IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2000 Term

FILED
May 5, 2000
DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 26733

RELEASED
May 5, 2000
DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
Plaintiff below, Appellee,

v.

HENRY HARRIS,
Defendant below, Appellant.

Appeal from the Circuit Court of Ohio County
Hon. Arthur M. Recht, Judge
Case No. 99-MAP-7

AFFIRMED

Submitted: March 22, 2000
Filed: May 5, 2000

William Ihlenfeld, II, Esq.
Robert G. McCoid, Esq.
Prosecuting Attorney's Office
Wheeling, West Virginia
Attorney for Appellee

Heather A. Wood, Esq.
Public Defender Corp.
Wheeling, West Virginia
Attorney for Appellant

JUSTICE STARCHER delivered the Opinion of the Court.

JUSTICE DAVIS concurs in part and dissents in part, and reserves the right to file a separate opinion.

SYLLABUS BY THE COURT

1. "In order to qualify as an excited utterance under W.Va.R.Evid. 803(2): (1) the declarant must have experienced a startling event or condition; (2) the declarant must have reacted while under the stress or excitement of that event and not from reflection and fabrication; and (3) the statement must relate to the startling event or condition." Syllabus Point 7, *State v. Sutphin*, 195 W.Va. 551, 466 S.E.2d 402 (1995).

2. When a court in a criminal case is evaluating whether to apply the "excited utterance" exception of *W.Va.R.Evid*. 803(2) to a hearsay statement offered against the defendant by an unknown, anonymous, declarant, the court should ordinarily conclude that the statement does not meet the criteria for the 803(2) exception, unless the statement is accompanied by exceptional indicia of reliability and the ends of justice and fairness require that the statement be admitted into evidence.

Starcher, Justice:

I.
Introduction

Henry Harris was convicted of domestic battery[1] on May 3, 1999, after a bench trial[2] before Judge Arthur Recht of the Circuit Court of Ohio County. Specifically, Mr. Harris was charged with beating up his girlfriend, to whom we will refer as Ms. M.

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[1]"*Domestic battery*" is the name the law gives to certain conduct that is defined as a crime by a statute enacted by the Legislature in 1994. That statute, *W.Va. Code*, 61-2-28 [1994], reads (in part) as follows:

> (a) Domestic battery.--If any family or household member unlawfully and intentionally makes physical contact of an insulting or provoking nature with another family or household member or unlawfully and intentionally causes physical harm to another family or household member, he or she is guilty of a misdemeanor, and, upon conviction thereof, shall be confined in jail for not more than twelve months, or fined not more than five hundred dollars, or both fined and confined.

"Battery" is a legal term for the illegal, intentional touching of another person. In this case, the circuit judge observed that Mr. Harris was actually quite fortunate to only be charged with the misdemeanor crime of domestic battery. The judge stated, when he sentenced Mr. Harris: "Quite frankly, the Defendant should have been indicted for [the felony of] Malicious Assault in this case, which carries with it a penitentiary punishment of not less than two nor more than ten years. This is a brutal beating."

[2]A "bench trial" is a trial where a judge, not a jury, decides whether a defendant who is charged with a crime is guilty or innocent. A defendant can waive their right to have their case decided by a jury. In this case, Mr. Harris apparently waived his jury trial right. He was first convicted in a bench trial in the Magistrate Court of Ohio County. He appealed to circuit court, where he had a second bench trial.

In this opinion, we include explanatory remarks like the foregoing that we might not put in an ordinary opinion of this Court -- because this case is being studied by a high school program called LAWS, where students attend the argument of a case before this Court and discuss the case (and our opinion) in class. For the same reason, we have tried to keep legal jargon and extensive citations to a minimum.

Judge Recht concluded that the evidence at trial showed beyond a reasonable doubt that Mr. Harris had indeed beaten Ms. M. -- and, therefore, Mr. Harris was guilty of domestic battery. The judge sentenced Mr. Harris to 1 year in jail.

In this appeal, Mr. Harris says that his conviction and sentence should be reversed and set aside, and that he should be entitled to a new trial. Mr. Harris argues that he did not receive a fair trial because the judge improperly based his decision on hearsay evidence.[3]

II.
Discussion

A.
Statement of Ms. M.

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[3] "Hearsay evidence" is a legal term for "second-hand" evidence. Technically, hearsay evidence is defined as (1) a statement by a person that is not trial testimony, that is (2) offered as evidence to prove that the statement is true. Both (1) and (2) have to be true, to make a statement hearsay.

We can illustrate with a hypothetical case what is and what is not legal hearsay. If Bob comes to court, and he testifies in court that the moon is made of blue cheese, Bob's statement is not hearsay, because the person who made the statement (Bob) is in court, and he makes the statement in court.

