COURT OF APPEALS
DECISION
DATED AND FILED

May 13, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2625-CR **Cir. Ct. No. 01 CF 2979**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NOU YANG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MICHAEL B. BRENNAN and PATRICIA D. McMAHON, Judges. *Affirmed*.

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Nou Yang appeals from a judgment entered on a jury verdict finding him guilty of substantial battery, with the intent to cause

bodily harm, as an habitual offender. *See* WIS. STAT. §§ 940.19(2) and 939.62 (1999–2000).[1] He also appeals from an order denying his postconviction motion to vacate his judgment and sentence. Yang claims that the trial court erroneously exercised its discretion when it: (1) admitted the victim's statement into evidence under the excited-utterance exception to the hearsay rule; and (2) rejected a proposed plea bargain that would have amended the substantial-battery charge to simple battery with no habitual-criminal penalty enhancer. We affirm.

I.

¶2 Nou Yang was charged with substantial battery after a physical confrontation with his live-in girlfriend, Ka Vang. Three police officers interviewed Vang. Vang told them that she and Yang had gotten into a fight because she had not gone to work that day. According to Vang, Yang kicked her, threw a suitcase at her, and punched her behind her left ear. Vang was taken to Froedtert Hospital where she received nine stitches under her right eye and three stitches on her forehead.

¶3 Before trial, the State moved to admit Vang's statement to the police under the excited-utterance exception to the hearsay rule. *See* WIS. STAT. RULE 908.03(2). The trial court heard the testimony of Officer Lawrence Pyfferoen, one of the officers who interviewed Vang. Pyfferoen testified that he received a dispatch to the Yang/Vang house between 3:20 a.m. and 3:30 a.m. He arrived there around 3:30 a.m. and found Vang bleeding from her eye and her forehead.

[1] All references to the Wisconsin Statutes are to the 1999–2000 version unless otherwise noted.

According to Pyfferoen, Vang was "crying, kind of hunched over, shaking and seemed fearful … like she didn't want to look up at all."

¶4 As noted, Vang told Pyfferoen that she and Yang got into an argument around 12:30 a.m. because she did not go to work that day. Pyfferoen testified that Vang told him that, during the argument, Yang: kicked Vang; threw a suitcase or a briefcase at her, hitting her under her right eye; kicked her in the forehead; and punched her behind her right ear. Pyfferoen estimated that the physical confrontation took place about fifteen minutes before he got there.

¶5 On cross-examination, Pyfferoen testified that the physical confrontation occurred at approximately 3:00 a.m., thirty minutes before he arrived. The defense elicited testimony from Pyfferoen that the interview with Vang was in a "question and answer" format—Pyfferoen asked Vang questions and she responded. Pyfferoen admitted that, on the police report, he only checked a box that indicated Vang was crying. The report did not indicate that Vang was shaking or fearful. Pyfferoen explained, however, that he did not check any other boxes because his supervisors told him to only check one box and that, in his opinion, crying was the most appropriate box.

¶6 The trial court concluded that Vang's statement was admissible. It found Pyfferoen credible and determined that Vang was "crying, hunched over, [and] seemed fearful" when Pyfferoen interviewed her. It also found that: the argument began around 12:30 a.m.; it escalated into a physical confrontation around 3:00 a.m.; and Pyfferoen arrived around 3:30 a.m. Based on these findings, the trial court concluded that Vang's statement was admissible as an excited utterance:

> [T]he excited utterance exception has three requirements.

> First, there must be a startling event or condition. M[s.] Vang testified that Mr. Yang did strike her both with his feet and legs as well as with the briefcase, resulting in lacerations that required stitching. That would rise to the level of being a startling event or condition.
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> The second, the declarant's out of court statement was related to the startling event or condition. The Court has considered the narrative as relayed by Officer Pyfferoen, as well as Officer Pyfferoen's testimony, and in that statement Ms. Vang did state to Officer Pyfferoen that this activity was -- occurred to her as a result of Mr. Yang's conduct.
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> Third requirement, the statement must have been made while the declarant was under the stress of excitement caused by the event or condition. This is the sliding scale which the Court applies of the level of severity of injury resulting in a longer period within which that excitement might have lasted.
>
> The Court does believe based upon the severity of the injuries here that one half hour is not too long a time for which Ms. Vang would continue to be in an excited, upset state, … the spontaneity and stress, which Officer Pyfferoen testified to, is a basis upon which the Court would find that Ms. Vang's statements to Officer Pyfferoen as to who did this to her, when it happened, and how it happened would have sufficient indicia of reliability.

