[J-84-2008]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 531 CAP
	:	
Appellee	:	Appeal from the Order entered on
	:	08/31/2004 in the Court of Common
	:	Pleas, Criminal Division of Dauphin
v.	:	County at No. CP-22-CR-0000692-2003
	:	(Order entered on 03/20/2007 reinstating
	:	review on direct appeal nunc pro tunc).
ERNEST WHOLAVER, JR.,	:	
	:	
Appellant	:	ARGUED: May 13, 2008

CONCURRING OPINION

MR. CHIEF JUSTICE CASTILLE **DECIDED: February 18, 2010**

I join the Majority Opinion in its entirety. I write separately only to supplement the Majority's resolution of appellant's claim that the trial court erred in precluding him from introducing an out-of-court statement he made to his brother (and co-defendant) Scott Wholaver, which appellant argued fell under the excited utterance exception to the hearsay rule. See Maj. Slip Op., 29-30. For the reasons set forth below, in my view, even if the statement at issue otherwise qualified as an excited utterance, we should be wary of admitting obviously self-serving statements by a party who, like appellant here, declines to take the stand and expose himself to cross-examination.

Appellant claims that when he returned to the car where Scott had been waiting for five to ten minutes, he said, "I only looked in the window, and you won't believe what I

saw." N.T. Trial, 8/27-31/04, Vol. I, at 410. The statement, which referred to appellant seeing the lifeless bodies of his family, was intended to suggest that the murders were committed by someone else prior to appellant arriving at the house. The trial court ruled that the statement was inadmissible both pre-trial on the Commonwealth's motion *in limine*, and during the cross-examination of Scott. In its opinion, the trial court found that the statement was a mechanism whereby appellant sought to distance himself from the murders and that the five to ten minutes that appellant was absent from the car was sufficient time for reflection, thereby negating the excited utterance exception. The Majority properly finds no abuse of the trial court's discretion in excluding appellant's self-serving statement.

The underlying rationale of the excited utterance exception is the notion that a statement made in the excitement of a startling event, before the speaker has the opportunity to reflect on the event, has sufficient indicia of truthfulness to warrant admission.

> An excited utterance is the event speaking and not the speaker. It is an exception to the hearsay rule, carved from human experience, which teaches that an unreflected, spontaneous utterance made under the impact of a shocking, unexpected emotion, precipitated by a traumatic event, renders the speaker the medium and not the message. Such an utterance is allowed in evidence because it is spontaneous and unreflected, without influence from thought, design and reason.

Commonwealth v. Zukauskas, 462 A.2d 236, 237 (Pa. 1983).

Like the trial court and the Majority here, the Zukauskas court ultimately ruled that the time that elapsed between the event and the defendant's statement in that case negated the excitement or shock required for the statement's admission. But, in my view, where statements proffered by the non-testifying accused are exculpatory, there is substantial reason to question their reliability and this fact provides an independent reason not to apply the excited utterance exception. Some courts have touched on this reality.

For example, in Commonwealth v. Simms, 426 A.2d 620 (Pa. Super. 1981), the prosecutor, in his opening statement, referred to a statement made at the time of their arrest by Simms' co-defendant (Mills) that Simms had given him the drugs the police found. In response to Simms' motion for a mistrial, the prosecutor argued that Mills' statement was an excited utterance. The trial court granted the mistrial. On appeal to the Superior Court, the central question was whether double jeopardy barred retrial. The court rejected the Commonwealth's argument that Mills' statement qualified as an excited utterance, reasoning as follows:

> [W]e agree with the reasoning of the trial court that the statement does not fit within the rationale of the "excited utterance" exception, "(s)ince that rationale lies in the special reliability" of such an utterance and "(t)he self-serving nature of Mills' statement destroys any indicia of reliability."

Id. at 623 n.10.

In Lininger v. Kromer, 358 A.2d 89 (Pa. Super. 1976), the Superior Court noted that, "Whether a statement is spontaneous depends on the peculiar facts and circumstances of each case." Id. at 93 (citing McCurdy v. Greyhound Corp., 346 F.2d 224 (3d Cir. 1965)). The court then quoted McCormick, Evidence, § 288 at 706-07 (2d ed. 1972), regarding a self-serving statement:

> "Evidence that the statement was self-serving or made in response to an inquiry, while not justification for automatic exclusion, is an indication that the statement was the result of reflective thought, and where the time interval permitted such thought these factors might swing the balance in favor of exclusion."

Lininger, 358 A.2d at 94 (quoting McCormick).

Some federal courts have rejected the argument that a defendant's exculpatory out-of-court statement is admissible as an excited utterance. For example, in United States v.

Sewell, 90 F.3d 326 (8th Cir. 1996), the Eighth Circuit considered the defendant's statement that a gun found by police did not belong to him and stated:

> Defendant's argument that he was merely reacting naturally to the "shock" of an "extraordinarily startling event"-i.e., the discovery of a weapon in his possession-is unconvincing. Where incriminating evidence is discovered in one's possession, it requires only the briefest reflection to conclude that a denial and plea of ignorance is the best strategy. This hardly comports with the spirit of disinterested witness which pervades the rule. There is no evidence that the defendant's self-serving statement derived from an uncontrolled "excitement" experienced while learning of the evidence against him.

Id. at 327. See also United States v. Elem, 845 F.2d 170, 174 (8th Cir. 1988) (exculpatory statements made by defendant after he was in custody and focus of criminal investigation not admissible as excited utterances).

In sum, I believe that an exculpatory statement made by a criminal defendant in the aftermath of his crime simply does not carry the indicia of truthfulness required for an excited utterance to be admissible as an exception to the hearsay rule. Particularly where, as here, the defendant exercises his right not to testify, but seeks to introduce such self-serving "testimony" that would not be subject to cross-examination, I would be disinclined ever to recognize the exception.