However, if Sally comes to court, and she testifies in court that "Bob said last night that the moon is made of blue cheese," Bob's statement, as recounted by Sally, may *or may not* be a hearsay statement.

If the issue at trial is whether the moon is really made of blue cheese, Bob's statement *is* hearsay -- because Bob is not in court to be cross-examined about why he is so sure about the composition of the moon.

However, if the issue at trial is not what the moon is made of, but whether Bob has some goofy ideas about the moon, Bob's statement as told by Sally *is not* hearsay -- because Bob's statement is being offered as evidence that Bob has goofy ideas, not to prove the truth of his statement itself.

The point is, sometimes a "she said" or "second-hand" statement is hearsay, and sometimes it is not -- and what is and is not legal hearsay can be difficult to understand, even for lawyers and judges.

In this case there was evidence introduced into the trial that Mr. Harris claims was improper hearsay. The evidence to which the defendant objects came from the police officers who arrested Mr. Harris. These officers testified that Ms. M. told them, at the residence where the police first encountered her, and later at a hospital where she was being treated, that Mr. Harris had beaten her several times on the night when he was arrested. The police testimony that Mr. Harris complains about, in summary, was: "She told us that Mr. Harris had beaten her."

Was the police testimony about what Ms. M. said to them hearsay? Using the two-part test that we describe at footnote 3, we first see that the police testified about statements that were not made in court -- Ms. M. made her statements about Mr. Harris just after Mr. Harris was arrested, and a short time later at the hospital.

Second, we see that Ms. M.'s statements were presented as evidence to prove that Mr. Harris in fact beat Ms. M. -- in other words, to prove the truth of the statements. So, Ms. M.'s statements that the police repeated to the court were indeed hearsay.

The question naturally arises as to why the prosecutor chose to use hearsay evidence, to prove that Mr. Harris beat Ms. M. Why didn't the prosecutor just call Ms. M. as a witness? Then her statement would not be hearsay. Moreover, if Ms. M. testified in court, there would not be the possibility that the police misheard her. And if she testified, Mr. Harris's lawyer could try to pick her testimony apart, and perhaps show that she was making things up or exaggerating. Both to make the prosecution's case stronger, and to make the trial more fair for Mr. Harris, direct evidence from Ms. M. would have been more desirable.

So why did the prosecution present the hearsay evidence from the police?[4] The answer is that Ms. M. did not testify. The prosecution tried more than six times to serve a subpoena on Ms. M., but could not do so. She was unable or unwilling to come to court to repeat what the police said she told them right after the alleged crime.

We do not know why the prosecution couldn't find Ms. M. to subpoena her. And even if they had subpoenaed her, we don't know if she would have shown up at trial -- and if she had shown up, we don't know what she would have said about the night that the alleged crime occurred. While we do not specifically know why Ms. M. wasn't in court at Mr. Harris's trial, we do know that in domestic violence cases it is common for the alleged victim not to "press charges" against the person who is accused or suspected of committing the domestic violence.

This legal opinion is not the place to write an essay on domestic violence. We are addressing an issue of evidence -- did Mr. Harris lose his right to a fair trial because the judge relied on hearsay evidence? But we do recognize in making our decision that domestic violence cases frequently present hearsay issues. The alleged victim commonly makes an initial statement to police in which the victim says that a certain person beat them -- but then later, the alleged victim often will not repeat that statement in court. Perhaps the alleged victim has or hopes to be reconciled with the person who is charged, perhaps they are fearful, perhaps they exaggerated or even lied in their initial statement. But whatever the reason,

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[4]Just because the police said that Ms. M. told them that Mr. Harris beat her, that testimony by the police does not guarantee that she did say that to them. Like the testimony of any other person, police testimony can be erroneous and inaccurate. Our criminal justice legal system has as a basic principle the rule that a police officer's testimony is not entitled to any special credibility just because they are a police officer.

in domestic violence cases, the criminal legal system is often presented with the fact that hearsay evidence may be the only evidence there is.

The unavailability of an alleged victim or other witness to testify in a criminal case can happen in many different circumstances, not just domestic violence cases. People move, they become sick or die, or they make themselves scarce. Sometimes victims or witnesses who are physically available to testify will no longer testify to things they said earlier. People change their recollections, they forget what happened, or they just "clam up."

Because there are often circumstances where people cannot or will not come into court to testify, our legal system has evolved a number of rules that describe when we will permit hearsay evidence of what a person said out of court to be presented as evidence in a court.

Where did we get these always-evolving "rules of evidence" that allow hearsay evidence in some cases? These rules evolved from individual cases, where trial court judges either let in some hearsay evidence -- or kept it out -- because it seemed to be fair and necessary or not fair and unnecessary under the circumstances. Then a party who objected to the trial judge's ruling on hearsay evidence appealed. And then an appeals court (like ours) looked at what the trial judge did, and approved or disapproved of the trial judge's ruling, and wrote down their reasons in a legal opinion like this one.