¶7 Yang's first trial ended in a mistrial. Before the second trial, the State proposed a plea bargain that would have amended the charge of substantial battery, as an habitual criminal, to simple battery with no habitual-criminal penalty enhancer. When Yang was charged, substantial battery, as an habitual criminal, carried a maximum sentence of seven years in prison, *see* WIS. STAT. §§ 940.19(2), 939.50(3)(e), and 939.62(1)(b); simple battery, as an habitual criminal, carried a maximum sentence of three years in prison, *see* WIS. STAT. §§ 940.19(1), 939.51(3)(a), and 939.62(1)(a); and simple battery without the enhancement, carried a maximum sentence of nine months in prison, *see* WIS. STAT. §§ 940.19(1) and 939.51(3)(a).

¶8 The trial court agreed to amend the charge to simple battery, but refused to dismiss the habitual-criminal penalty enhancer:

> On the habitual criminal penalty enhancer and the motion to dismiss that, the Court is not in a position and will not accept that motion. In this instance Mr. Yang has got a lengthy previous record. I believe it's a total of 15 convictions. Some of those are juvenile adjudications, but they include previous batteries, including a recent DV Battery, albeit involving the brother, not the common-law wife who was the alleged victim in this case, 2979. But given the number of previous convictions and the nature of them, the Court does not and cannot accept in its role here, its equitable role, a motion to dismiss the habitual criminality penalty enhancer.
>
> In its current iteration of the case, the maximum term of imprisonment which Mr. Yang faced was ten years. Given what the Court would accept in terms of plea negotiations here, that would drop to three years…. [G]iven the number of previous convictions here, the Court does not believe its role--equitable role here of protecting the community, insuring the best justice is done possible, that it can accept a motion to dismiss the habitual criminal enhancer…. That would drop Mr. Yang's maximum exposure from ten years down to three years.

As a result, Yang was tried at the second trial on the original charge.

¶9 The second trial-jury found Yang guilty of substantial battery, as an habitual offender. The trial court sentenced Yang to seventy-two months in prison, with thirty-six months of initial confinement and thirty-six months of extended supervision.

II.

A. Excited Utterance

¶10 First, Yang alleges that the trial court erroneously exercised its discretion when it admitted Vang's statement to Officer Pyfferoen under the excited-utterance exception to the hearsay rule. As the trial court noted, an excited utterance must meet three conditions to be admissible: (1) there must be a startling event or condition; (2) the statement must relate to the startling event or condition; and (3) the statement must be made while the declarant is under the stress or excitement caused by the event or condition. WIS. STAT. RULE 908.03(2); ***State v. Huntington***, 216 Wis. 2d 671, 682, 575 N.W.2d 268, 273 (1998).[2]

¶11 The admission of evidence under a hearsay exception is within the trial court's discretion. *See* ***State v. Moats***, 156 Wis. 2d 74, 96, 457 N.W.2d 299, 309 (1990). We will affirm a discretionary determination if it appears from the record that the trial court: (1) examined the relevant facts; (2) applied a proper standard of law; and (3) using a demonstrative rational process, reached a conclusion that a reasonable judge could reach. ***Loy v. Bunderson***, 107 Wis. 2d 400, 414–415, 320 N.W.2d 175, 184 (1982).

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[2] WISCONSIN STAT. RULE 908.03(2) provides:

> The following are not excluded from the hearsay rule, even though the declarant is available as a witness:
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> ….
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> EXCITED UTTERANCE. 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.

¶12 In this case, Yang does not dispute that the first two elements of the excited-utterance test were met. He does, however, appear to challenge the trial court's finding on the third prong of the test—that Vang gave a statement to Officer Pyfferoen while she was under stress or excitement caused by the battery. To support this contention, Yang argues that the trial court applied the wrong standard because it used case law that only applies to child-sexual-assault cases. We disagree.

¶13 This issue was addressed in ***State v. Boshcka***, 178 Wis. 2d 628, 641–642 n.3, 496 N.W.2d 627, 631 n.3 (Ct. App. 1992). In ***Boshcka***, the defendant argued that the trial court's decision to admit an adult victim's statement as an excited utterance was "flawed because it [was] premised on case law that only appli[ed] to statements made by children victims." ***Id. Boshcka*** disagreed:

> There is a "special species" of the excited utterance rule that is applied to statements made by young children alleged to have been the victims of sexual assault. In general, the special rule allows admission of statements by child victims "for a longer period after the incident than with adults." It is enough to say, in response to [the defendant's] argument, that, as may be seen from this opinion we rely solely on general statements of the excited utterance rule—not on the "special" variant of the rule applicable to child sexual assault cases.

