IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 67272-0-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
FAUSTO VEGA-FILIO,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: July 23, 2012
________________________________	)	

Becker, J. — Fausto Vega-Filio contends his convictions for kidnapping, assault, robbery, felony harassment, and interference with domestic violence reporting should be reversed because the court permitted a police recording of the victim's statements on the night of the attack to be played for the jury at trial. The court's admission of the recording under the excited utterance exception to the hearsay rule was not an abuse of discretion. The remaining issues Vega-Filio raises in a statement of additional grounds do not warrant further review. We affirm.

FACTS

According to testimony presented at trial, Vega-Filio and Tara Lovejoy lived in the same apartment complex. They dated off and on over the two years they lived as neighbors. One evening in 2010, Vega-Filio approached Lovejoy

as she walked to her apartment. He smelled of liquor. He lifted his shirt to show her the handle of a gun tucked into his pants. He commanded that she follow him, placed the gun against her back, hit her over the head with the gun handle, forced her through the window of his ground floor bedroom, and began to beat her. During the attack, she screamed for help and pounded on the walls. At some point, she took out her cell phone to call for help, but Vega-Filio took it from her. Vega-Filio told her to stop crying, and when she did not stop, he used his hands to strangle her.

Police were called to the scene by a witness to the commotion. When Seattle Police Officer Nicole Freutel entered the bedroom, she observed a man leaning into the room through the window with his hands on Lovejoy. Lovejoy was disheveled, swollen, gasping, and had marks on her neck. She appeared hysterical and was screaming that she thought she was going to die. Officer Freutel called in a medical team to evaluate her on site.

About 5 minutes later, Vega-Filio was apprehended by police in a nearby area. He had mud on his pants and matched the description of the man Officer Freutel had seen in the window. He also had Lovejoy's cell phone. About 10 minutes later, a K-9 team located a toy handgun hidden in a muddy area along Vega-Filio's path from the apartment complex.

Officer Freutel then drove Lovejoy to where Vega-Filio was being held by police. Lovejoy identified him without getting out of the patrol car. She cried as she sat in the back of the patrol car. Officer Freutel drove her back to the apartment complex. While Lovejoy was

still seated in the patrol car, Officer Freutel took her witness statement. Lovejoy was calmer than before, but still distressed. A “dash cam” recording device in Officer Freutel’s patrol car captured Lovejoy’s statement.

Vega-Filio was charged with first degree kidnapping, second degree assault, first degree robbery, felony harassment, and interfering with domestic violence reporting. Each charge carried a domestic violence allegation. A jury trial lasting four days was held. The State presented testimony by 10 witnesses, including Lovejoy and Officer Freutel. Over defense objection, the court admitted the dash cam recording of Lovejoy’s statements to be played for the jury.

The jury convicted Vega-Filio as charged. He was sentenced within the standard range. He now appeals.

EXCITED UTTERANCE

Vega-Filio contends the court erred by admitting Lovejoy’s recorded statement to be played for the jury. After Vega-Filio moved to exclude the recording, the court watched it *in camera*. The court admitted the recording as an excited utterance based on Officer Freutel’s testimony that when Lovejoy gave the statement, she had calmed down somewhat, but was still “distressed,” “upset,” and “scared.” The recording was played for the jury on the third day of trial.

We review decisions regarding the admission of hearsay under the excited utterance exception for an abuse

of discretion. State v. Briscoeray, 95 Wn. App. 167, 171-73, 974 P.2d 912, review denied, 139 Wn.2d 1011 (1999).

Hearsay is "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." ER 801(c). Because of concerns as to the reliability of statements that are not subject to cross-examination, hearsay is inadmissible unless it falls under one of the recognized exceptions to the hearsay rule. ER 802; State v. Chapin, 118 Wn.2d 681, 685, 826 P.2d 194 (1992).

The excited utterance rule is one such exception. ER 803(a)(2). A statement is not excluded as hearsay if it is an excited utterance "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). The utterance of a person in such a state is believed to be "'a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock,'" rather than an expression based on reflection, self interest, fabrication, intervening actions, or the exercise of choice or judgment. Chapin, 118 Wn.2d at 686, quoting 6 J. Wigmore, Evidence § 1747, at 195 (1976); Briscoeray, 95 Wn. App. at 173. For a statement to qualify as an excited utterance, three requirements must be met: (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. Chapin, 118 Wn.2d at 686.

Vega-Filio disputes only the

second requirement in this case. He contends Lovejoy was no longer under the stress of the attack when she gave her statement to Officer Freutel.

