COURT OF APPEALS
DECISION
DATED AND FILED

April 2, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2812-CR **Cir. Ct. No. 00 CM 6915**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS A. LEE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge. *Affirmed*.

¶1 FINE, J. Thomas A. Lee appeals from a judgment entered on a jury verdict convicting him of battery. *See* WIS. STAT. § 940.19(1). He claims that the trial court erroneously exercised its discretion in admitting under the excited-utterance exception to the rule against hearsay the victim's out-of-court statements. We affirm.

I.

¶2 Lee was accused of choking for three minutes a woman with whom he lived. The victim did not appear at the trial, and before the trial court admitted her out-of-court statements it held an evidentiary hearing. The only persons who testified at the hearing were two Milwaukee police officers, Thomas Boaz and Travis Guy.

¶3 Officer Boaz testified that he first spoke to the victim at 3:54 a.m. He was sent to where the victim was because of a 3:20 a.m. 911 call by a third party. The police officer read from a police report of the call:

> [C]aller states that [victim] was assaulted at 19th and Florist by her boyfriend, Thomas Lee. The victim refused to give any details to caller about what happened. She keeps asking for the police to come. Victim will be waiting outside at location.[1]

The "location" was where she worked, not where she claimed that Lee had choked her. The victim herself called the police at 3:46 a.m. and told them that Lee had choked her, and that she was "bleeding from ear, [and her] face [was] all red."

¶4 Officer Boaz testified that when he first saw the victim she was "crying" and "was scared, fearful." He also testified that there was "some swelling and redness to her cheeks and across her neck with a few scratches." The officer then answered the following questions posed to him by the State:

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[1] Lee's trial lawyer objected that the police report was itself hearsay. The trial court ruled that the report was admissible under various, though unspecified, exceptions to the rule against hearsay. The evidentiary hearing, however, was held under the trial court's responsibility under WIS. STAT. RULE 901.04(1) to determine whether evidence is admissible. Other than privileges and certain HIV-test results, the rules of evidence do not apply at RULE 901.04(1) hearings. RULE 901.04(1) ("In making the determination [as to whether evidence is admissible] the judge is bound by the rules of evidence only with respect to privileges and as provided in s. 901.05.").

> Q. Officer, did she make statements to you when she was crying and upset that you described before?
>
> A. Yes.
>
> Q. Can you tell the Court exactly what she said to you when she was crying and upset?
>
> A. She stated that Mr. Lee had taken a bandanna out of his pocket, pants pocket, and choked her, put it across her mouth, then pulled the -- pulling both ends, pulled it around her face by her ears.
>
> Q. And officer, did she maintain this crying and upset stage during the time she conveyed those statements to you?
>
> A. Yes.

The victim also told the officers that Lee had started to choke her at 1:40 a.m. and that the choking lasted for approximately three minutes.

¶5 Officer Guy's testimony was similar to that of Officer Boaz's:

> When I got on the scene, she was pretty much sobbing, crying, and nervous, and she was talking to P.O. Boaz over there about what happened at work. Apparently she was at work, and she got a phone call from her boyfriend. And she left work, went home, and I guess she said he was laying in the bed, and all of a sudden she sat next to him and he snapped, got up [and] grabbed a bandana, and started choking her for some unknown reason.

According to what the victim told the police officers, after Lee released his choke-hold she was able to calm him down by telling him that she would not call the police. She then left the apartment and returned to work. The trial court ruled that the victim's statements to the officers fell within the excited-utterance exception to the rule against hearsay.

II.

¶6 A trial court's decision to admit or exclude evidence is a discretionary determination and will not be upset on appeal if it has "a reasonable basis" and was made "'in accordance with accepted legal standards and in accordance with the facts of record.'" ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498, 501 (1983) (citation omitted); ***State v. Moats***, 156 Wis. 2d 74, 96, 457 N.W.2d 299, 309 (1990) (trial court's ruling that a statement fell within the excited-utterance exception to the rule against hearsay will be upheld unless "manifestly wrong"). As the parties recognize, the governing provision is WIS. STAT. RULE 908.03(2), which permits receipt of an out-of-court statement "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

¶7 Lee argues that several factors indicate that the stress of excitement caused by the alleged choking had already dissipated by the time that the officers spoke with the victim: 1) more than two hours had elapsed from when she said that Lee had choked her and when she first spoke with the officers; 2) right after the choking, she was able to assuage Lee's fear that she would call the police; and 3) she drove from her apartment, where Lee had allegedly choked her, back to her place of employment. Although these factors might have persuaded the trial court that the stress cased by the alleged choking had dissipated, the trial court did not erroneously exercise its discretion in concluding otherwise.

¶8 First, the officers' unrefuted testimony was that the victim was crying, was upset, and appeared to be frightened when she told them what she said Lee had done to her. Second, the mere passage of time will not necessarily mean that the stress of excitement caused by a traumatic event has dissipated. *See*

State v. Huntington, 216 Wis. 2d 671, 684–686, 575 N.W.2d 268, 274 (1998); ***Moats***, 156 Wis. 2d at 95–98, 457 N.W.2d at 309–310; ***United States v. Scarpa***, 913 F.2d 993, 1016–1017 (2d Cir. 1990). Here, the trial court could properly conclude that although the victim was able to act with sufficient rationality to escape from Lee and to drive, she was still under the stress of excitement caused by his attack. *See* ***State v. Friday***, 147 Wis. 2d 359, 370–371, 434 N.W.2d 85, 89 (1989) (appellate courts accept reasonable inferences trial courts draw from the evidence). Accordingly, we affirm.

By the Court.—Judgment affirmed.

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