**IN THE**
**TENTH COURT OF APPEALS**

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**No. 10-19-00041-CR**

**NICHOLAS RYAN JOHNSON,**

**Appellant**

**v.**

**THE STATE OF TEXAS,**

**Appellee**

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**From the 85th District Court**
**Brazos County, Texas**
**Trial Court No. 18-01716-CRF-85**

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## MEMORANDUM OPINION

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Nicholas Ryan Johnson was convicted of aggravated assault by threat with a deadly weapon, a knife, and sentenced to 26 years in prison. *See* TEX. PENAL CODE § 22.02(a)(2). Johnson's girlfriend, P.W., with whom he lived, was the victim of the threatened assault. By the time of the trial, P.W. did not want Johnson to be prosecuted. Because the trial court did not err in admitting hearsay testimony, impeachment testimony, and expert testimony, the trial court's judgment is affirmed.

**EXCITED UTTERANCE EXCEPTION**

In his first issue, Johnson argues the trial court erred in allowing a College Station police officer to testify that P.W. told him Johnson grabbed a knife and threatened to kill her. Specifically, he contends P.W.'s statement was not admissible under the excited utterance exception to the hearsay rule.

The admissibility of an out-of-court statement under exceptions to the general hearsay rule is within the trial court's discretion. *Zuliani v. State*, 97 S.W.3d 589, 595 (Tex. Crim. App. 2003). An abuse of that discretion occurs only when the trial court's decision was so clearly wrong as to lie outside that zone within which reasonable persons might disagree. *Id*.

Rule of Evidence 803(2) defines the excited-utterance exception to the hearsay rule 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." TEX. R. EVID. 803(2); *Zuliani v. State*, 97 S.W.3d 589, 595 (Tex. Crim. App. 2003). In determining whether a hearsay statement is admissible as an excited utterance, the court may consider factors which include the length of time between the occurrence and the statement, the nature of the declarant, whether the statement is made in response to a question, and whether the statement is self-serving. *Apolinar v. State*, 155 S.W.3d 184, 187 (Tex. Crim. App. 2005). These are simply factors to consider; they are not, by themselves, dispositive. *Zuliani* at 596. The critical determination is whether the

declarant was still dominated by the emotions, excitement, fear, or pain of the event or condition at the time of the statement. *Id*.

Johnson contends that because Officer Walker described P.W.'s demeanor when he arrived at the scene as "very closed off" and that she was "unwilling to provide any information about what had occurred," her statement was in response to a question by Officer Walker, and it was almost 20 minutes from the startling event to the statement, P.W.'s statement was not made while she was under the stress of excitement that the event caused and could not qualify as an excited utterance. We disagree with Johnson.

In this case, from the time of the officer's arrival on the scene[1] to the time P.W. made the statements, approximately 20 minutes had elapsed. P.W. looked like she had been crying when Walker made his initial contact with her.[2] Her eyes were "really red and puffy." Her hair was messed up, and tears were still on her face. Although she appeared "closed off" and "kind of out of it," Walker believed she was still under the stress of the assault. P.W. remained reluctant to tell Walker what happened; but about 5 minutes later, when Walker revealed that someone had "called in" because that person heard bumping noises and someone saying "stop" or "I'm going to kill you," P.W. started crying. She then told Walker that Johnson threatened to kill her with a knife.

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[1] There was no testimony as to how much time elapsed between the time the officer received the 9-1-1 call and the time he arrived on the scene or between the time the call was made to 9-1-1- by a neighbor and the time it was dispatched to the officer.

[2] Another officer had been gathering information from P.W. about 13 minutes before Walker spoke to P.W. Johnson had been in the apartment with P.W. at the time the officers arrived but was separated from P.W. by Walker.

