NOT FINAL UNTIL TIME EXPIRES FOR REHEARING
AND, IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

STATE OF FLORIDA

Appellant,

v.

Appeal No. CRC 14-00024 APANO
UCN: 522014AP000024XXXXCR

ASHLEY E. TYSON

Appellee.
_____/

Opinion filed September 8, 2014.

Appeal from an order granting in part
a Motion in Limine entered by
the Pinellas County Court,
County Judge Paul A. Levine

John D. McBride, Esquire
Office of the State Attorney
Attorney for Appellant

Debora S. Moss, Esquire
Attorney for Appellee

ORDER AND OPINION

PETERS, Judge.

THIS MATTER is before the Court on Appellant, State of Florida's, appeal from an order granting a defense Motion in Limine. We affirm.

Background

The Appellee, Ashley Tyson, was charged by Misdemeanor Information with Driving Under the Influence. On the morning a jury trial was to commence, Ms. Tyson's counsel argued a Motion in Limine seeking to exclude at least a portion of the 911 recording; specifically arguing all of the recording was not an excited utterance. The trial court heard argument, listened to the recording and made the following ruling:

> What I'm going to do is I'm going to allow in the first 45 seconds of the tape. I think the first 45 seconds clearly established an exception to the hearsay rule under an excited utterance.
>
> After the first 45 seconds, the tape sort of gets into a situation where the lady, although explaining what she's reportedly seeing at the time, you know, could be found to her trying to support her observations as was stated earlier in the call. *Maybe, maybe not, but what I'm going to do is strike a balance that I think is fair based upon the motion and allow in the first 45 seconds* ... (emphasis added).

In response the State of Florida filed the present appeal.

Issue

Appellant argues the trial court committed reversible error by ruling that portions of the 911 call could not be admitted into evidence at trial.

Standard of Review

The standard of review of a trial court's ruling on a motion in limine is abuse of discretion. ... Such discretion is limited by the rules of evidence, and a trial court abuses its discretion if its ruling is based on an "erroneous view of the law or on a clearly erroneous assessment of the evidence." *Patrick v. State*, 104 So.3d 1046, 1056 (Fla. 2012) (internal citation omitted). Under the abuse of discretion standard, discretion is abused only 'when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would

take the view adopted by the trial court. *Frances v. State,* 970 So.2d 806, 813 (Fla. 2007). If reasonable people could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. *Bryant v. State*, 901 So.2d 810, 817 (Fla. 2005). Nevertheless a trial court's ruling on a motion in limine based upon an erroneous interpretation of the applicable case law is reviewed de novo. *Bellevue v. Frenchy's South Beach Cafe, Inc.*, 136 So.3d 640, 643 (Fla. 2nd DCA 2013).

Involved Points of Law

1. *Hearsay Evidence and Police Dispatch Information.* "Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Section 90.801(1)(c), Fla.Stat. (1989). A statement is 'an oral or written assertion.' Section 90.801(1)(a) 1, Fla.Stat. (1989). 'If an out-of-court statement is offered in court to prove the truth of the facts contained in the statement, it is hearsay. If an out-of-court statement is not offered to prove the facts contained in the statement, it is not hearsay.' Ehrhardt, *Florida Evidence,* § 801.2 (1992 ed.) (footnotes omitted)." *Lark v. State,* 617 So.2d 782, 788 (Fla. 1st DCA 1993).

Hearsay testimony of a police dispatch report is normally irrelevant and inadmissible evidence at trial. If it is offered as proof that there was a crime in progress it is hearsay. If it is offered to show why law enforcement had contact with a suspect it is irrelevant and inadmissible. *See Conley v. State*, 620 So2d 180, 182 (Fla. 1993). The inherently prejudicial effect of admitting into evidence an out-of-court statement relating accusatory information only to establish the logical sequence of events outweighs the probative value of such evidence. *State v. Baird*, 572 So.2d 904, 908 (Fla.1990).

2. *Florida Statute § 90.803. Hearsay exceptions; availability of declarant immaterial.* Florida Statute § 90.803, in pertinent part, provides:

> The provision of s. 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:
>
> (1) Spontaneous statement.--A spontaneous statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, except when such statement is made under circumstances that indicate its lack of trustworthiness.
>
> (2) Excited utterance.--A statement or 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.

3. *Florida Statute §90.403. Exclusion on grounds of prejudice or confusion.* Florida Statute § 90.403 provides:

> Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. This section shall not be construed to mean that evidence of the existence of available third-party benefits is inadmissible.

The Present Case

For purposes of discussion and for simplicity, we will assume that the entirety of the 911 call was admissible hearsay.[1] That assumption made, the trial court exercised discretion contemplated by Florida Statute § 90.403 by allowing only the first forty-five seconds of the call into evidence. The record before this court does not establish an abuse of discretion; the involved judicial action was not arbitrary, fanciful, or unreasonable nor can it be seriously contended that no reasonable person would have

[1] The briefs filed in this appeal primarily, if not exclusively, address the issue of whether portions of the 911 recording qualify as hearsay exceptions of spontaneous statements or excited utterances. This court appreciates and compliments the professional and detailed arguments presented. However, as explained above, this court concludes it is not necessary address whether or not the entire 911 recording is admissible hearsay to resolve the issue presented by this appeal.

allowed only the first 45 seconds of the 911 recording to be played at trial. The trial court's ruling on the Motion in Limine made and argued on the morning a jury trial was to commence was not reversible error.

Conclusion

This court concludes the order of the trial court should be affirmed.

IT IS THEREFORE ORDERED that the order of the trial court is affirmed.

ORDERED at Clearwater, Florida this 8th day of September, 2014.

Original order entered on September 8, 2014 by Circuit Judges R. Timothy Peters, Michael F. Andrews, and Raymond O. Gross.

cc: Honorable Judge Paul A. Levine
Office of the State Attorney
Debora S. Moss, Esquire