COURT OF APPEALS
DECISION
DATED AND RELEASED

August 16, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-2440-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ARMANDO M. TIA,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Armando M. Tia appeals from a judgment convicting him of second-degree recklessly endangering safety while using a weapon contrary to §§ 941.30(2) and 939.63, STATS., and possession of a firearm as a felon contrary to § 941.29(1)(b), STATS. We affirm.

The criminal complaint alleged that on June 14, 1992, Tia and his girlfriend, Pearl Levine, were involved in a confrontation with Mark Levine, Pearl's cousin. Tia pulled a handgun from the waistband of his pants and said

"I'm going to shoot you, I'm going to shoot you" to Mark. Tia then pursued Mark, pointing the handgun at him. When he reached Mark, Tia swung the handgun at his head and struck him in the neck area. At that point, the handgun discharged into the ceiling. Tia and Pearl fled. Police located an expended nine-millimeter cartridge in the apartment where the confrontation occurred.

Prior to trial, the State moved the trial court in limine to admit a recording of a telephone call made by Pearl (Levine) Tia[1] to a 911 dispatcher on November 11, 1993, during an altercation. Pearl told the dispatcher that Tia had a nine-millimeter handgun which he kept loaded. Being aware that the defense would claim that Mark, not Tia, fired the nine-millimeter handgun in June 1992, the State argued that possession of the handgun would be at issue and the November 1993 911 call tended to establish that Tia had such a handgun in June 1992. The State advised that Pearl was in Texas and unavailable to testify, but argued that her statement to the 911 dispatcher was an excited utterance and therefore admissible as an exception to hearsay under § 908.03(2), STATS.

Tia objected to the evidence on several grounds. First, the charged crimes and the 911 telephone call occurred approximately seventeen months apart. Second, Pearl's statement was not sufficiently credible and should not constitute an excited utterance. Finally, the tape was highly prejudicial, particularly since a search of Tia's residence nine days after the 911 call did not yield a weapon. The trial court withheld a ruling on the pretrial motion.

At trial, Detective Thomas Blaziewske testified on cross-examination by Tia's counsel that the November 1993 search of Tia's residence did not locate a nine-millimeter handgun.[2] In response, the State sought permission to play the tape of Pearl's 911 telephone call. Tia objected on confrontation grounds. The trial court found that by inquiring regarding the November 1993 search of his residence, Tia opened the door on the question of handgun possession. The trial court listened to the tape and found that Pearl

[1] Pearl Levine and Tia were married after the June 1992 incident charged in the criminal complaint.

[2] The search was not conducted before November 1993 because the detective did not know where Tia could be found between June 1992 and November 1993.

was "agitated, upset and concerned." The trial court concluded that her demeanor supported its determination that she made an excited utterance.

After admitting the tape into evidence, the trial court granted Tia's request for a cautionary instruction advising the jury that the tape was being introduced to demonstrate whether Tia had a nine-millimeter handgun in November 1993 and that he was not on trial for any matters relating to the November 1993 altercation. The parties then stipulated to playing the series of 911 telephone calls from that date, starting with a call from Tia, followed by a call from Pearl and a final call from Tia.

Whether to admit evidence is within the trial court's discretion and we will uphold the trial court's determination if it is supportable by the record. ***State v Patino***, 177 Wis.2d 348, 362, 502 N.W.2d 601, 606 (Ct. App. 1993). The first inquiry is whether the evidence fits within a recognized hearsay exception. If it does, the implications for the confrontation clause must be considered. ***State v. Bauer***, 109 Wis.2d 204, 215, 325 N.W.2d 857, 863 (1982).

The trial court correctly concluded that the statement Pearl made to the 911 dispatcher constituted an excited utterance under § 908.03(2), STATS.[3] This exception to the hearsay rule "is based in the spontaneity of the statements and the stress of the incident which endow the statements with the requisite trustworthiness necessary to overcome the general rule against admitting hearsay evidence." ***State v. Moats***, 156 Wis.2d 74, 97, 457 N.W.2d 299, 309 (1990). Excited utterances are not excluded as hearsay, regardless of the availability of the maker of the statement, if the statement relates "to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Section 908.03(2).

