IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. TRAMAINE ISABELL, Appellant.	)	No. 64328-2-I DIVISION ONE UNPUBLISHED OPINION FILED: November 15, 2010

spearman, j. — Tramaine Isabell appeals his conviction for residential burglary, contending that the trial court erred by admitting as evidence a recording of a 911 call made by his ex-girlfriend, Shayla Poree, who did not testify at his trial. In the call, Poree stated that Isabell broke into her house at 3:30 a.m. and claimed he had a gun. Because the 911 call was made to address an ongoing emergency, the challenged statements were nontestimonial and did not implicate Isabell's right to confront adverse witnesses. Isabell's challenge to the trial court's admission of the statement under the rules of evidence is similarly unavailing. We affirm his judgment and sentence.

FACTS

At approximately 3:30 a.m. on February 1, 2009, Poree and her acquaintance Shawn Crawford awoke to find an intruder in Poree's bedroom. Poree later told a 911 operator and investigating police officers that the intruder was Tramaine Isabell, with whom she had a three-year relationship that ended two months earlier. Poree woke up her sleeping five-year-old daughter, and ran outside. Crawford got dressed and left. He believed that the intruder had a weapon, but did not see one.

At about 3:34 a.m., Poree called 911. She reported that her ex-boyfriend had broken into her apartment, and that he said he had a gun. In response to the operator's questioning, she revealed that the intruder was Isabell. She stated that she was in an alley in back of her apartment, and that her daughter was with her. She explained that she was on her way to her neighbor's apartment, and audibly knocked on her neighbor's door. The operator told Poree that police were on the way. Poree's neighbor got on the phone and told the 911 operator the address of the apartment. Shortly thereafter, the call ended.

Seattle Police Officers Mitch Choi and Dave Foley responded to the 911 call. When the officers entered Poree's apartment the intruder was gone, but her sofa was overturned, lotion had been sprayed all over the bedroom, and the contents of dresser drawers had been strewn about. Derogatory and profane graffiti had been written on the walls.

After securing Poree's apartment, Officer Choi took an additional statement from

Poree. While giving her statement, Poree received a call on her cell phone. She told Officer Choi that Isabell was the caller. Choi got on the phone, identified himself as a police officer, and asked the caller where he was calling from. The caller did not answer, but told Choi that "they wouldn't let him into the apartment," and that "[h]e was punched in the face." The caller then hung up. On February 18, 2009, Seattle Police Detective Michelle Barker took an additional statement from Poree.

The State charged Isabell with residential burglary. Shortly thereafter, Poree left a message for Detective Barker, stating that she did not want to proceed with the case and that she and Isabell had reconciled. A few days later, Poree sent a statement to Isabell's public defense agency recanting much of what she had initially reported to police. She stated that Isabell had permission to be in her apartment, and had not assaulted or threatened her.

A jury trial was held in September 2009. Prior to trial, the State moved to admit a recording of Poree's 911 call. After hearing argument, the trial court ruled that the recording was admissible. Poree did not testify, but the recording was played for the jury. The jury convicted Isabell as charged.

ANALYSIS

Confrontation Clause

Isabell first contends that the trial court violated his constitutional right to confront adverse witnesses by admitting Poree's statements to the 911 operator

identifying Isabell as the intruder. The Sixth Amendment's Confrontation Clause prohibits admission of testimonial statements presented through a hearsay witness when the declarant does not testify, unless there was a prior opportunity to cross-examine the declarant about the testimonial statement. Crawford v. Washington, 541 U.S. 36, 59, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004). Nontestimonial hearsay, however, is admissible under the Sixth Amendment, subject to the rules of evidence. State v. Pugh, 167 Wn.2d 825, 831, 225 P.3d 892 (2009) (citing Davis v. Washington, 547 U.S. 813, 821,126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)).