Reviewing this evidence in light of the factors, although the time delay between the event and the statement might appear to be long, statements have been admitted under the excited utterance exception where the delay was longer. *See e.g. Zuliani v. State*, 97 S.W.3d 589, 596 (Tex. Crim. App. 2003) (20 hours); *Dixon v. State*, 358 S.W.3d 250, 261 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd) (one hour). Further, P.W. appeared distressed at the time Walker interviewed her, the statement did not appear to be in response to a question, and there did not appear to be any self-serving reason for the statement. Accordingly, the trial court could have determined, based on the testimony, that P.W. was still dominated by her emotions surrounding the event when she made the statement, and thus, did not abuse its discretion in admitting P.W.'s statement to Walker pursuant to the excited utterance exception to the hearsay rule.

Johnson's first issue is overruled.

**IMPEACHMENT**

Next, Johnson asserts the trial court erred in permitting the State to impeach P.W. with a prior inconsistent statement and through a College Station police officer and a victim assistance coordinator.

First we must note that Johnson never objected to any alleged improper impeachment by the State during Officer Walker's testimony[3] or during P.W.'s

[3] Walker testified before P.W. testified.

testimony.[4] It was only when the State called Melissa Carter, a victim assistance coordinator, that Johnson objected pursuant to Rules of Evidence 607 and 403. *See* TEX. R. EVID. 403; 607 Accordingly, Johnson's complaints regarding the direct impeachment of P.W. or impeachment through Walker are not preserved. *See* TEX. R. APP. P. 33.1.

As to Carter's testimony, Johnson complains the State knew beforehand that P.W. would testify not only that she did not remember many of the details of the assault but also that she had fabricated facts in her interview with Walker because she was told law enforcement would not make Johnson leave the apartment that night; consequently, she had said what she needed to say to have Johnson arrested and removed from the house. Thus, his argument continues, the State could not, pursuant to Rules 607 and 403, call Carter to impeach P.W. with prior inconsistent statements.

A witness' prior inconsistent statement may be used to impeach the witness' credibility. *See* TEX. R. EVID. 607. A Rule 607 challenge to a witness' credibility may come from any party, including the party calling the witness. *Hughes v. State*, 4 S.W.3d 1, 5 (Tex. Crim. App. 1999); *Brasher v. State*, 139 S.W.3d 369, 371 (Tex. App.—San Antonio 2004, pet. ref'd). A party may not, however, call a witness it knows to be hostile for the primary purpose of eliciting otherwise inadmissible impeachment evidence. *Hughes*, 4 S.W.3d at 5; *Arrick v. State*, 107 S.W.3d 710, 722 (Tex. App.—Austin 2003, pet. ref'd). A party's knowledge that its own witness will testify *unfavorably* is a

[4] At most, during P.W.'s testimony, Johnson informed the trial court that the State was beginning to attempt to impeach its own witness. When the trial court replied that nothing had been asked yet, Johnson said he would object then in a few minutes. He never did.

factor the trial court must consider when determining whether the evidence is admissible under Rule 403. *Hughes*, 4 S.W.3d at 5; *Brasher*, 139 S.W.3d at 372. A trial court abuses its discretion under Rule 403 when it permits a party to introduce otherwise inadmissible impeachment evidence for the primary purpose of placing it before the jury with the hope the jury will misuse it by considering it for its truth. *Hughes*, 4 S.W.3d at 5; *Brasher*, 139 S.W.3d at 372. Prior knowledge by the State is key. *Kelly v. State*, 60 S.W.3d 299, 302 (Tex. App.—Dallas 2001, no pet.).

In this case, P.W. was the State's witness, but she was never asked about the assault. Rather, she was asked about and testified that: 1) she did not want Johnson to be prosecuted; 2) she and Johnson were trying to get married, and Johnson told her the paperwork needed to be completed by a certain date; and 3) Johnson told her she did not have to meet with the prosecutor, and the prosecutor would try to turn her against Johnson. It was on cross-examination that Johnson's counsel elicited testimony that P.W. made up the story about the knife to get Johnson out of the house and that she did not feel threatened by Johnson. On re-direct, P.W. confirmed that she did not tell the State she made up the story to get Johnson out of the house. This was also when the State elicited some "I don't remember" comments to questions regarding what P.W. told the officer about Johnson's threatening behavior toward P.W.

