TEXAS COURT OF CRIMINAL APPEALS

LARRY BRIDGES, Appellant, vs. STATE OF TEXAS, Appellee	Case No.: PD-9575-14 BRIDGES V STATE OF TEX

OPINION

WILLIAMS, J. delivered the opinion of the court.

DOUGLAS, A. delivered the dissent.

Larry Bridges and Thomas Hutton were inmates at the Shepard Correctional Complex. On November 3, 2014, a jury convicted Bridges of attempted murder and aggravated assault of Hutton. Bridges seeks reversal, arguing that (1) the admission of Hutton's out-of-court testimonial statements violated his Sixth Amendment right to confrontation, and that (2) if the statements were not testimonial, the court abused its discretion in admitting the statements under the excited utterance hearsay exception. The court of appeals found that the rights of the Appellant were not violated. We agree and affirm the Appellant's conviction.

I. STATEMENT OF FACTS

On January 2, 2013, Larry Bridges and Thomas Hutton were inmates at the Shepard Correctional Complex's D Unit. The D Unit has two Dayrooms. A control booth with glass windows is located next to Dayroom 2. At the opposite end of Dayroom 2 is the inmate laundry room. There are two security surveillance cameras located in Dayroom 2 but no cameras in the laundry room.

On the morning of January 2, 2013, Sergeant Timothy Crane and Officer John McMurtry were in the control booth. A third officer, Officer Ben Johnson, was monitoring the D unit, and Bridges and Hutton were in Dayroom 2.

Hutton was the laundry porter for the D Unit. He was authorized to remain in Dayroom 2 while doing the laundry. At approximately 10:30 a.m. Sergeant Crawford said he saw Hutton sitting in a chair in the entry to the laundry room reading a book.

Meanwhile, Bridges was pacing back and forth between the Dayroom 2 window facing the control booth and the far wall near the laundry room. Between 10:30 a.m. and 10:40 a.m. inmates must return to their cells. The officers check each cell beginning at 10:50 a.m.

Officer McMurtry testified that at approximately 10:40 a.m. he opened the door to Dayroom 2 to let Bridges return to his cell located on the second tier. Almost immediately thereafter, Officer McMurtry saw Hutton stagger out of the laundry room in obvious distress. Officer McMurtry said Hutton was "flapping his hands with something around his neck. It looked like some type of string or long cord was around his neck. He was facing toward the booth, trying to get my attention." Officer McMurtry testified that he could not determine "whether it was self-harm or something that had been done to him. I just saw that there was an issue with Hutton and he was panicking and gasping for air." Officer McMurtry immediately called an emergency code. Sergeant Crane and Officer Johnson entered Dayroom 2 at 10:42 a.m. Within a few seconds, two other corrections officers entered the room.

Officer Johnson said that Hutton was panicked and had red marks on his neck. Hutton was gasping and barely able to speak, but when he was able to get words out he said "Bridges," and pointed towards the second tier of cells. The officers attempted to get Hutton to sit down and catch his breath so that they could assess his medical condition. Sergeant Crane removed the rolled-up sheet from around Hutton's neck. Sergeant Crane testified that Hutton had deep ligature marks on Hutton's neck and fingertips. Crane testified, "Hutton said he tried to pull the sheet off his neck and that while he was trying to do this at one point he turned, and he saw Bridges. He said that he was fighting and then he said that he acted like he was sleeping."

At 10:43 a.m. the medical response team arrived. Sergeant Crane reported to his supervisor that Hutton was "allegedly assaulted by Bridges." After the medical team treated Hutton, Sergeant Crane moved Hutton to Dayroom 1 and gave Hutton a pencil and paper and asked him to write a detailed statement of what had occurred.

The State charged Bridges with attempted murder and aggravated assault. Bridges entered a plea of not guilty. The trial was set for November of 2014.

In February of 2014 Hutton was being held in County Jail pending a burglary charge. Hutton contacted the deputy prosecutor to ask about getting a better deal and when the

prosecutor declined to extend any assistance, Hutton stated that he was not interested in testifying against Bridges. The court held a hearing to determine whether Hutton would testify at trial. Hutton stated that he would not answer questions under oath at trial and would instead ask the jury to acquit Bridges because "I don't consider myself a victim and I say there's no crime." Hutton further testified that he suffers from an "obsessive-compulsive disorder" that makes him "feel that there's an entity that stalks me and will actually bring harm to my family if I do so."

Subsequently the court held another pre-trial hearing to determine whether the out-of-court statements Hutton made to Officer Johnson and Sergeant Crane were admissible as evidence. Officer Johnson testified that Hutton was in distress, gasping and trying to get words out.

Sergeant Crane testified that after catching his breath Hutton said, "He tried to kill me." When Sergeant Crane asked who, Hutton said "Bridges." Sergeant Crane described the emergency medical response procedure. He testified that the initial response focuses on getting medical assistance and evaluating the situation.