The determinative inquiry is whether Poree's statements to the 911 operator were testimonial.[1] Isabell contends that they were. We disagree. Statements made in the course of a police interrogation are nontestimonial if made under circumstances objectively indicating that the primary purpose of interrogating the speaker was "'to enable police assistance to meet an ongoing emergency.'" Pugh, 167 Wn.2d at 832 (quoting Davis, 547 U.S. at 822). Four factors assist in determining the primary purpose of the statements: (1) Whether the speaker was describing events as they were occurring or past events; (2) whether a reasonable listener would conclude that the speaker faced an ongoing emergency and required help; (3) whether the police questions elicited statements necessary to resolve a present emergency; and (4) the degree of formality of the interview. See State v. Koslowski, 166 Wn.2d 409, 418-19,

[1] Neither party disputes that Poree did not testify and Isabell did not have an opportunity to cross-examine her concerning her statements to the 911 operator.

209 P.3d 479 (2009). A consideration of these factors reveals that Poree's statements were not testimonial in nature.

Poree called 911 within minutes of Isabell's entry into her apartment. During the call, she was describing ongoing events as they occurred or shortly thereafter, in order to enable police to address an ongoing emergency. She told the 911 operator that she was asleep at home when Isabell broke into her apartment at 3:30 in the morning and claimed to have a gun. She stated that she fled from her apartment with her young daughter and believed Isabell was still in the apartment. Based on these circumstances, a reasonable listener would conclude that Poree faced an ongoing emergency and required help.

In addition, the 911 operator's questions elicited responses that were necessary to resolve the present emergency, including the location, basic information about the perpetrator, and the fact that the perpetrator claimed to have a weapon. Moreover, the brief conversation, made while Poree was outside in an alley, while also seeking refuge and help from a neighbor in the middle of the night immediately after a violent intrusion, was entirely devoid of formality. It was easily distinguishable from a formal police interview designed to gather evidence regarding past events.

The evidence amply supports the trial court's conclusion that Poree's statements were not testimonial. Based on the circumstances of this case, their admission did not infringe on Isabell's confrontation rights.

Hearsay Exceptions

Isabell next asserts that the court erroneously admitted the statements because they did not fall within any exception to the hearsay rules. We disagree.

The admissibility of nontestimonial hearsay evidence is governed by the rules of evidence. Pugh, 167 Wn.2d at 831. ER 803(a) enumerates categories of statements that "are not excluded by the hearsay rule, even though the declarant is available as a witness." These include an excited utterance[2] and a present sense impression.[3] Evidentiary rulings are addressed to the sound discretion of the trial court. State v. Ohlson, 162 Wn.2d 1, 7-8, 168 P.3d 1273 (2007). A reviewing court will find an abuse of discretion only if it finds that no reasonable person would have ruled as the trial judge did. Ohlson, 162 Wn.2d at 8.

Isabell first contends that Poree's statements were not excited utterances because there was no evidence Poree was in a state of excitement caused by the event at the time she made her statements. Three requirements must be met for a statement to qualify as an excited utterance: (1) A startling event or condition must have occurred; (2) the statement must have been made while the declarant was under the stress of excitement caused by the event or condition; and (3) the statement must relate to the startling event or condition. State v. Thomas, 150 Wn.2d 821, 853, 83

[2] "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." ER 803(a)(2); State v. Hardy, 133 Wn.2d 701, 714, 946 P.2d 1175 (1997).

[3] "A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." ER 803(a)(1).

P.3d 970 (2004). Here, the evidence supports the trial court's conclusion that Poree's statements were excited utterances. Poree was describing events as they occurred or immediately thereafter, and her statements concerned the startling events and were made while she was still under the immediate influence of the events. The trial court acted within its discretion in admitting the challenged statements under ER 803(a)(2).

Isabell also asserts that portions of Poree's 911 statements were erroneously admitted as present sense impressions. Present sense impression statements must grow out of the event reported and in some way characterize that event. See Pugh, 167 Wn.2d at 840 (citing Walters v. Spokane Int'l Ry. Co., 58 Wash. 293, 297-98, 108 P. 593 (1910)). Here, the evidence supports the conclusion that the challenged statements qualified as present sense impressions. Poree described certain events, such as knocking on her neighbor's door, contemporaneously with their occurrence. Her statements both grew out of and characterized those events. The trial court acted within its discretion in admitting portions of the statement under ER 803(a)(1).

We affirm.

Spearman, J.

WE CONCUR:

Upper Becker, J.