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

CRAIG ALLEN MOTLEY.

Appellant,

v.

Appeal No. CRC 14-00032 APANO
UCN 522014AP000032XXXXCR

STATE OF FLORIDA

Appellee.
_____/

Opinion filed November 12, 2014

Appeal from a judgment and sentence
entered by the Pinellas County Court
County Judge Robert Dittmer

Simone A. Lennon, Esquire
Attorney for Appellant

Office of the State Attorney
Attorney for Appellee

ORDER AND OPINION

PETERS, Judge.

THIS MATTER is before the Court on Appellant, Craig Allen Motley's, appeal from a conviction, after a jury trial, of Battery, a first degree misdemeanor, in violation of § 784.03 (1) Fla. Stat. We affirm.

Background

On September 27, 2013, Officer Caricia Martinez of the St. Petersburg Police Department was dispatched to a domestic violence call. Upon arrival at the involved location Officer Martinez made contact with and took a statement from the victim, Vera Mathis, Mr. Motley's wife. At trial, the following testimony of Officer Martinez was presented:

Q. Okay. Let's go step-by-step. You stated first you spoke to the victim in this case?

A. Yes, sir.

Q. Can you please explain to the members of the jury how would you describe her -- I mean, how would you describe her emotional state? I mean, how did she appear to you when you made contact with her?

A. She was upset when I made contact with her.

Q. Okay. Did she appear to be under the stress of the event that had just occurred?

A. Yeah. She appeared upset.

Q. Okay. And was she upset while she was making statements to you?

A. Yes.

Q. Okay.

A. I would say she was upset as I was talking to her, getting her statement.

Q. Okay. I want to talk to you about your conversation with her. What exactly did your conversation entail? I mean, what did she tell you?

A. When I made contact with her, you know, I asked her if she was okay, if she needed rescue. And then I asked –

MR. SEVERSON: Objection. Hearsay.

[...]

Q. And Officer, when you stated she was upset, how would you describe -- I mean, what led you to believe her to be under this upset state, emotional state?

A. She was talking quickly and her demeanor was stressed out. Her shoulders were tense and I had to bring her back to point.

Q. Okay. So stressed out is what you said? And how long after this incident had happened between and when you were making contact with her (sic)?

A. How long did it occur?

Q. Right. How long ago did the battery occur to her from the time you got there (indiscernible)?

A. I don't have the exact lapse of time.

Q. Okay.

A. The reported time is it occurred between 8:00 and 8:07 p.m. --
Q. Okay.
A. -- but I don't have my arrival time.
Q. Was it a long time after, or -- I mean, how quickly did you respond?
A. It would not have been a long time because it's a priority type of call, but, I'm sorry, I don't know the exact amount of the lapse of time.
Q. Okay. But as far as you can tell from your experience in these types of calls and this night, it was not a long time?
A. Yeah. It would not have been.

The hearsay objection was overruled. The victim and Mr. Motley also testified at trial and a recording of the 911 call was entered into evidence. At the conclusion of the trial, the jury found Mr. Motley guilty of the charged offense, misdemeanor battery.

Issue

Appellant argues the trial court erred in admitting into evidence at trial, as an *excited utterance*, the victim's hearsay statements made to a responding police officer.

Standard of Review

A trial court has wide discretion concerning the admissibility of evidence, and, in the absence of an abuse of discretion, a ruling regarding admissibility will not be disturbed. *Jent v. State,* 408 So.2d 1024, 1029 (Fla. 1981); *See Williams v. State,* 967 So.2d 735, 747-48 (Fla.2007), *cert. denied,* 552 U.S. 1283, 128 S.Ct. 1709, 170 L.Ed.2d 519 (2008); *Johnston v. State,* 863 So.2d 271, 278 (Fla.2003); *Werley v. State,* 814 So2d 1159, 1161 (Fla. 1st DCA 2002). "However, a trial court's discretion is limited by the rules of evidence. [...] 'Discretion ... is abused 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.'" *Ballard v. State*, 66 So.3d 912, 917 (Fla. 2011) (internal citation omitted). If the trial court

mistakenly allows the introduction of inadmissible evidence it will not be reversed if the error was preserved and was harmless.[1]

Involved Points of Law

1. *The "Excited Utterance" Hearsay Exception.* Florida Statute § 90.803(2) provides hearsay statements are admissible when there is a startling event or condition that causes a person to be in a state of excitement.

> This Court has stated "that to qualify as an excited utterance, [a] statement must be made: (1) 'regarding an event startling enough to cause nervous excitement'; (2) 'before there was time to contrive or misrepresent'; and (3) 'while the person was under the stress or excitement caused by the event.' (citations omitted) "While an excited utterance need not be contemporaneous to the event, it must be made while the declarant is under the stress of the startling event and without time for reflection." (citations omitted).

Hojan v. State, 3 So3d 1204, 1209-1210 (Fla. 2009).

2. *Statements to Police & Excited Utterance.* While several Florida courts have remarked in dicta that statements made in response to police questioning are, by definition, not excited utterances,[2] there is a substantial body of case authority, including a Florida Supreme Court Case, finding statements given to officers under stressful situations to be excited utterances.[3]

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[1] [T]he defendant bears the burden of demonstrating that an error occurred in the trial court, which was preserved by proper objection. [...] Only when the defendant satisfies the burden of demonstrating the existence of preserved error does the appellate court engage in a *DiGuilio* harmless error analysis. If the error is not properly preserved or is unpreserved, the conviction can be reversed only if the error is "fundamental." *Goodwin v. State,* 751 So.2d 537, 544 (Fla. 1999) (internal citations omitted).