Nurse Jamie Peters testified that she responded to Dayroom 2 as part of the emergency medical team. Peters said Hutton had petechiae or redness on his face and in his eyes and "a line around his neck that looked bloody." Peters testified that she checked Hutton's vital signs and that he was given oxygen "just to make him feel more comfortable because he was experiencing a lot of anxiety." She stated that while the medical team was treating Hutton, he was saying that he had been strangled and that Bridges had done it.

The Dayroom 2 video surveillance shows Bridges pacing back and forth near the laundry entrance. At 10:34 a.m. Bridges walks into the laundry room. Less than a second later, a book falls onto the floor in the threshold of the laundry room doorway. At 10:40 a.m. Bridges walks out of the laundry room. At 10:41 a.m. Hutton staggers into view and stumbles toward the window facing the control booth. The video ends at 10:45 a.m. as the medical personnel are treating Hutton.

The defense theory of the case was that Hutton injured himself in order to get pain medications and special treatment. Because self-injury is a violation of prison rules, Hutton would have been punished unless the injuries were blamed on someone else. In fact, Hutton was given Valium and was not punished since his injuries were blamed on Bridges, who Hutton accused at the time but then later refused to testify against.

The court ruled that the initial out-of-court statements Hutton made to Officer Johnson and Sergeant Crane were not testimonial. The court found that Hutton made the statements within minutes of the attack and the circumstances objectively established an ongoing emergency. The court determined that the primary purpose of the initial questions and answers was to resolve the emergency, and that the initial questions and answers did not constitute formal interrogation. The court also ruled that the initial statements Hutton made were admissible at trial as an excited utterance. We agree.

II. ANALYSIS

Confrontation Clause

Bridges contends that the court erred in admitting Hutton's out-of-court statements in violation of his Sixth Amendment right to confrontation. U.S. Const. amend. VI. The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." The confrontation clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). We review alleged violations of the Confrontation Clause de novo.

While Crawford does not provide a precise articulation or comprehensive definition of testimonial hearsay for the purposes of the Confrontation Clause, the Court defined "testimony" as a "solemn declaration or affirmation made for the purpose of establishing or providing some fact." *Crawford*, 541 U.S. at 51-52. The Court held that testimonial hearsay for purposes of the confrontation clause applies at a minimum to (1) ex parte testimony at a preliminary hearing and (2) statements taken by police officers in the course of interrogations. *Crawford*, 541 U.S. at 51-52.

In *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed,2d 224 (2006), the Court held that where the objective circumstances show "the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency," the statements to police are not testimonial. "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822.

The Court in Davis explained that the existence of an ongoing emergency focuses the participants on something other than "proving past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822. An ongoing emergency focuses on "ending a threatening situation." *Davis*, 547 U.S. at 832.

In *Michigan v. Bryant*, U.S. 131 S.Ct 1143, 1150-67, 179 L.Ed.2d 93 (2011), the Supreme Court considered whether the victim's statements to police officers violated the Confrontation Clause. In Bryant, police officers found the victim lying on the ground next to his car at a gas station, mortally shot in the abdomen. The officers asked the victim what happened and who shot him. The victim identified the defendant and said the shooting had occurred about 25 minutes earlier. *Bryant*, 131 S.Ct at 1150.

The Court held the primary purpose of the interrogation was to enable law enforcement to meet an ongoing emergency. *Bryant*, 131 S.Ct at 1166. "The existence of an ongoing emergency at the time of an encounter between an individual and the police is among the most important circumstances informing the primary purpose of an interrogation." *Bryant,* 131 S.Ct. at 1157.

An objective evaluation of the circumstances in which Hutton made his statements to the corrections officers clearly demonstrates that the primary purpose of the questioning by Sergeant Crane was to respond to an ongoing medical emergency, determine whether Hutton injured himself or whether he was attacked by another person, and assess the risk of harm to other inmates and corrections officers. The initial statements Hutton made to Officer Johnson and Sergeant Crane fall squarely under the ongoing emergency exception. For this reason, we affirm the district court's ruling.

Excited utterance

Bridges contends that even if Hutton's statements were not testimonial, the court erred in admitting the statements as an excited utterance. The excited utterance and testimonial hearsay inquiries are separate, but related. While both inquiries look to the surrounding circumstances to make determinations about the declarant's mindset at the time of the statement, their focal points are different. The excited utterance inquiry focuses on whether the declarant was under the stress of a startling event. The testimonial hearsay inquiry focuses on whether a reasonable declarant, similarly situated (that is, excited by the stress of a startling event), would have had the capacity to appreciate the legal ramifications of his/her/their statement. These parallel inquiries require an ad hoc, case-by-case approach. An inquiring court first should determine whether a particular hearsay statement qualifies as an excited utterance. If not, the inquiry ends. If, however, the statement so qualifies, the court then must look to the attendant circumstances and assess the

likelihood that a reasonable person would have either retained or regained the capacity to make a testimonial statement at the time of the utterance. *US v. Brito*, 427 F.3d 53.