Other appeals courts, facing similar issues of hearsay evidence, would read these opinions in law books -- as would the law professors and scholars who write books based on court opinions. Over hundreds of years, commonly accepted (but always evolving) rules have emerged from these cases and books, rules that give courts guidance as to when a court may allow hearsay evidence to be the basis for a court decision.

One of these rules, in the area of hearsay evidence, has come to be called in West Virginia the "excited utterance" rule. In our *West Virginia Rules of Evidence*, Rule 803(2) says:

> [a] statement relating to a startling event or condition made while the declarant [the person making the statement] was under the stress of excitement caused by the event or condition.

This Court set forth its most recent discussion of this rule in the case of *State v. Sutphin*, 195 W.Va. 551, 466 S.E.2d 402 (1995). In *Sutphin* we said:

> In order to qualify as an excited utterance under W.Va.R.Evid. 803(2): (1) the declarant must have experienced a startling event or condition; (2) the declarant must have reacted while under the stress or excitement of that event and not from reflection and fabrication; and (3) the statement must relate to the startling event or condition.

Syllabus Point 7, *State v. Sutphin*, 195 W.Va. 551, 466 S.E.2d 402 (1995).

In applying this rule to Mr. Harris's appeal, the question that this Court must decide is: was Judge Recht correct in concluding that the statements that the police testified that Ms. M. made qualified as "excited utterances?" If Ms. M.'s statements were "excited utterances," then it was permissible for the judge to allow the statements into evidence, and to base his decision on the statements -- even though the statements were hearsay.

To make this decision, we must look at what evidence the judge had about when and how the statements were made. We must ask: did this evidence, if the judge believed it, allow the judge to conclude that Ms. M.'s statements, that Mr. Harris beat her, were excited utterances?

The testimony before the judge was that Ms. M. had a broken nose, profuse bleeding from the nose, and an eye that was swollen shut. The photographs of Ms. M. strongly suggested that she had received a severe beating. There is no doubt that such a beating and such injuries are a "startling event."

Officer Schultz testified that he arrived at the scene of the alleged beating "within two minutes" of having received notification from dispatch. He testified that "less than ten minutes" had elapsed between the time that he had arrived at the scene and the time he encountered Ms. M. Upon encountering her, he noted that she was "upset [and] crying," that she was "bleeding from the nose quite heavily," and that the blood that he observed about her was "fresh." Officer LaCava similarly testified that, upon encountering Ms. M., he observed that she was "bleeding from the nose and mouth area." Significantly, Schultz testified that Ms. M.'s eye was noticeably swelling shut in his presence. Ms. M.'s statements to the police at her residence were clearly made while she continued to experience excitement over the startling event.

With respect to Ms. M.'s statement at the hospital emergency room, reaffirming her statements made to the officers while at her residence, Officer Schultz testified that his hospital interview of Ms. M. occurred less than 30 minutes from the time that he left her at her residence, and that she was still "very upset and crying" during the interview. These statements also clearly qualified as excited utterances.

We conclude that the circuit court judge did not make a legal error in applying the "excited utterance" rule to the statements of Ms. M. The judge was on solid ground in basing his decision to convict Mr. Harris on the statements by Ms. M. to which the police testified -- even though she did not testify herself at trial.

B.

Statement of "Someone in the Crowd"

Mr. Harris also argues that the circuit court considered other hearsay evidence at his trial that made the trial unfair. This evidence came in when the police were describing how they first came to the scene, where they found the injured Ms. M. Specifically, the police testified that there was a crowd of 10 or so people on the scene, and that one of them (no one knew who) shouted to the police that Mr. Harris had just beaten Ms. M.

Was this alleged statement to the police by an anonymous person in the crowd hearsay? It was an out-of-court statement, so it meets the first part of the test. Was this statement offered to prove the truth of the statement? That is, was it offered to prove that Mr. Harris beat Ms. M. -- or was it offered in evidence just to explain why the police went after Mr. Harris?

While we cannot tell clearly from the record why the statement was offered, we will assume that it was offered to help prove that Mr. Harris beat Ms. M. Therefore, it was hearsay.

If this "crowd member" statement was hearsay, then our next question is: did the statement qualify as an "excited utterance?"

Here, the question is far more difficult than the case of Ms. M.'s statements. The circuit court had plenty of evidence that showed that Ms. M.'s statements were "excited utterances." But the circuit court had much less evidence to go on, in evaluating the circumstances of the anonymous "crowd member" statement.

