IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-158

No. COA20-318

Filed 20 April 2021

Cabarrus County, No. 18 CRS 54344

STATE OF NORTH CAROLINA,

v.

BRAXTON JEFFREY BROADWAY, Defendant.

Appeal by defendant from judgment entered 29 August 2019 by Judge Casey Viser in Cabarrus County Superior Court. Heard in the Court of Appeals 23 February 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Norlan Graves, for the State.

W. Michael Spivey, for Defendant-Appellant.

CARPENTER, Judge.

¶ 1 Braxton Jeffrey Broadway ("Defendant") appeals pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) from judgment entered after a jury found him guilty of one count of discharging a firearm into an occupied dwelling pursuant to N.C. Gen. Stat. § 14-34.1(b), one count of assault with a deadly weapon pursuant to N.C. Gen.

Stat. § 14-33(c)(1), and one count of discharging a firearm within city limits pursuant to Kannapolis, N.C., Code § 11-1(a). Defendant argues the trial court erred by not admitting an exculpatory hearsay statement as an excited utterance. We find no error.

I. Factual & Procedural Background

¶ 2 The State's evidence at trial tended to show that on the evening of 30 September 2018, Defendant and his friend were visiting Defendant's first cousin, Erin Campbell ("Campbell") in her Kannapolis home. At the time, Campbell was living at her father's house with her father, Billy Whitley ("Whitley"), her boyfriend, Michael Foster ("Foster"), and her mother, Tammy Martin ("Martin"). Campbell testified that during this visit, Defendant referred to her as "yummy," which made her "feel weird" given their familial relationship. Defendant also grabbed her "butt" later that evening. In response, Campbell raised her voice and told him not to touch her in that manner. Campbell further testified that Foster came inside the house after overhearing her yell, and the two went for a walk to cool off. They returned home after Whitley informed them that Defendant had left with his friend.

¶ 3 The next day, 1 October 2018, Defendant returned to the home with his mother, Whitley's sister, to pick up a cellphone charger he believed he had left. Whitley and Foster asked Defendant to apologize to Campbell for his behavior the night before. When Defendant refused to apologize, Whitley testified he told

Defendant, Foster, and Campbell to get out of the house. Whitley remained inside while Foster and Campbell stepped onto the front porch. Defendant's mother and Martin were on the porch steps. Defendant ran off the porch in the direction of his mother's car. Foster testified that as Defendant was running, he directed obscenities at Defendant. Defendant asked his mother to open the car, and she unlocked it using a key fob as she stood by the car. Defendant pulled a shotgun from the back seat of the car. Immediately thereafter, Defendant's mother warned that Defendant had a gun. Defendant then fired one shot into the woods and discharged a second shot towards the house, which struck the front door frame. Whitley called 911 after hearing the second shot. Defendant and his mother left the home in her car after the shooting.

¶ 4 Whitley, Foster, Campbell, and Martin testified that no one had engaged in a physical altercation with Defendant, nor had anyone brandished weapons on the day of the shooting or the night before. Additionally, they testified that no one had followed or chased Defendant after he ran off the porch to retrieve the shotgun.

¶ 5 Officers of the Kannapolis Police Department responded to the "hot call" as an active shooting. After Whitley identified the shooter, additional officers were directed to the residence shared by Defendant and his mother. Defendant and his mother were not at the home when the officers arrived. The officers then proceeded to the house of Defendant's grandmother, and with her consent, they searched and found a

shotgun under her bedroom mattress.

¶ 6 Amy Johnson ("Johnson"), Defendant's grandmother's neighbor, testified that Defendant and his mother arrived at his grandmother's house on 1 October 2018, and she greeted them as usual on the porch. Johnson witnessed Defendant return to the car and carry a long object "covered in a blanket into [his] grandmother's house." Johnson testified that she assumed the object was a shotgun because Defendant carried it "flat-handed" with both hands.