Tia claims that his right of confrontation was violated because Pearl's unavailability to testify at trial was never established by the State or inquired into by the trial court. The premise of Tia's argument is flawed. In ***White v. Illinois***, 502 U.S. 346 (1992), the Supreme Court held that "where

[3] On appeal, Tia does not dispute that Pearl's statements were made while she was under the stress of the November 1993 incident.

proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied." ***Id***. at 356. The excited utterance exception to the hearsay rule, § 908.03(2), STATS., has been held to be firmly rooted for confrontation purposes. ***Patino***, 177 Wis.2d at 373-74, 502 N.W.2d at 611. Because Pearl's statements to the 911 dispatcher fall within a firmly rooted exception to the hearsay rule, the trial court need not have inquired and the State need not have shown that she was unavailable to testify at trial. *See* ***White***, 502 U.S. at 357.

In his reply brief, Tia argues that unusual circumstances warranted exclusion of the 911 tape. *See* ***State v. Hickman***, 182 Wis.2d 318, 328-29, 513 N.W.2d 657, 662 (Ct. App. 1994). In particular, he claims that he did not have an opportunity to challenge the reliability of Pearl's statements. However, Tia offers no facts suggesting that Pearl was incapable of making the statement to the 911 dispatcher or that there is some other reason her statement is suspect. A firmly rooted hearsay exception is deemed to have sufficient guarantees of reliability and "adversarial testing can be expected to add little to its reliability." ***White***, 502 U.S. at 357. Tia has not shown the existence of an unusual circumstance which would have warranted exclusion of the 911 tape.

Tia also argues that the tape was too remote to have probative value and the trial court erroneously balanced the tape's probative value against its prejudicial effect. The tape was probative. Tia denies he possessed a handgun on June 14, 1992, and the 911 tape counters that defense. It was for the jury to decide whether Tia had a nine-millimeter handgun in November 1993 and, if so, whether this made it more likely that he had a nine-millimeter handgun in June 1992.

Section 904.03, STATS., requires the trial court to consider whether relevant evidence is unfairly prejudicial. ***State v. Mordica***, 168 Wis.2d 593, 605, 484 N.W.2d 352, 357 (Ct. App. 1992). Unfair prejudice cannot be equated with unfavorable evidence. ***Id***. "Rather, unfair prejudice results where the proffered evidence, if introduced, would have a tendency to influence the outcome by improper means ...." ***Id***.

We discern no unfair prejudice to Tia. The jury was cautioned that it could consider the tape only on the issue of Tia's possession of a nine-

millimeter handgun and that the tape was not evidence of Tia's character upon which it could base a guilty verdict. We presume the jury followed the court's instruction. ***State v. Grande***, 169 Wis.2d 422, 436, 485 N.W.2d 282, 286 (Ct. App. 1992). Additionally, the trial court admitted Tia's contemporaneous 911 calls in which he denied having a gun.[4] This ameliorated any unfair prejudice.

Finally, the evidence was not too remote. "Evidence is irrelevant on remoteness grounds if `the elapsed time is so great as to negative all rational or logical connection between the fact sought to be proved and the remote evidence offered in proof thereof.'" ***State v. Oberlander***, 149 Wis.2d 132, 143, 438 N.W.2d 580, 584 (1989) (quoted source omitted). The passage of seventeen months between the time of the charged offenses, when Tia allegedly brandished a nine-millimeter handgun, and Pearl's November 1993 911 call reporting that Tia had a nine-millimeter handgun, is not so long as to sever all rational or logical connection between the allegations.

We discern no misuse of the trial court's discretion in admitting the 911 tape into evidence. The Confrontation Clause was satisfied, and the trial court properly balanced the probative value of the tape against the danger of unfair prejudice.

By the Court.—Judgment affirmed.

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

[4] Neither the tape nor a transcript is included in the record on appeal. Therefore, we rely upon the parties' descriptions of the contents of the tape.