[2] *Blandenburg v. State,* 890 So.2d 267, 272 (Fla. 1st DCA 2004); *J.A.S. v. State,* 920 So.2d 759, 763 (Fla. 2d DCA 2006); *Lyles v. State,* 412 So.2d 458, 460 (Fla. 2d DCA 1982); *Strong v. State,* 947 So.2d 552, 557 (Fla. 3rd DCA 2006).

[3] *See Garcia v. State*, 492 So. 2d 360, 365 (Fla. 1986) (Statement made to police officer by wounded victim was admissible because "her response was spontaneous, sprang from the stress, pain and excitement of the shootings and robberies, and was not the result of any premeditated design."); *Conley v. State,* 592 So. 2d 723, 727-28 (Fla. 1stDCA 1992), rev'd on other grounds, 620 So. 2d 180 (Fla. 1993) (Statement of sexual battery victim made to police officer when he arrived at scene in which victim stated that a man called "Mad Dog" had just raped her and a statement that she made thirty-five to sixty minutes later recounting the details of the incident were admissible under section 90.803(2).); *Holmes v. State*, 642 So.

> We have previously found statements given in question-and-answer exchanges by officers under similarly stressful situations to be excited utterances. *See, e.g., Henyard* [*v. State*], 689 So.2d [239] at 251 [(Fla. 1996)] (holding victim's statements made to officer at scene were excited utterances); *Pope v. State,* 679 So.2d 710, 713 (Fla.1996) (holding victim's statement to officer during questioning at scene was an excited utterance).

Hojan, 3 So3d at 1210.

Analysis

The Appellant argues the trial court erred by allowing into evidence, as an *excited utterance*, the testimony by Officer Martinez regarding the victim's statements. The problem with this argument is there was no abuse of the wide discretion of the trial court concerning the admissibility of evidence; the admission of the disputed statements was not arbitrary, fanciful, or unreasonable. There was *competent substantial evidence* in the record to support the trial court's conclusion that the disputed statements were *excited utterances*.[4] The first witness called to testify by the State Attorney was the victim, Vera

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2d 1387, 1389 (Fla. 2d DCA 1994) (Statements by victim at hospital about an hour and a half after the shooting when the detective described the victim as "upset" were inadmissible under section 90.803(2); *Bell v. State*, 847 So. 2d 558, 561 (Fla. 3d DCA 2003) (In prosecution for attempted kidnapping, no error to admit testimony concerning statement of victim made 50 minutes after the crime where victim was hysterical and unable to speak when the police first arrived at the crime scene.); *Pedrosa v. State*, 781 So. 2d 470 (Fla. 3d DCA 2001) ("[T]he victim's statements made to the police immediately after the incident qualified as excited utterances.); *Williams v. State*, 714 So. 2d 462, 463 (Fla. 3d DCA 1997) (In domestic violence prosecution, tape of 911 call containing victim's statement that "her boyfriend, Williams, had forced his way into her apartment and struck her on the forehead" was admissible under section 90.803(2) as an excited utterance.); *Rivera v. State*, 718 So. 2d 856, 857 (Fla. 4th DCA 1998) (Victim's statement to police officer that defendant had punched her in the lip made 15 minutes after the incident when the victim was crying hysterically was admissible under section 90.803(2) after the victim testified at trial that the defendant did not strike her and the altercation was her fault...) *See also U.S. v. Glenn*, 473 F.2d 191, 194 (D.C. Cir. 1972) ("[T]he shock of the injury and the excitement of the moment have produced an utterance that is spontaneous and sincere as distinguished from one endangered by deliberation and design. Such statements may be admissible although made in response to an inquiry.

[4] The term "*competent substantial evidence*" does not relate to the quality, character, convincing power, probative value or weight of the evidence but refers to the existence of some evidence (quantity) as to each essential element and as to the legality and admissibility of that evidence. Competency of evidence refers to its admissibility under legal rules of evidence. "Substantial" requires that there be some (more than a mere iota or scintilla), real, material, pertinent, and relevant evidence (as distinguished from ethereal, metaphysical, speculative or merely theoretical evidence or hypothetical possibilities) having definite probative value (that is, "tending to prove") as to each essential element of the offense charged. *Joseph v. State,* 103 So.3d 227, 229 -230 (Fla. 4th DCA 2012).

Mathis. Officer Martinez was the second witness. The trial court heard that testimony and observed those witnesses; the necessary, resulting factual finding, whether expressly stated or not, that Ms. Mathis remained under the stress or excitement caused by the event and that there had not been sufficient time to contrive or misrepresent was not unreasonable. It certainly cannot be said that no reasonable judge would have taken that view. There was no abuse of discretion.

Conclusion

This Court finds that the trial court's admission of the victim's hearsay statements was a lawful exercise of discretion. The judgment and sentence of the trial court were lawfully entered and should be affirmed.

IT IS THEREFORE ORDERED that the judgment and sentence of the trial court is affirmed.

ORDERED at Clearwater, Florida this 12th day of November, 2014.

Original Order entered on November 12, 2014, by Circuit Court Judges Michael F. Andrews, Raymond O. Gross, R. Timothy Peters.

cc: Honorable Robert Dittmer
Simone A. Lennon, Esquire
Office of the State Attorney