COURT OF APPEALS
DECISION
DATED AND FILED

June 26, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-3345-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CHARLES JONES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed.*

¶1 FINE, J. Charles Jones appeals from a judgment entered on jury verdict convicting him of battery, *see* WIS. STAT. § 940.19(1), and bail jumping, stemming from his violation of a no-contact order, *see* WIS. STAT. § 946.49(1)(a), both as an habitual criminal, *see* WIS. STAT. § 939.62, and from the trial court's order denying his motion for postconviction relief. He claims that he was deprived of his right to confrontation when the trial court

permitted a police officer to testify about what the victim and her nineteen-year-old son told the officer. He also claims that the discovery of what he calls "new evidence" entitles him to a new trial. Additionally, he contends that there was no proof that he was on bail when he committed the acts that resulted in the bail-jumping conviction. He also seeks a new trial in the interest of justice. We affirm.

I.

¶2 The only witness presented by the State was a police officer who responded to a domestic-violence dispatch at 11:30 p.m. in late January of 1998. He testified that when he arrived at the home where Doris Payne and her nineteen-year-old son Donzell Payne lived, both Ms. Payne and her son were agitated and extremely upset. They told the officer, and the officer was permitted to tell the jury, that Jones was angry with Ms. Payne and, although she had "kicked him out" of the house several days earlier because of his excessive drinking "and the problems that she's had with him," Jones was in the Payne residence when she returned from her sister's house. The officer testified that Jones "jumped up off the couch and grabbed her and slammed her up against the wall and then grabbed her hair and threw her about the residence, throwing her down onto the ground and then dragged her out of the residence." The officer, who, before he became a police officer was an emergency medical technician, described fresh injuries that were consistent with Ms. Payne's story.

¶3 The police officer also testified that Donzell Payne told him that Jones came to the Payne residence shortly after 11 p.m. According to Mr.

Payne, Jones "was knocking at the door, knocking on the windows, he was yelling obscenities outside," threatening that he was going to beat up Doris Payne. Mr. Payne told the officer that he was not going to open the door to let Jones in the house, but that "when he heard glass breaking, he opened up the door, and that's when Mr. Jones forced his way into the residence." They argued and, when Ms. Payne walked into the house and said that she was going to call the police, Jones, according to Donzell Payne, "just went nuts" and "came at Mrs. Payne and threw her up against the wall, slapped her and threw her onto the ground and dragged her out of the residence."

¶4 After the officer's testimony, the State asked the trial court to take judicial notice that at the time of Jones's invasion of the Payne home and his battery of Ms. Payne, Jones "had an open misdemeanor case pending" in which the judge before whom the case was pending "had specifically ordered the defendant to have absolutely no contact with Doris Payne and that that order was in full effect at the time this incident occurred." The prosecutor presented what he called "the court file" to the trial court, which asked Jones's lawyer if he "had an opportunity to review that." Jones's lawyer indicated that he had, and that he had no objection to the trial court's taking judicial notice as requested by the prosecutor.

II.

¶5 As noted, Jones claims that he is entitled to a new trial for several reasons. We discuss these claims in turn.

1. *Hearsay and Confrontation.*

¶6 WISCONSIN STAT. RULE 908.03(2) recognizes that an out-of-court statement is not barred by the rule against hearsay if it "relat[es] to a startling event or condition" and is made while the person making the statement is "under the stress of excitement caused by the event or condition," irrespective of whether the person is available as an in-court witness. Additionally, under both the Sixth Amendment to the United States Constitution and under Article I, § 7 of the Wisconsin Constitution, a defendant in a criminal case has the right to confront his or her accusers.

¶7 Our standard of review here is two-fold. First, a trial court's decision to admit evidence under one of the exceptions to the rule against hearsay is a discretionary determination that we will uphold if the trial court has reasonably applied the facts to the governing legal principles. ***State v. Ballos***, 230 Wis. 2d 495, 504, 602 N.W.2d 117, 122 (Ct. App. 1999). Second, where a defendant's right of confrontation is implicated, we review *de novo* whether admitting the hearsay statement violates that right. ***Ibid.***

¶8 The trial court recognized that there are three factors that must be considered in determining whether a statement falls under WIS. STAT. RULE 908.03(2): there must be a startling event or condition, the out-of-court statement must relate to that startling event or condition, and the out-of-court declarant must be still under the stress of excitement caused by the event or condition when he or she makes the out-of-court statement. ***State v.***

