment of error.

{¶ 17} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

RAYMOND C. HEADEN, JUDGE

**EILEEN T. GALLAGHER, P.J., CONCURS WITH THE LEAD OPINION AND CONCURS WITH THE SEPARATE CONCURRING OPINION;
EILEEN A. GALLAGHER, J., CONCURS (SEE SEPARATE CONCURRING OPINION)**

EILEEN A. GALLAGHER, J., CONCURRING:

{¶ 18} I concur with the judgment of my colleague but write separately as to the second assignment of error relating to the statements made by Ms. Johnson and admitted as hearsay under the excited utterance exception. I am of the opinion that the statements made by Ms. Johnson do qualify for admission under Evid.R. 803(1) as a present sense impression and that there was no error, harmless or otherwise, in admitting them.