For one thing, the court had no idea of the identity of the person who the police testified made the statement. For all the court knew, that person, if they indeed said what the police said, was repeating something that someone else had told them, and had not seen anything directly.

This situation was confronted by the Supreme Court of New York, Appellate Division, in the case of *People v. Alexander*, 173 A.D.2d 296, 569 N.Y.S.2d 689 (1991). In that case, Donald Alexander was convicted of burglary of an apartment. The trial judge allowed a police officer to testify that people in a crowd outside the apartment building had told the police that they had seen Mr. Alexander climb out the window of the burglarized apartment.

The New York Appeals Court concluded that the police testimony that "people in the crowd said that Mr. Alexander climbed out the window" was clearly hearsay, because the crowd statement was an out-of-court statement, and it was offered to prove the truth of the statement -- that Mr. Alexander had indeed climbed out the window.

The next question the New York court considered was whether the "excited utterance" exception to the rule against hearsay (New York calls this the "spontaneous declaration" exception) allowed the anonymous "crowd member" statement to be used as evidence against Mr. Alexander.

The New York court noted that there was no proof of the identity of the crowd members, and no proof that they actually had an adequate opportunity to observe the events they described. The New York court decided that under these circumstances, the "excited utterance" exception did not apply -- because the trial court did not have a sufficient basis to evaluate the circumstances of the person who made the statement.

We agree with the New York court that the situation of an unavailable, anonymous, unknown declarant who makes a hearsay statement should presents serious concerns for a court considering whether to admit the statement into evidence.

In another similar case, another appeals court stated that when the hearsay declarant is not only unavailable but is also unidentified, the party seeking to introduce the hearsay statement carries a heavier burden to demonstrate the statement's circumstantial trustworthiness. *Miller v. Keating*, 754 F.2d 507, 510 (3d Cir. 1985).

Unquestionably, it goes against our longstanding legal tradition, of insisting on a strict and high standard of proof and evidence in criminal cases, to allow people to be convicted of crimes based on the statements of anonymous people who do not appear in court to make their accusations.

Of course there are many well-recognized and necessary exceptions to the rule that hearsay is generally prohibited. But the hearsay rule itself is crucial to the fairness of a criminal trial, where it should be applied strictly and its exceptions construed narrowly and in favor of the criminal defendant.

The distinguished law professor Frank Cleckley of the West Virginia University College of Law, and a former Justice of this Court, states in his classic text on West Virginia evidence law that "[a]n excited utterance is not admissible under Rule 803(2) unless the utterance is based upon personal knowledge of the declarant. See *State v. Golden*, 175 W.Va. 551, 336 S.E.2d 198 (1985)[.]" Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers*, Vol. 2, 3d ed., Sec. 8-3(B)(2)(d). p. 201. Applying this principle to the record before us, it appears that the trial court did not have a solid basis to conclude that the "crowd member's" statement, that Mr. Harris had beaten Ms. M., was based on that crowd member's personal knowledge.

Based on the foregoing, we hold that in a criminal case when a court is evaluating whether to apply the "excited utterance" exception of the *W.Va.R.Evid*. 803(2) to a hearsay statement by an unknown, anonymous, declarant, the court should ordinarily conclude that the statement does not meet the

criteria for the 803(2) exception, unless the statement is accompanied by exceptional indicia of reliability and the ends of justice and fairness require that the statement be admitted into evidence.

In the *Alexander* case, the New York court reversed Mr. Alexander's conviction because of the hearsay that was used in his trial, and remanded the case for a new trial in which the "crowd" statements could not be put into evidence against Mr. Alexander. Specifically, the New York court reversed Mr. Alexander's conviction because "the only evidence placing [Mr. Alexander] directly at the scene of the crime was the crowd's hearsay statement." 173 A.D.2d at 298, 569 N.Y.S.2d at 691.

However, in the case before us, the anonymous crowd member's alleged statement that Mr. Harris had just beaten Ms. M. was not the only evidence that directly implicated Mr. Harris. Ms. M. herself, and other circumstantial evidence, directly and clearly implicated Mr. Harris.

Additionally, when we read the trial judge's statement of his reasons for finding Mr. Harris guilty, the judge does not mention at all the "crowd member's" statement. Rather, the only "statement" that the judge refers to is the police testimony about what Ms. M. told them.

III.
Conclusion

We conclude that while the trial court technically erred in allowing the crowd statement to be put in evidence to prove that Mr. Harris beat Ms. M., because the trial judge did not consider that evidence in making his decision, that evidence did not contribute to the conviction of Mr. Harris. The trial judge's minor error did not deprive Mr. Harris of his right to a fair trial. We therefore affirm Mr. Harris's conviction for domestic battery, and his sentence based on that conviction.

Affirmed.