¶ 7 At trial, the State objected to "any hearsay that might come out" as the defense counsel began its cross-examination of Johnson. The trial court conducted a *voir dire* outside the presence of the jury. Johnson testified that she believed Defendant and his mother were describing to his grandmother what had just happened. Johnson heard his grandmother react to their story by stating: "What the hell? Why did you do that?" She also heard Defendant's mother respond to his grandmother, "Well, he shouldn't have tried to stab him; he shouldn't have tried to attack him." According to Johnson, Defendant's mother's statements were made during "normal conversation" and in a loud, matter-of-fact tone. Johnson also noted that "they did not seem like they were too concerned about the situation." The trial court excluded the statement made by Defendant's mother over the defense counsel's objection that it fell under the excited utterance exception.

¶ 8 On 5 November 2018, the Cabarrus County Grand Jury indicted Defendant on

one count of discharging a firearm into an occupied dwelling pursuant to N.C. Gen. Stat. § 14-34.1(b), one count of assault with a deadly weapon pursuant to N.C. Gen. Stat. § 14-33(c)(1), and one count of discharging a firearm within city limits pursuant to Kannapolis, N.C., Code § 11-1(a). A jury found Defendant guilty of all charged offenses. The trial court consolidated all offenses for judgment and sentenced Defendant to a term of imprisonment for a minimum of 51 months and a maximum of 74 months. Defendant gave oral notice of appeal in open court.

II. Jurisdiction

¶ 9 This Court has jurisdiction to address Defendant's appeal pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2019) and N.C. Gen. Stat. § 15A-1444(a) (2019).

III. Issue

¶ 10 The sole issue on appeal is whether the trial court erred by excluding an exculpatory statement, made by Defendant's mother and overheard by a third-party witness, because it did not fall within the "excited utterance" hearsay exception.

IV. Excited Utterance

A. Standard of Review

¶ 11 "On appeal, the standard of review of a trial court's decision to exclude or admit evidence is that of an abuse of discretion. An abuse of discretion will be found only when the trial court's decision was so arbitrary that it could not have been the result of a reasoned decision." *State v. Sloan*, 180 N.C. App. 527, 533, 638 S.E.2d 36, 40

(2006) (citations and quotations omitted).

B. Analysis

¶ 12 Defendant contends that the trial court erred in excluding his mother's statement, which supports that he was acting in self-defense, because his mother was still under the influence of the excitement caused by the shooting. The State maintains that the utterance by Defendant's mother was not excited, and there was sufficient time for Defendant's mother to manufacture the statement so it could not constitute an excited utterance. After careful review of the record, we agree with the State.

¶ 13 Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2019). "Hearsay is not admissible except as provided by statute or by the[Rules of Evidence]." N.C. Gen. Stat. § 8C-1, Rule 802 (2019). One such provision under the Rules of Evidence is the excited utterance hearsay exception. N.C. Gen. Stat. § 8C-1, Rule 803(2) (2019). An "excited utterance" is defined as "[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." *Id.* "In order to fall within this hearsay exception, there must be (1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication." *State v. Smith*, 315 N.C.

76, 86, 337 S.E.2d 833, 841 (1985) (quoting McCormick on Evidence § 297). "If 'the facts indicate a lapse of time sufficient to manufacture a statement and that the statement lacked spontaneity,' the statement is inadmissible under th[e excited utterance] exception." *State v. Riley*, 154 N.C. App. 692, 695, 572 S.E.2d 857, 859 (2002) (citing *State v. Sidberry*, 337 N.C. 779, 783, 448 S.E.2d 798, 801 (1994)). Our Supreme Court has explained the rationale behind the excited utterance doctrine:

> The reason for allowing this exception is that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces spontaneous and sincere utterances. The trustworthiness of this type of utterance lies in its spontaneity . . . . There is simply no time to fabricate or contrive statements spontaneously made during the excitement of an event.

State v. Reid, 335 N.C. 647, 662, 440 S.E.2d 776, 782 (1994) (citations and quotations omitted).

¶ 14 Here, Defendant's mother is the declarant of the statement in question, which is as follows: "Well, he shouldn't have tried to stab him; he shouldn't have tried to attack him." Defendant sought to prove the truth of the matter asserted by having the statement admitted as support for his affirmative defense of self-defense; thus, the statement is inadmissible hearsay unless if falls within an exception. *See* N.C. Gen. Stat. § 8C-1, Rule 801(c).

