

[Cite as *State v. Waltzer*, 2011-Ohio-594.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94444

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

BRIAN WALTZER

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-529366-A

BEFORE: Sweeney, J., Kilbane, A.J., and Keough, J.

RELEASED AND JOURNALIZED: February 10, 2011

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JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant Brian Waltzer appeals his convictions for felonious assault and domestic violence. After reviewing the facts of the case and pertinent law, we affirm.

{¶ 2} In the early morning hours of August 8, 2009, defendant got into an argument with his girlfriend, L.M. Defendant and L.M., who were living in L.M.'s house in Cleveland at the time, had been drinking alcohol with friends the night before. L.M. called the police,

alleging that defendant hit her in the head with a baseball bat and cut or stabbed her in the hand with a steak knife. The police arrived at L.M.'s house and took her statement and pictures of her injuries. EMS arrived and treated her injuries on the scene, but L.M. refused further medical treatment.

{¶ 3} On September 30, 2009, defendant was indicted for felonious assault in violation of R.C. 2903.11(A)(2) and domestic violence in violation of R.C. 2919.25(A). On December 1, 2009, a jury found defendant guilty of both counts. On December 7, 2009, the court sentenced defendant to five years in prison for the felonious assault to run concurrent with six months in prison for the domestic violence.

{¶ 4} Defendant appeals and raises three assignments of error for our review.

{¶ 5} “I. The appellant was denied his constitutional right of due process when the court impermissibly allowed hearsay testimony.”

{¶ 6} Specifically, defendant argues that the court erred when it allowed the use of L.M.'s statement to Cleveland Police Officer Christopher Lozinak on August 8, 2009, under the excited utterance exception to the rule against hearsay.

{¶ 7} The standard of review for admissibility of evidence is abuse of discretion. See *Peters v. Ohio State Lottery Comm.* (1992), 63 Ohio St.3d 296, 587 N.E.2d 290. Evid.R. 801 states that hearsay is inadmissible in court and defines hearsay as follows: “a statement, other than one made by the declarant while testifying at the trial or hearing, offered into

evidence to prove the truth of the matter asserted.”

{¶ 8} Additionally, Evid.R. 803 lists the many exceptions to the rule against hearsay. Under Evid.R. 803(2), an excited utterance is a “statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition,” and is admissible in court.

{¶ 9} Defendant argues that L.M. made her statement to the police after the excitement of the event subsided, because Officer Lozinak testified that he “had to calm her down before a statement could be obtained.” Additionally, three hours had passed between the time the argument allegedly began and the time L.M. called 911. Therefore, defendant argues her statement was inadmissible as an excited utterance.

{¶ 10} After speaking with L.M., Officer Lozinak wrote a police report that stated as follows: “Suspect picked up an aluminum baseball bat and a steak knife and came after victim. Victim states that she attempted to grab the blade of the steak knife with her left hand which left a 2” laceration on her left palm. Suspect then struck her on the right side of her head with the baseball bat leaving an abrasion near victim’s right temple.”

{¶ 11} L.M. subsequently filled out a misdemeanor complaint form, which stated that defendant “[h]it me with a baseball bat and stabbed my hand with a knife.”

{¶ 12} L.M. testified that she could not remember what happened because she was intoxicated. L.M. testified that she could not remember defendant coming at her with a knife

or hitting her with a bat. Asked if that is what she told the police happened on August 8, 2009, L.M. answered, yes, “In my intoxicated state, I thought that’s what happened.”

{¶ 13} Officer Lozinak testified that L.M. was “excited,” “shaky,” and “upset” when he arrived at her house, but L.M. was not too intoxicated to make a statement. Rather, she gave her statement twice orally and once in writing, and

{¶ 14} was consistent all three times. Officer Lozinak testified that L.M. stated defendant came after her with “an aluminum baseball bat and a knife from the kitchen.” L.M. tried to grab the knife, which resulted in a cut on her left palm. Defendant then hit her with the bat “on the right side of her head, near her temple.”

{¶ 15} In *State v. Bell*, Cuyahoga App. No. 92308, 2009-Ohio-6302, this court held that a victim’s prior statements were properly admitted as excited utterances under circumstances similar to the facts of the case at hand. In *Bell*, the victim called 911 after the defendant attacked her. “[T]he officers’ observations of her demeanor indicate that she was still under the stress of the altercation. * * * The victim’s statements also related to the startling event. Because she was the victim, she was also a witness to the event. Consequently, the victim’s prior statements were properly admitted as excited utterances.” *Bell*, at ¶¶14-15.