Huntington, 216 Wis. 2d 671, 682, 575 N.W.2d 268, 273 (1998).[1] The trial court's findings that the statements of both Doris Payne and Donzell Payne satisfied each of these elements were certainly those that a reasonable judge could make under the facts. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16, 20–21 (1981) (explaining what constitutes a reasonable exercise of trial-court discretion). First, Jones's invasion of their home and battery of Doris Payne was certainly a startling event for both Ms. Payne and her son. Second, the statements each of them made to the officer concerned that incident. Third, the officer testified that both Doris Payne and her son were extremely agitated when he interviewed them, and it was reasonable for the trial court to conclude that the agitation arose from Jones's actions and persisted through the officer's interview with them. *See* ***Huntington***, 216 Wis. 2d at 683, 575 N.W.2d at 273 ("'time is measured by the duration of the condition of excitement rather than mere time elapse from the event or condition described'") (quoted source omitted). The trial court did not erroneously exercise its discretion in concluding that the out-of-court statements made by Doris Payne and Donzell Payne to the officer were within the scope of RULE 908.03(2).

¶9 As noted, Jones also asserts that admission of the out-of-court statements made by Doris Payne and Donzell Payne to the officer violated his

[1] The Honorable Jean W. DiMotto presided over the hearing to determine whether the excited-utterance exception to the rule against hearsay applied.

right to confrontation. "Generally, when evidence is admissible under a firmly rooted hearsay exception, the Confrontation Clause has been satisfied, and no further showing of particularized guarantees of trustworthiness is required." ***Ballos***, 230 Wis. 2d at 510, 602 N.W.2d at 124. "[I]t is well settled that the excited utterance exception is firmly rooted." ***Ibid.*** Although there may be "unusual circumstances" that dictate exclusion nevertheless, ***ibid.***, there are none here. Indeed, the officer who testified described Doris Payne's injuries as "fresh" and it is clear that they were consistent with her story. The trial court did not err in receiving the out-of-court statements made by Doris Payne and Donzell Payne through the testimony of the officer.

2. *Newly discovered evidence*.

¶10 In an argument on an issue that was not presented to the trial court, Jones contends that medical records from Froedert Memorial Hospital dated one day after Jones's confrontation with Doris Payne and her son, put into question the version of the events as related both by Ms. Payne and her son. The general rule, of course, is that we do not review matters that are first raised on appeal. ***Wirth v. Ehly***, 93 Wis. 2d 433, 443–444, 287 N.W.2d 140, 145–146 (1980). Additionally, one of the essential elements to a claim that newly discovered evidence requires a new trial is that the evidence must have come to the moving party's knowledge after the trial. ***State v. Brunton***, 203 Wis. 2d 195, 200, 552 N.W.2d 452, 455 (Ct. App. 1996). Not only did Jones know about his hospitalization that day, but Jones admits in his brief on this appeal that the lawyer who represented him at the trial court's hearing on whether to receive the statements of Doris Payne and Donzell Payne as excited utterances knew about the hospitalization, noting that the lawyer who represented Jones at the trial received the records "after trial but prior to sentencing" from Jones's "prior trial attorney." Moreover, Jones's hospitalization

was referenced by Jones's prior lawyer during the excited-utterance hearing. Jones's claim that he is entitled to a new trial because of newly discovered evidence is without merit.

3. *Foundation for bail-jumping charge*.

¶11 In an amorphous and undeveloped argument, Jones argues that there was insufficient evidence to prove that he was under the no-contact order of which the trial court took judicial notice. First, we will not address arguments that are not developed. *See* ***In re Estate of Balkus***, 128 Wis. 2d 246, 255 n.5, 381 N.W.2d 593, 598 n.5 (Ct. App. 1985). Second, as we have seen, Jones's trial lawyer represented to the trial court that he both examined the records upon which the State's request for the trial court to take judicial notice was based, and that he had no objection to the trial court taking the requested judicial notice. Jones's argument that there was no foundation for the bail-jumping charge is without merit.

4. *New trial in the interests of justice.*

¶12 In an undeveloped argument that relies on his prior assertions of alleged trial-court error, Jones argues that he is entitled to a new trial "in the interest of justice." First, as noted, we do not consider undeveloped arguments. Second, a rehash (especially a truncated rehash) of arguments already made adds nothing to the mix. *See* ***Mentek v. State,*** 71 Wis. 2d 799, 809, 238 N.W.2d 752, 758 (1976) ("[z]ero plus zero equals zero").

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.