A statement is not excluded as hearsay if it is an excited utterance related to a startling event or condition made while the declarant was under the stress and excitement that it caused. Tex. R. Evid. 803(2). The reasoning behind the excited utterance exception is psychological: when a person is in the instant grip of violent emotion, excitement, or pain, that person ordinarily loses capacity for the reflection necessary for fabrication, and the truth will come out. *Zuliani v. State*, 97 S.W.3d 589, 595 (Tex. Crim. App. 2003). In other words, the statement is trustworthy because it represents an event speaking through the person rather than the person speaking about the event. Id.; *Ricondo v. State*, 475 S.W.2d 793, 796 (Tex. Crim. App. 1971). In determining whether a hearsay statement is admissible as an excited utterance, the court may consider as factors the time elapsed and whether the statement was in response to a question. *Salazar v. State*, 38 S.W.3d 141, 154 (Tex. Crim. App. 2001). The focus, however, must remain on whether the declarant was still dominated by the emotions, excitement, fear, or pain of the event at the time of the statement. Id. In short, a reviewing court must determine whether the statement was made "under such circumstances as would reasonably show that it resulted from impulse rather than reason and reflection." *Fowler v. State*, 379 S.W.2d 345, 347 (Tex. Crim. App. 1964).

The trial court ruled that when Hutton made the statements right after the alleged attempted murder, he was under the stress of excitement of a startling event. The court did not abuse its discretion in finding that when Hutton made his initial statements to the corrections officers, he was under the stress of a startling event. The assault occurred between 10:34 a.m., when Bridges walked into the laundry room, and 10:41 a.m. when Hutton emerged from the laundry room signaling for help and gasping for breath. The initial statements Hutton made while in Dayroom 2 were made while still under the stress from the startling event. The court did not abuse its discretion in admitting the statements under Tex. R. Evid. 803(2). For this reason, we affirm the district court's ruling.

DISSENT

Confrontation Clause

In Crawford, the Supreme Court held that the admission of a hearsay statement made by a non-testifying declarant violates the Sixth Amendment if the statement was testimonial, and the defendant lacked a prior opportunity for cross-examination. Thus, a testimonial statement is inadmissible absent a showing that the declarant is presently unavailable, and the defendant had a prior opportunity for cross-examination, even if the statement "falls under a `firmly rooted

hearsay exception' or bears `particularized guarantees of trustworthiness.'" The Court stressed that if "testimonial" evidence is at issue, "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."

The Court identified three kinds of statements that could be regarded as testimonial:

(1) "ex parte in-court testimony or its functional equivalent that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially"; 2) "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; and 3) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

The Supreme Court noted that some statements qualify as testimonial under any definition for example, "ex parte testimony at a preliminary hearing" and "[s]tatements taken by police officers in the course of interrogations."

The Court in Bryant held that the primary purpose of an interrogation on the scene of an emergency was to enable law enforcement to meet an ongoing emergency. Bryant, 131 S.Ct. at 1166. But the Court notes that the interaction with the police can evolve from an interrogation to determine the need for emergency assistance into testimonial statements if a perpetrator is disarmed, surrenders, is apprehended, or flees with little prospect of posing a threat to the public. By the time Hutton told corrections officers that Bridges was responsible for Hutton's injuries, Bridges had been removed from the scene and posed no threat. Neither Hutton nor the officers had any reason to fear harm from Bridges. Furthermore, under the defense's theory of the case, Hutton could have self-harmed and had motive to implicate someone else. Because the statements were made in safety after the initial threat was over, and because there was no opportunity for the statements to be cross-examined, Bridges was harmed at trial and his Sixth Amendment rights violated under the Confrontation Clause.

Excited utterance

The Court in Brito noted that generally statements made to police while the declarant is still in personal danger are not made with consideration of their legal ramifications because the declarant usually speaks out of urgency and a desire to obtain a prompt response; thus, those statements will not normally be deemed testimonial. But after the immediate danger has dissipated, a person who speaks while still under the stress of a startling event is more likely to

comprehend the larger significance of his words: "If the record fairly supports a finding of comprehension, the fact that the statement also qualifies as an excited utterance will not alter its testimonial nature." *US v. Brito*, 427 F.3rd 53.

We understand the State's position to be that, by definition, an excited utterance is not made under circumstances conducive to subjective contemplation of future legal proceedings. We cannot agree. Moreover, even if we were to assume the State is correct in such premise, we nevertheless conclude, based on Crawford, that subjective contemplation is irrelevant to an analysis of whether such out-of-court statements would be testimonial or non-testimonial. Second, even if the test were subjective, the declarant's perception could be determined only through cross-examination. Crawford identifies as testimonial "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford,* supra.

Surely the record supports that Hutton comprehended that his accusation against Bridges would support prosecution against Bridges. The facts show that Hutton was receiving medical treatment within minutes of sustaining his injuries, and thus did not need to name Bridges in order to attend to Hutton’s medical emergency; the questions from corrections officers and statements by Hutton as to who inflicted the injuries were only to aid in prosecution and Hutton was capable of comprehending that. The trial court abused its discretion in admitting Hutton’s statements as excited utterances.