{¶ 16} We find that L.M.’s statements qualify as excited utterances. Defendant came at L.M. with an aluminum bat and a knife during an argument. L.M. cut her hand while

trying to get the knife away from defendant and then defendant hit L.M with the bat. The police arrived shortly after L.M. called 911. Officer Lozinak testified that L.M. was visibly shaken and upset, and they had to calm her down before she could make a statement about what happened. See *State v. Humphries* (1992), 79 Ohio App.3d 589, 598, 607 N.E.2d 921 (holding that the “controlling factor * * * in determining whether a statement qualifies as an excited utterance * * * is whether the declaration was made under such circumstances as would reasonably show that it resulted from impulse rather than reason and reflection”).

{¶ 17} Furthermore, the lapse of time between a startling event and a statement about that event “is relevant but not dispositive” of whether the statement qualifies as an excited utterance. “There is no *per se* amount of time after which a statement can no longer be considered to be an excited utterance.” *State v. Taylor* (1993), 66 Ohio St.3d 295, 303, 612 N.E.2d 316.

{¶ 18} Officer Lozinak testified that L.M. told him that she and defendant “had been drinking at approximately 5:00 in the morning or so” when they began to argue. At approximately 8:00 a.m., L.M. called 911 and the police arrived at L.M.’s house. Asked to explain the difference in time, Officer Lozinak testified as follows: “It is not uncommon for a person that has been drinking to lose track of time. Sometimes the argument goes on for longer than they elaborate. Sometimes they just get the time wrong. We didn’t see any unusual significance with that.”

{¶ 19} Accordingly, the court did not abuse its discretion in admitting L.M.'s prior statements, and defendant's first assignment of error is overruled.

{¶ 20} In defendant's second and third assignments of error, he argues as follows:

{¶ 21} "II. The evidence was insufficient to sustain a finding of guilt because the state failed to present evidence to establish beyond a reasonable doubt the elements necessary to support the conviction."

{¶ 22} "III. Appellant's convictions are against the manifest weight of the evidence."

{¶ 23} When reviewing sufficiency of the evidence, an appellate court must determine, "after viewing the evidence in a light most favorable to the prosecution, whether any reasonable trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492.

{¶ 24} The proper test for an appellate court reviewing a manifest weight of the evidence claim is as follows:

{¶ 25} "The appellate court sits as the 'thirteenth juror' and, reviewing the entire record, weighs all the reasonable inferences, considers the credibility of witnesses and determines whether, in resolving conflicts in evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541.

{¶ 26} In the instant case, defendant was convicted of felonious assault in violation of

R.C. 2903.11(A)(2), which states that “[n]o person shall knowingly * * * [c]ause or attempt to cause physical harm to another * * * by means of a deadly weapon * * *.” Defendant was also convicted of domestic violence in violation of R.C. 2919.25(A), which states as follows: “No person shall knowingly cause or attempt to cause physical harm to a family or household member.”

{¶ 27} Defendant argues there was insufficient evidence, or, in the alternative, it was against the manifest weight of the evidence, to convict him because he did not act “knowingly,” nor did he use the baseball bat and knife as a “deadly weapon.”

{¶ 28} R.C. 2901.22(B) states that “[a] person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.”

{¶ 29} Defendant argues that without the testimony about L.M.’s statements to the police on August 8, 2009, the evidence only showed that L.M. had a cut on her hand and her head. However, we concluded that her prior statements implicating defendant were admissible as excited utterances. Furthermore, L.M. testified that she and defendant were alone in the house after their friends had left. L.M. remembered arguing with defendant. Additionally, the police took photos of L.M.’s injuries and recovered from the scene the aluminum baseball bat and steak knife which L.M. alleged that defendant used.

{¶ 30} Defendant also argues that “there was no testimony that the baseball bat or the knife was capable of inflicting death.” Defendant cites no law to support this argument.

{¶ 31} Pursuant to R.C. 2923.11(A), a deadly weapon is “any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon.”

{¶ 32} This court has previously held that injuries caused by a steak knife were caused by a deadly weapon. *State v. Brown*, Cuyahoga App. No. 87651, 2006-Ohio-6267. Additionally, in *State v. Green*, Cuyahoga App. No. 81232, 2003-Ohio-1722, ¶34, this court held that “[t]here can be no legitimate argument that a baseball bat is not an instrument that can cause the death of another * * * if one believes * * * the bats were used as weapons and not for their normally intended purpose.”

{¶ 33} Defendant’s convictions for felonious assault and domestic violence are supported by sufficient evidence in the record and are not against the manifest weight of the evidence. Defendant’s second and third assignments of error are overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant’s conviction having been affirmed, any bail pending appeal is terminated.

Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, JUDGE

MARY EILEEN KILBANE, A.J., and
KATHLEEN ANN KEOUGH, J., CONCUR