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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2003-307

NOVEMBER TERM, 2004

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Addison Circuit
James S. Webb	}	
	}	DOCKET NO. 682-9-02 Ancr
		Trial Judge: Helen Toor

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

Defendant James S. Webb appeals from his conviction of lewdness following a jury trial. He argues that the trial court committed prejudicial error in admitting a hearsay statement of the complainant as an "excited utterance." We affirm.

Defendant was charged with lewdness in violation of 13 V.S.A. § 2632(a)(8) after allegedly grabbing a woman's breast. The following evidence was presented at trial. In July 2003, the complainant was working alone at Synergy Gas. Defendant was a customer and was known to the complainant. At approximately 3:00 p.m., defendant entered the store. While the complainant attempted to locate information for defendant, he leaned over and grabbed her breast. The telephone then rang, and defendant began to rub the complainant's back and massage her neck while she spoke on the phone. When she got off the phone, defendant asked the complainant if she was happily married, if she had children, or was planning on having children. Defendant then put his arm over her shoulder and informed her that he was happy to see her. The complainant testified that she was scared, nervous, and surprised by defendant's behavior. The complainant then observed Patrick Carr, a fellow employee, approaching the office. As Mr. Carr pulled into the driveway, defendant went to other side of the customer counter. Defendant left the office as Mr. Carr arrived. Complainant testified that she told Mr. Carr that defendant had grabbed her breast.

Mr. Carr testified that when he arrived at the office, he observed defendant leaving in a hurry. The complainant was otherwise alone. Mr. Carr stated that the complainant's face was red, and she seemed nervous and upset, contrary to her usual demeanor. Over defendant's objection, Mr. Carr testified that the first thing that the complainant had said to him was that she was glad that he had arrived when he did because defendant had touched her breast. The jury found defendant guilty of lewdness, and this appeal followed.

On appeal, defendant argues that the complainant's statement to Mr. Carr should not have been admitted under the "excited utterance" exception to the hearsay rule. According to defendant, an

insufficient foundation was laid to allow the testimony because the complainant testified in conclusory terms that she was "scared," and Mr. Carr stated only that the complainant was nervous and had a red face. Defendant asserts that the complainant had the time to reflect before making her statement to Mr. Carr because the alleged criminal act occurred early in the twenty to twenty-five minutes defendant spent in the office. Thus, defendant asserts that the record does not support a finding that the complainant was under the influence of the event when she spoke, and the court therefore erred in admitting this "critical" testimony.

We find this argument without merit. Pursuant to V.R.E. 803(2), a hearsay statement may be admitted as an "excited utterance" when there has been "a startling event or condition," and the declarant makes "a spontaneous utterance in reaction to the event or condition . . . under the stress of excitement and not as a result of reflective thought." In re Estate of Peters, 171 Vt. 381, 391 (2000). A statement need not necessarily be contemporaneous with the exciting event to be admissible as an excited utterances. Rather, the critical inquiry is whether the declarant made the statement while she was in a "highly excited, agitated state sufficient to suspend her powers of reflection and fabrication." Id. at 391-92 (internal quotation marks and citation omitted). The trial court has wide discretion in determining whether a declarant was under the influence of the excited event in making a statement. State v. Ayers, 148 Vt. 421, 424 (1987).

Defendant cites State v. Verrinder, 161 Vt. 250 (1993), and State v. Solomon, 144 Vt. 269 (1984), to support his assertion that the trial court erred in admitting complainant's hearsay statement. Neither case supports defendant's argument. In Verrinder, we found no abuse of discretion in the trial court's exclusion of a hearsay statement given the lapse of time between the event and the utterance, a lack of foundation establishing that the declarant was under the stress of excitement, and a finding that the content of the statement showed contemplation. Id. at 258. In that case, the witness who sought to testify to the declarant's hearsay statement did not testify to the declarant's demeanor while on the stand. Id. Additionally, another witness who had been on the scene testified that the declarant was calm and rational. Id. Thus, based on the lack of foundation evidence, we concluded that "the trial court could reasonably have found that [the declarant] was not under sufficient stress . . . to quell his reflective faculties." Id. As discussed below, the evidence in this case supports a finding that the complainant was under the stress of the event at the time of her statement. Defendant's reliance on Solomon is equally misplaced. In Solomon, we upheld the trial court's exclusion of a hearsay statement because the statement had not been made in response to a "startling event." 144 Vt. at 272. By contrast, defendant does not argue that his alleged behavior was not "startling", but asserts that the record does not support a finding that the complainant was under the influence of the event when she spoke. We reject this argument.

In this case, the trial court found that, based on the complainant's testimony, as well as Mr. Carr's observations of the complainant's demeanor, the statement that the complainant made to Mr. Carr was admissible as an excited utterance. The court did not abuse its discretion in reaching this conclusion. The complainant testified that she was nervous and scared during the approximately twenty minutes that defendant was in the store. Mr. Carr arrived just as defendant was leaving, and the complainant testified that the first thing that she said to Mr. Carr was that defendant had touched her breast. Mr. Carr testified that he entered the store as defendant was leaving, and he observed that the complainant's face was red, and she seemed nervous and upset. The complainant then made the statement at issue, which related to the startling event. This evidence supports the trial court's conclusion that the complainant was under the influence of the startling event at the time of her

statement to Mr. Carr. See Ayers, 148 Vt. at 423-24 (testimony that victim was upset, bordering on tears, and her voice "quivered heavily" supported finding that victim's statement was made under stress of excitement of startling event); State v. Longe, 133 Vt. 624, 626 (1975) (statement made by victim of sexual assault was admissible as "excited utterance" where it was made fifteen minutes after assault occurred and shortly after victim had been released by assailants, and statement was made to first person that victim saw after alleged assault). We find no abuse of discretion.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Frederic W. Allen, Chief Justice (Ret.),
Specially Assigned