¶ 15 The sole testimony regarding the statement at issue was made by Johnson, the

neighbor of Defendant's grandmother. Johnson had also made a joint statement with her sister and her mother to an officer of the Kannapolis Police Department on 1 October 2018, following the incident. In the October statement, the three jointly described Defendant, his mother, and his grandmother as "yelling" during their communications. At trial, Johnson testified that when Defendant and his mother arrived at the grandmother's house, they were greeted as usual on the porch. They appeared to be having an ordinary conversation, in a slightly louder-than-normal tone of voice. The grandmother became more excited when she stated, "What the hell? Why did you do that?" Defendant's mother then made her statement "in exchange" of Defendant's grandmother's question, without showing signs of being "frazzled." Defendant's mother was not at the scene of the shooting when she made the statement, nor did she attempt to offer the statement until after she was asked the question by Defendant's grandmother. Based on the record, Defendant's mother was not "under the stress of excitement" caused by Defendant's shooting; therefore, her statement is neither sufficiently spontaneous nor trustworthy. *See State v. Jolly*, 332 N.C. 351, 360, 420 S.E.2d 661, 667 (1992) (holding a statement did not fall within the scope of the excited utterance exception where the declarant was no longer under the stress of the event and had opportunity to reflect on the occurrence).

¶ 16 The record does not indicate how much time passed and what exactly Defendant did in the time period between his firing the shotgun and his mother's

conversation with his grandmother. Defendant states in his brief that the distance between Whitley's house and Defendant's grandmother's house is approximately four miles.

¶ 17 In *Riley*, we upheld a trial court's exclusion of an excited utterance for lack of spontaneity although the record did not identify the specific amount of time that lapsed between the event and the statement. *State v. Riley*, 154 N.C. App. 692, 695, 572 S.E.2d 857, 859 (2002). Here, the record does not indicate how much time had lapsed between the shooting and Defendant's mother's statement. However, as in *Riley*, the record clearly indicates that a sufficient amount of time had lapsed between Defendant firing the shots on his uncle's property and his mother making her statement at his grandmother's house. *See id*., 572 S.E.2d at 859. This lapse of time gave Defendant's mother the opportunity to manufacture her statement. *See Sidberry*, 337 N.C. at 783, 448 S.E.2d at 801. Even assuming Defendant and his mother drove directly between the two distances, sufficient time had lapsed for her statement to be fabricated. Based on the evidence, the statement lacked the spontaneity necessary to show it was made free from reflection or fabrication. *See Riley,* 154 N.C. at 695, 572 S.E.2d at 859.

¶ 18 Additionally, our Supreme Court has considered whether a declarant had motive for fabrication in determining whether to admit the declarant's statement. *State v. Deck*, 285 N.C. 209, 214, 203 S.E.2d 830, 834 (1974) (noting the declarant

"had no motive for fabrication").

¶ 19 In the instant case, the evidence tends to show that Defendant's mother witnessed Defendant fire his gun. Immediately following the incident, she drove him away from the scene of the shooting to his grandmother's house. She was present when Defendant carried his concealed shotgun into the home. Based on the facts, Defendant's mother had motive to protect her son, which provided a basis for her to fabricate her statement to Defendant's grandmother. *See State v. Safrit*, 145 N.C. App. 541, 548, 551 S.E.2d 516, 521 (2001), *disc. rev. denied*, 357 N.C. 65, 579 S.E.2d 571 (2003) (holding a defendant's statement, although related to a sufficiently startling event or condition, lacked spontaneity in part due to his "clear motive for fabrication").

V. Conclusion

¶ 20 In light of the circumstances, including the context in which the statement was made, the lapse of time between the shooting and the statement, and Defendant's mother's motive to fabricate, we hold the trial court did not abuse its discretion and therefore did not err in sustaining the State's objection and finding Defendant's statement was inadmissible under N.C. Gen. Stat. § 8C-1, Rule 803(2).

NO ERROR.

Judges ARROWOOD and GORE concur.

Report per Rule 30(e).