

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2000-586

DECEMBER TERM, 2001

State of Vermont	}	APPEALED FROM:
	}	
v.	}	District Court of Vermont,
	}	
Darrick Washington	}	Unit No. 2, Chittenden Circuit
	}	
	}	DOCKET NO. 4578-9-97
	}	Cncr
	}	
	}	Trial Judge: James R. Crucitti

In the above-entitled cause, the Clerk will enter:

Defendant Darrick Washington appeals his conviction for attempted assault and robbery after a jury trial claiming two errors in the trial court's admission of evidence. We affirm.

Defendant was charged with attempted assault and robbery and attempted murder on September 18, 1997 after an incident in the City of Burlington in the early morning of September 14. Shortly after midnight on September 14, Burlington Police Department officers responded to an emergency call from an apartment at 197 South Winooski Avenue. They arrived to find the premises with the lights on and the doors locked, but no one present. They discovered blood droplets and a spent .22 caliber bullet casing on the porch. The officers began investigating to determine what happened by entering the premises and interviewing neighbors. Approximately thirty minutes after the police arrived, George Hawley, the apartment's resident, returned to the apartment holding a bloody cloth to his left ear. Officer Long testified that Hawley looked like a "mess," was scared and was suffering considerable pain. Officer Long asked Hawley to describe what happened in detail. Hawley told the officer that defendant and another man, Matthew Thompson, approached him as Hawley sat on his porch. Defendant demanded that Hawley give him his watch, which defendant had just admired, and/or his money. Hawley refused. Defendant then removed a gun from his waistband and shot Hawley in the ear.

At trial, the court permitted the State to offer Officer Long's testimony about what Hawley told him when Hawley returned to the apartment after the police arrived. The trial court also allowed testimony in the state's case on rebuttal from a man named Bradley Reed concerning Thompson's statement to him on September 13, 1997 that he intended to rob someone named "Oak" later that night. Testimony at trial revealed that Oak was present in Hawley's apartment for a party earlier that evening. After hearing testimony and considering other evidence admitted at trial, the jury returned a guilty verdict against defendant for attempted assault and robbery, but acquitted defendant of attempted murder. Defendant subsequently appealed.

On appeal, defendant argues that the court should not have permitted Officer Long's testimony about Hawley's statement to him because the statement did not meet the requirements for an excited utterance under V.R.E. 803(2). Defendant also argues that the court should have excluded Reed's testimony about Thompson's statement regarding his plan to rob someone. Neither argument persuades us that the court erred.

As to defendant's first argument, the trial court properly admitted Hawley's statement as an excited utterance. An excited utterance is not hearsay and is admissible if the court finds the utterance relates to a startling event or condition and was "made under the stress of excitement and not as a result of reflective thought." In re Estate of Peters, ___ Vt. ___, ___, 765 A.2d 468, 476 (2000); see V.R.E. 803(2) (setting out elements of excited utterance exception to prohibition of hearsay). We will not reverse the trial court's factual findings supporting the elements for an excited utterance unless they are clearly erroneous or the court abused its discretion. State v. Ayers, 148 Vt. 421, 424 (1987). In this case, the

court admitted Officer Long's testimony after finding that Hawley's condition, coupled with the timing of the statement just thirty minutes after Hawley was shot, met the requirements of V.R.E. 803(2). There was ample evidence in the record to support the court's findings on this issue, and it did not abuse its discretion by admitting the testimony for the jury's consideration.

Defendant's claim that the court erred by admitting Reed's testimony about Thompson's stated intent to rob someone at Hawley's apartment that evening is similarly unavailing. The record shows that although defendant objected to Reed's testimony when the State sought to offer it in its direct case, he did not object when the State offered Reed's testimony in rebuttal. By failing to make a specific objection at the time the testimony was offered as required by V.R.E. 103(a)(1), defendant has waived this claim on appeal. State v. Fisher, 167 Vt. 36, 43 (1997).

We also disagree with defendant that admitting Reed's testimony amounted to plain error. See V.R.E. 103(d) (Court may take notice of plain errors affecting substantial rights even if not brought to trial court's attention); V.R.Cr.P. 52(b) (same). The State offered Reed's testimony to rebut evidence defendant himself elicited from Thompson that Thompson never told Reed that he intended to rob someone on the evening of September 13. Under the circumstances, the court's admission of Reed's rebuttal testimony without objection from defendant was not unfairly prejudicial and did not affect defendant's substantial rights. See Fisher, 167 Vt. at 43 (to reverse on plain error Court must find that error seriously affected substantial rights and had an unfair prejudicial impact on the jury's deliberations).

Affirmed.

BY THE COURT:

Jeffrey L. Amestoy, Chief Justice

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice