STATE OF MINNESOTA
IN COURT OF APPEALS
A10-224

State of Minnesota,
Appellant,

vs.

Roger Vernon Henderson,
Respondent.

Filed September 7, 2010
Affirmed in part, reversed in part, and remanded
Muehlberg, Judge[*]

Hennepin County District Court
File No. 27-CR-09-57909

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Susan L. Segal, Minneapolis City Attorney, Jennifer A. Saunders, Assistant City Attorney, Minneapolis, Minnesota (for appellant)

Sharon E. Jacks, St. Paul, Minnesota (for respondent)

Considered and decided by Stauber Presiding Judge; Lansing, Judge; and Muehlberg, Judge.

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

MUEHLBERG, Judge

In this pretrial appeal, the State of Minnesota challenges the district court's ruling granting, in part, a motion by respondent to exclude statements made by his stepson during a 911 call and by his wife to police when they responded to the call shortly after 1:00 a.m. on November 22, 2009. We affirm in part, reverse in part, and remand.

FACTS

In the early morning hours of November 22, 2009, a 911 call was placed from the north Minneapolis residence of respondent Roger Vernon Henderson. The call was made by respondent's 20-year-old developmentally disabled stepson. The stepson indicated that he was calling from the basement of the house and that respondent was "upstairs beating up on my mother right now." The brief call ended with the statement, "I'm busted . . . cops," and the sound of a struggle.

Minneapolis police officer James Loveland and his partner arrived at the residence within three minutes of the call. Loveland testified that he did not hear any fighting or noise as he approached the house. Respondent answered the door and stepped outside, where he was detained by Loveland's partner. Respondent was cooperative and did not resist.

Loveland went inside the house and came upon respondent's wife, his stepson, and his 12-year-old son. According to Loveland, the wife was crying and visibly upset, but not hysterical or sobbing, and the stepson and other son were calm.

Officer Loveland interviewed respondent's wife, who told him that she and respondent had returned from the grocery store approximately 30 minutes earlier. Respondent asked his stepson to turn down or turn off his hand-held video game because it was too loud. Respondent's wife told Loveland that when the stepson did not comply, respondent pushed him from the room into the basement and locked the door on him. The wife further stated that when she tried to help her son, respondent began to push her around the room. The wife stated that she was concerned about calling 911 because she was afraid she might lose her in-home daycare business. She also stated that she had not called 911 in the past, but this time she was so afraid that she tried to do so, but respondent either pushed her or knocked the phone out of her hand, and she hit the closet door near the front entry of the house. As the wife was making these statements to Loveland, she was speaking through her tears, but she calmed down before Loveland left. The officers arrested respondent.

Loveland took photographs of a bunched rug that the wife reported she had tripped over and of the broken phone lying on the floor. There were no other signs of a struggle and no one had any signs of physical harm. The next day, with the help of her daughter, respondent's wife sought an order for protection that was subsequently dismissed at the wife's request.

A complaint was filed charging respondent with interfering with an emergency call in violation of Minn. Stat. § 609.78, subd. 2 (2008); two counts of misdemeanor domestic assault against his wife in violation of Minn. Stat. § 609.2242, subd. 1(1), (2) (2008); two counts of misdemeanor domestic assault against his stepson in violation of

Minn. Stat. § 609.2242, subd. 1(1), (2) (2008); and disorderly conduct in violation of Minn. Stat. § 609.72, subd. 1(3) (2008).

Prior to trial, the wife was served with a subpoena and indicated that she would be available for pretrial hearings and trial. But in a statement to a victim advocate made on the day trial was to begin, the wife recanted portions of her statement to Loveland. Instead, she described a heated disagreement between respondent and the stepson in which the stepson threatened to kill respondent. She also described her argument with respondent, during which she claimed that he grabbed a wooden deer that she pulled away from him. She further claimed that she held a box of toys in front of her and became scared when she saw the look on his face, dropped the box, and ran around the kitchen table with him following. The wife further told the advocate that she told respondent that she wanted a divorce, grabbed her coat, and ran to the door, at which point respondent placed two fingers on his stepson's shoulder and told him to go downstairs while she calmed down. The wife stated that respondent closed the basement door, which automatically locked behind the stepson. The wife further stated that while she was running to the front door, she told the stepson to call police, which she hoped would "shock" respondent and "make him think." Respondent told her to calm down. She tripped over the rug and dropped the phone she was holding. The wife told the victim advocate that it was the stepson who mostly spoke with police and that she only remembered crying and agreeing to what the stepson said.

In motions in limine prior to trial, defense counsel moved to exclude statements made by respondent's wife to police and by his stepson to the 911 operator. On the record over a two-day period, the district court granted the defense motion in part.

The district court first ruled that the stepson was incompetent to testify about the incident because he was developmentally disabled and had not been taking his medications on the day of the incident. The district court further concluded that the stepson's statement that his stepfather was "beating up" on his mother was inadmissible because the probative value of the statement was outweighed by its prejudicial effect. The district court nevertheless granted the state's request to be allowed to call the 911 operator, who could testify that she had received a call that night from the residence seeking assistance and that she had dispatched police. The district court also ruled, at the state's request, that the jury could hear the last part of the 911 call, wherein there was a struggle and the call ended abruptly, as an excited utterance.

The district court next ruled that if the wife took the stand and testified inconsistently with her initial statements to police, the state could impeach her with those out-of-court statements. But the district court denied the state's request that it be allowed to admit these statements as substantive evidence under the excited utterance rule or under the residual exception to the hearsay rule.

The state has taken this pretrial appeal, claiming that the district court abused its discretion in its rulings. The stated argues that (1) the wife's statements are admissible under exceptions to the hearsay rule and do not invoke a Confrontation Clause analysis;

and (2) the statement made by the stepson during the 911 call is admissible, even though the developmentally disabled stepson was ruled incompetent to testify.

D E C I S I O N

I.

Critical Impact

"In a pretrial appeal, the state must demonstrate (1) the trial court 'clearly and unequivocally erred' in its judgment, and (2) the error will have a 'critical impact' on the outcome of the trial unless reversed." *State v. Aubid*, 591 N.W.2d 472, 477 (Minn. 1999) (quoting *State v. Joon Kyu Kim*, 398 N.W.2d 544, 547 (Minn. 1987)). Critical impact can be shown not only "where the lack of the suppressed evidence completely destroys the state's case, but also in those cases where the lack of the suppressed evidence significantly reduces the likelihood of a successful prosecution." *Joon Kyu Kim*, 398 N.W.2d at 551.

The state argues that the district court's rulings have a critical impact on its ability to successfully prosecute this case because respondent's wife has recanted her original statements to Loveland and has made it clear that she will not testify favorably to the prosecution. The state also argues that because the stepson has been declared incompetent to testify at trial, his statements to the 911 operator are the only evidence available to show what he perceived that night.

Respondent counters the state has failed to establish critical impact because the district court's rulings are conditional and it is still unknown whether the wife will testify inconsistently with her statement to police. But the fact that the district court's rulings

were conditional does not necessarily mean that it lacks critical impact for purposes of a pretrial appeal. *See In re Welfare of L.E.P.*, 594 N.W.2d 163, 169 (Minn. 1999) (holding that critical impact shown when there was uncertainty as to whether victim would testify and what her testimony would be if she did testify). Without the excluded statements, it will be difficult for the state to prosecute respondent on all of the charged offenses. We therefore conclude that the critical impact requirement has been met in this case.

II.

Admissibility of wife's statements to police

The district court ruled that the wife's out-of-court statements to Officer Loveland are not admissible as excited utterances because the ongoing emergency ended once police arrived and respondent was removed from the house and placed in the squad car by Loveland's partner, everyone was calm and cooperative, the wife was safe and secure, and her statements were not spontaneous but were in response to questions from Loveland. The state asserts that the district court's concerns are more properly applied to a determination of whether statements are testimonial or nontestimonial for purposes of the Confrontation Clause.[1]

While this is true, the factors considered by the district court tend to overlap with factors relevant to whether the statements are admissible under the rules of evidence. The fact that the statements are testimonial does not foreclose admissibility of the

[1] It should be noted that the district court determined that the wife's statements were testimonial for purposes of the Confrontation Clause. At this point, the parties agree that there is no Confrontation Clause problem because it is presumed that the wife is available to testify at trial.

statements as excited utterances or under the residual hearsay exception. *See State v. Robinson*, 718 N.W.2d 400, 409-10 (Minn. 2006) (concluding that Confrontation Clause does not apply where witness testified and was subject to cross-examination, and that witness's statements were admissible under residual hearsay exception); *see also State v. Wright*, 726 N.W.2d 464, 473 (Minn. 2007) (listing factors to consider in determining whether statement is testimonial or nontestimonial).

For a statement to be admitted as an excited utterance, there must be a startling event or condition, the statement must relate to the event or condition, and the statement must be made under the stress caused by the event or condition. Minn. R. Evid. 803(2) 1989 comm. cmt. The rationale behind the exception "stems from the belief that the excitement caused by the event eliminates the possibility for conscious fabrication, and insures the trustworthiness of the statement." *State v. Daniels*, 380 N.W.2d 777, 782 (Minn. 1986). Relevant factors to consider include "the length of time elapsed, the nature of the event, the physical condition of the declarant, [and] any possible motive to falsify." *Id*. at 782-83.

Consideration of these factors supports admission of the wife's statements in this case. First, the lapse of time between the incident and the statements was very short: Loveland and his partner responded to the 911 call within approximately three minutes and the wife's statements were made to Loveland in the next 15 minutes. *See, e.g.*, *Daniels*, 380 N.W.2d at 783 (statements made within one hour after fatal house fire admissible); *State v. Berrisford*, 361 N.W.2d 846, 850 (Minn. 1985) (statements made 90 minutes after murder admissible); *State v. Berry*, 309 N.W.2d 777, 779-80, 783 (Minn.

1981) (statements made within about one hour of murder admissible). Next, the nature of the incident qualifies it as a startling event: the wife stated that she had just witnessed respondent push her son into the basement and lock the door; the wife further claimed that respondent then pushed her, chased her around the table, and prevented her from calling 911. The wife's physical condition when police arrived further supports admission of her statements: she was upset and crying when police arrived, and she only calmed down after Loveland spoke with her for approximately 15 minutes. *See Daniels*, 380 N.W.2d at 783 (one declarant shaking and the other frightened); *see also State v. Edwards*, 485 N.W.2d 911, 912, 915-16 (Minn. 1992) (concluding statement admissible under residual exception to hearsay rule when declarant appeared frightened and was clinging to hospital bed).

Finally, the statements appear reliable and the conditions under which the statements were given tend to show trustworthiness. The fact that the statements were made in response to police questioning does not necessarily render those statements inadmissible or unreliable. *See In re Welfare of Chuesberg*, 305 Minn. 543, 546, 233 N.W.2d 887, 889 (1975) (statement made in response to nonleading question); *State v. Ellis*, 271 Minn. 345, 365-67, 136 N.W.2d 384, 396-98 (1965) (statement made in response to officers' demand for gun); *see also State v. Stallings*, 474 N.W.2d 645, 650 (Minn. App. 1991) (stating that when hearsay declarant subsequently recants excited utterance, this does not negate statement's reliability; "excited utterance is reliable because the excitement caused by the event eliminates the possibility of conscious fabrication" (quotation omitted)), *rev'd on other grounds*, 478 N.W.2d 491 (Minn. 1991).

Compare State v. Page, 386 N.W.2d 330, 333-34 (Minn. App. 1986) (reversing district court's admission of statements to police as excited utterance when made during interview following deliberate and successful effort to calm declarant, which "took quite a little time"), *review denied* (Minn. June 30, 1986).

At this point, nothing in the record suggests that the wife had motive or opportunity to consciously fabricate her statements or that her statements were unreliable. She expressed her reluctance to Loveland, but told him what happened despite that reluctance. The fact that she has since attempted to recant those statements does not render them unreliable. Victims of spousal abuse have been known to recant evidence of their abuse. *See generally State v. Grecinger*, 569 N.W.2d 189, 194-95 (Minn. 1997) (upholding admissibility of expert testimony on battered women syndrome to explain victim's failure to pursue prosecution).

Evidentiary rulings are generally within the discretion of the district court. *Aubid*, 591 N.W.2d at 478. Because the wife's statements to police at the scene meet the requirements for admissibility as excited utterances and because the district court focused on factors that were more relevant to determining whether the statements were testimonial or nontestimonial for purposes of the Confrontation Clause, we conclude that the district court abused its discretion in its pretrial ruling. Given this decision, we need not consider whether the statements are also admissible under the residual exception to the hearsay rule, Minn. R. Evid. 807, or as non-hearsay admissible under the present sense impression exception, Minn. R. Evid. 801(d)(1)(D).

III.

Admissibility of stepson's statements to 911 operator

The state argues that the stepson's statements during his 911 call are admissible even if he is declared incompetent to testify at trial. The state argues on appeal that the statements are admissible either as an excited utterance under Minn. R. Evid. 803(2) or under the residual hearsay exception, Minn. R. Evid. 807. But the state did not seek admission of the statements under either of these rules, and the parties focused on the stepson's competence to testify. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1990) (declining to address issues not raised to district court).

With the exception of the last portion of the 911 call, which the district court ruled it would allow into evidence, the district court excluded the rest of the stepson's statements under Minn. R. Evid. 403. A district court has discretion to exclude evidence if "its probative value is substantially outweighed by the danger of unfair prejudice." Minn. R. Evid. 403. The danger of unfair prejudice in the admission of this evidence is high: the stepson's statement that his stepfather was "upstairs beating up on my mother" is highly prejudicial. Moreover, the reliability of the evidence is questionable, given the fact that the statement was made while the stepson was in the basement and was thus based solely on what he believed was going on upstairs. And the stepson made his statements during a time when he was not taking his medications. Under these circumstances, the district court did not abuse its discretion in ruling that the stepson's statements were inadmissible under rule 403.

Affirmed in part, reversed in part, and remanded.