Although the State may have known that P.W. was becoming uncooperative as time passed through her displayed memory loss, that is not the same as knowing P.W.,

on cross-examination by the opposing party, would testify unfavorably, including that she lied to police to get Johnson out of the apartment. Accordingly, we cannot say the trial court abused its discretion in allowing the State to impeach P.W. through Carter's testimony.

Johnson's second issue is overruled.

**EXPERT TESTIMONY**

In his third issue, Johnson asserts that the trial court erred in allowing the State's expert to testify about general matters regarding domestic violence victims without tying the testimony to the relationship between Johnson and P.W., neither of whom the expert had met or interviewed.

We review a trial court's decision to admit or exclude expert testimony for an abuse of discretion and a reviewing court may not reverse those rulings unless they fall outside the zone of reasonable disagreement. *Blasdell v. State*, 384 S.W.3d 824, 829 (Tex. Crim. App. 2012). The relevance inquiry in a challenge to expert testimony is whether evidence will assist the trier of fact and is sufficiently tied to the facts of the case. *Tillman v. State*, 354 S.W.3d 425, 438 (Tex. Crim. App. 2011). Thus, to be relevant, the expert must make an effort to tie pertinent facts of the case to the scientific principles which are the subject of the expert's testimony. *Id*. This is known as the "fit" aspect of the relevance inquiry. *Id*.

Johnson's sole argument under this issue is that the expert's testimony did not

sufficiently "fit" the facts of this case to be relevant because the expert knew nothing about Johnson's and P.W.'s relationship history; thus, his argument continues, the testimony should have been excluded. We disagree with Johnson's argument.

The Court of Criminal Appeals has long disapproved of excluding expert testimony as irrelevant due to the expert's failure to interview the State's witnesses or even examine the evidence at issue. *Tillman v. State*, 354 S.W.3d 425, 439 (Tex. Crim. App. 2011); *Jordan v. State*, 928 S.W.2d 550, 556 n.8 (Tex. Crim. App. 1996). Requiring such interviews or examinations, the Court has explained, would be contrary to Rule of Evidence 703, which permits an expert to base opinion testimony on the data and facts made known during trial. TEX. R. EVID. 703; *Id*. Further, it is well-settled that an expert can offer an opinion based solely on hypothetical questions posed at trial. *Tillman*, 354 S.W.3d at 439; *Jordan*, 928 S.W.2d at 556 n.8. Thus, based on Court of Criminal Appeals precedent, because an expert is not required to have any prior knowledge of the facts of the case before offering an opinion, the State's expert in this case was not required to know anything about the relationship history between P.W. and Johnson before the expert's testimony could be admitted by the trial court.

Accordingly, for this reason, the trial court did not abuse its discretion in admitting the expert's testimony, and Johnson's third issue is overruled.

**HARM**

In his final issue, Johnson complains that the errors listed in his first three issues

affected his substantial rights and thus, were harmful, individually and cumulatively, pursuant to Rule 44.2(b). TEX. R. APP. P. 44.2(b). Sometimes erroneously referred to as cumulative error, courts have been asked to consider whether multiple errors, determined harmless when reviewed separately, may combine to produce an effect that is harmful, requiring reversal. *Haskett v. Butts*, 83 S.W.3d 213, 221 (Tex. App.—Waco 2002, pet. denied); *see Larkin v. State*, Nos. 10-06-00313-CR, 10-06-00314-CR, 2008 Tex. App. LEXIS 3499, at *34 (Tex. App.—Waco May 14, 2008, pet. ref'd) (not designated for publication). By definition, cumulative harm requires more than one error. *Haskett*, 83 S.W.3d at 221. Because we have found no errors pursuant to the issues raised, we cannot find cumulative harm. *See Gamboa v. State*, 296 S.W.3d 574, 585 (Tex. Crim. App. 2009) (non-errors do not, in their cumulative effect, cause error).

Johnson's fourth issue is overruled.

**CONCLUSION**

Having overruled each issue on appeal, we affirm the trial court's judgment.

TOM GRAY
Chief Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Neill
Affirmed
Opinion delivered and filed August 21, 2020
[CRPM]