Id. (quoted source omitted). The same is true in this case. While the trial court cited to cases involving the sexual assault of a child, it relied on the general excited-utterance principles in those cases. *See* ***Huntington***, 216 Wis. 2d at 681–682, 575 N.W.2d at 273; ***Bertrang v. State***, 50 Wis. 2d 702, 706–707, 184 N.W.2d 867, 869–870 (1971). We see no evidence in the record, and Yang does not point us to any, which shows that the trial court used anything other than general standards.

¶14 Under general excited-utterance standards, "time is measured by the duration of the condition of excitement rather than the mere time elapse from the event or condition described." ***Muller v. State***, 94 Wis. 2d 450, 467, 289 N.W.2d 570, 579 (1980). "The significant factor is the stress or nervous shock acting on the declarant at the time of the statement." ***Id.***

¶15 Here, there were substantial facts from which the trial court could conclude that Vang was still "under the stress or excitement caused by the" battery when she made her statement. Pyfferoen interviewed Vang approximately one half-hour after the battery occurred. According to Pyfferoen, Vang's face was bleeding and she was "crying, kind of hunched over, shaking and seemed fearful." This supports the trial court's finding that Vang was still under the stress caused by the physical confrontation. *See* ***Boshcka***, 178 Wis. 2d at 641, 496 N.W.2d at 631 (adult victim's statements admissible as an excited utterance where she appeared to be frightened, upset, and agitated a few hours after the sexual assaults).

¶16 Yang attempts to show that this finding was clearly erroneous by attacking Pyfferoen's credibility. He claims that Pyfferoen was incredible because the police report stated that Vang was crying, while Pyfferoen testified that Vang was crying, hunched over, shaking, and fearful. Again, we disagree.

¶17 The determination of witness credibility is left to the trial court. ***Dejmal v. Merta***, 95 Wis. 2d 141, 151–152, 289 N.W.2d 813, 818 (1980). The trial court specifically found Pyfferoen credible: "Officer Pyfferoen testified, and the Court did believe credibly, that Ms. Vang was crying, hunched over, [and] seemed fearful." Yang has not shown how this finding is clearly erroneous.

Accordingly, Vang's statements to Pyfferoen were admissible under the excited-utterance exception to the hearsay rule.[3]

B. Plea Bargain

¶18 Second, Yang alleges, albeit briefly, that the trial court erroneously exercised its discretion when it rejected the proposed plea bargain because the trial court allegedly "was unaware of the maximum penalty of the charged offense and apparently, was also confused about the maximum penalty for the proposed offense." This appears to be the same argument that Yang raised in his postconviction motion. There, he argued that if the court was willing to accept a sentence reduction from what it thought was ten years to three years, it should have been willing to accept a reduction from seven years to nine months. The postconviction court disagreed:

> Although the court misunderstood the maximum penalty the defendant faced for the enhanced substantial battery charge, it understood that by accepting the proffered negotiations and dismissing the habitual criminality penalty enhancer, the defendant's maximum incarceration exposure would be reduced to nine months. While the court was willing to allow the defendant's penalty exposure to be reduced to a maximum of three years in state prison, it was not willing to allow the penalty to be reduced to a maximum of nine months in the House of Correction. Had the court understood that the maximum penalty for the original charge was seven years, rather than ten years, the result would have been no different because the court was

[3] Yang also appears to argue that his Sixth-Amendment rights were violated because "[Yang] may have been crying, but crying alone should not be sufficient to deny the defendant his Sixth Amendment right to confront his accuser." This contention is amorphous and insufficiently developed. Accordingly, we decline to address it. ***Barakat v. Department of Health and Soc. Servs.***, 191 Wis. 2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995) (we will not review arguments that are "amorphous and insufficiently developed"). Moreover, as we have noted, the trial court found that Vang was more than merely "crying" when she told the officer what Yang had done to her.

> not willing to accept any negotiations which reduced the defendant's incarceration exposure below three years for the reasons set forth in the record.

(Footnote omitted.) We agree with the postconviction court.

¶19 A trial court has the discretion to accept or reject a plea bargain that reduces or dismisses charges. *See* ***State v. Comstock***, 168 Wis. 2d 915, 927–928 n.11, 485 N.W.2d 354, 358 n.11 (1992). The trial court properly exercised its discretion in this case. It indicated that it would not dismiss the habitual-offender penalty enhancer because Yang had fifteen prior convictions. As we have seen, the trial court commented that: "given the number of previous convictions and the nature of them, the Court does not and cannot accept in its role here, its equitable role, a motion to dismiss the habitual criminality penalty enhancer." The trial court was concerned that anything less than an exposure of a three-year prison sentence was not enough time given Yang's extensive criminal record. This was not an erroneous exercise of discretion, and was unaffected by the trial court's misapprehension as to the specific penalties.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.