The key to admissibility is spontaneity. Briscoeray, 95 Wn. App. at 173. In determining the spontaneity of a statement, courts consider any factors that indicate whether the witness had an opportunity to reflect on the event and fabricate a story about it. Briscoeray, 95 Wn. App. at 173-74. Such factors include the amount of time that passed between the startling event and the statement, as well as the declarant's mental state during the interim and while making the statement. Briscoeray, 95 Wn. App. at 174.

Considering these factors, we observe no abuse of discretion in the court's admission of Lovejoy's statement as an excited utterance.

The record reflects that approximately 40 minutes elapsed between the time officers interrupted the attack on Lovejoy and the time Officer Freutel asked her to describe what happened. This passage of time was not enough, on its own, to remove Lovejoy from the stress of the attack as a matter of law. We have previously affirmed rulings admitting as excited utterances statements made several hours after an attack. See State v. Thomas, 46 Wn. App. 280, 284, 730 P.2d 117 (1986) (six to seven hours), aff'd, 110 Wn.2d 859, 757 P.2d 512 (1988); State v. Flett, 40 Wn. App. 277, 699 P.2d 774 (1985) (seven hours); State v. Guizzotti, 60 Wn. App. 289, 295-96, 803 P.2d 808 (seven and a half hours), review denied, 116 Wn.2d 1026 (1991).

Lovejoy's mental state was plainly affected during the 40-minute interval.

She regained her composure for brief periods of time but frequently relapsed into fits of crying. As reflected in the police video recording, Lovejoy was crying throughout her medical examination after the attack. While she waited alone in the backseat of Officer Freutel's patrol car, she wept loudly. She was again audibly upset as the officer began driving her to the scene of Vega-Filio's arrest. Her distress continued after she saw Vega-Filio while he was held by police and identified him.

Lovejoy remained in this heightened emotional state after Officer Freutel began to question her about the attack. Lovejoy was upset, crying, and her hands shook. An excited utterance may be prompted by a question that follows a startling event, such as when an investigator asks a crime victim what happened. State v. Owens, 128 Wn.2d 908, 913, 913 P.2d 366 (1996); see also State v. Robinson, 44 Wn. App. 611, 616, 722 P.2d 1379 (responses to questions admissible as excited utterances), review denied, 107 Wn.2d 1009 (1986); State v. Fleming, 27 Wn. App. 952, 958, 621 P.2d 779 (1980) (victim's statements to police during three-hour interview admissible as excited utterances where victim was "crying, sobbing, and upset" during interview), review denied, 95 Wn.2d 1013 (1981).

The trial court had tenable grounds for concluding that Lovejoy remained under the stress of the attack when she gave her recorded statement to the officer. Its admission at trial as an excited utterance was not an abuse of

discretion.

STATEMENT OF ADDITIONAL GROUNDS

In a statement of additional grounds for review, Vega-Filio argues that his convictions of first degree robbery and second degree assault were improper under the doctrines of double jeopardy and merger. He alleges the same facts supported each offense. There is no apparent double jeopardy problem because the charging documents and instructions show that Vega Filio was not convicted of those crimes based on a single act, as Vega Filio contends. He was convicted of assaulting the victim by strangulation. He was convicted of first degree robbery of her cell phone by displaying a weapon and using force.

As to Vega-Filio's challenge to his offender score based on the theory that the two convictions encompassed the "same criminal conduct," it is unlikely he has preserved this issue on appeal. See State v. Nitsch, 100 Wn. App. 512, 518-19, 997 P.2d 1000, review denied, 141 Wn.2d 1030 (2000). Even if we were to review it, however, we would reject it because the crimes did not have the same criminal intent. An objective view of the evidence shows that Vega-Filio's intent to commit assault arose from his animus toward Lovejoy after their relationship failed, while his intent to commit robbery arose later, as a way of preventing Lovejoy from reporting the assault.

Vega-Filio also argues that his 120-month sentence for first degree kidnapping—comprised of 84 months of confinement and 36 months of community custody—exceeded the statutory maximum. It did not. First degree kidnapping is a Class A felony. RCW

9A.40.010(2). The statutory maximum sentence for a Class A felony is life imprisonment. RCW 9A.20.021(1)(a). Vega-Filio has not presented grounds warranting further review under RAP 10.10.

Affirmed.

Becker, J.

WE CONCUR:

Leach, C.J.

Spearman, A.C.J.