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

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

JAN 15 2010

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2008-451

JANUARY TERM, 2010

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| State of Vermont | } | APPEALED FROM: |
| | } | |
| | } | |
| v. | } | District Court of Vermont, |
| | } | Unit No. 1, Windsor Circuit |
| | } | |
| Matthew Stevens | } | DOCKET NO. 1067-8-06 WrCr |
| | | |
| | | Trial Judge: Theresa S. DiMauro |

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

Defendant Matthew Stevens appeals from a judgment of conviction, based on a jury verdict, of second-degree murder. He contends that the court erred in refusing to admit, under the excited utterance exception to the hearsay rule, an exculpatory portion of a recorded 911-emergency telephone call. We affirm.

The facts may be summarized as follows. In early August 2006, defendant lived with his girlfriend, D.M., in a trailer in South Reading, Vermont. On the date in question, defendant invited a friend, C.A., to celebrate C.A.'s birthday, and the two spent the day together drinking. D.M, who stayed inside the trailer, recalled that defendant came running into the bedroom at around 9:30 that evening saying that he was going to kill C.A., picked up a mattress, and retrieved a revolver from underneath. Defendant then went back outside. D.M. heard three shots. She immediately grabbed her cell phone and called 911. While speaking with the dispatcher, D.M. observed C.A. lying on the ground, bleeding, in front of the steps. Defendant returned to the trailer, told D.M. that C.A. had been trying to attack him, and placed the gun on the kitchen counter.

D.M.'s telephone call to 911 was recorded, and the first fourteen minutes of the conversation—which lasted about an hour—were admitted by stipulation. During the call, D.M. informed the dispatcher that C.A. "was going to attack" defendant, and that defendant "came in and got the gun and shot [C.A.] three times." Defendant is also heard in the background of the call stating that C.A. "was going to attack me." D.M. informed the dispatcher that the two men had been drinking, gave directions to the residence, and then left on the advice of the dispatcher, walking into the woods near the trailer. After additional discussion, D.M. again informed the dispatcher that defendant "said that [C.A.] was trying to go after him."

After D.M. left the trailer, defendant also placed a call to 911. The jury heard the recording of this call, in which defendant stated that he thought the gun was unloaded, and that the victim "was attacking me and I was going to hit him in the head with it and it went off." Three more times during the course of the call, defendant repeated his claim that the victim was planning or trying to "attack me." The dispatcher transferred defendant's call to an officer with the State Police. In the course of his conversation with the officer, defendant reiterated his

assertion that the victim had planned to attack him, that he grabbed the gun thinking that it was unloaded, and that the shooting was accidental.

Defendant was taken into custody at the scene of the shooting and transported to the state police barracks for processing. A video camera in the police cruiser recorded his image and statements during the ride, and the recording was also played for the jury. In the video, defendant states that the victim was going to attack him and threatening to kill him, that the victim had threatened him before, and that he did not know the gun was loaded. An officer who spoke with defendant at the barracks also testified that defendant claimed the shooting was accidental, that the victim "was going to attack him," that he done so several times in the past, and that defendant was simply "trying to scare" him.

Several of defendant's neighbors and family recalled hearing two or three shots in rapid succession. A forensics expert testified that the gun found in the trailer, a .357 magnum Smith & Wesson revolver, required considerable pressure on the trigger (about ten and a half pounds) to fire shots in succession. The medical examiner testified that the victim died from a single gunshot wound to the neck.

As noted, the jury found defendant to be guilty of second-degree homicide. The court denied a motion for new trial, and defendant was subsequently sentenced to a term of ninety-nine years to life.

Defendant's sole claim on appeal is that he was deprived of a fair trial and due process of law by the trial court's refusal to admit a portion of the recording of D.M.'s 911 call. The issue arose at the beginning of the second full day of trial, at the start of defendant's case-in-chief. Defendant sought to admit a portion of the conversation at the end of the 911 call, in which D.M informed the dispatcher that, when defendant entered the trailer, he said that C.A. "went after him" as well as a subsequent statement indicating that defendant said he was "going to shoot" C.A. Defendant argued that the statements were admissible under the excited utterance exception to the hearsay rule. See V.R.E. 803(2) (defining excited utterance exception 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"). The State opposed the motion, arguing that more than an hour had elapsed since the shooting when the statement was made, that D.M. had since calmed down and another family member had arrived, and that the statements were therefore not made "under the stress" of the event. To rebut the argument, defendant called an officer who spoke with D.M. at the scene. The officer recalled that D.M. still appeared to be "visibly shaken by the incident," testifying that her hands were shaking and that she seemed scared and shocked. The officer acknowledged, however, that D.M.'s speech was calm, and that she was not crying or hyperventilating. The court ruled that D.M. was not still under the stress or excitement of the event, and excluded the statements.

Our review of the court's evidentiary ruling is "deferential, and we reverse only when there is an abuse of discretion resulting in prejudice." State v. Jackson, 2008 VT 71, ¶9, 184 Vt. 173. We have held that a statement need not be made immediately after the startling event to qualify for the exception. Id. The critical question is whether the underlying rationale for the exception continues to apply, i.e., "that a person's powers of reflection and fabrication will be suspended when she is subject to the excitement of a startling event, and any utterances she makes will be spontaneous and trustworthy." State v. Lemay, 2006 VT 76, ¶9, 180 Vt. 133 (quotation omitted).

Whether the declarant in this case was still under the stress of the shooting at the end of the 911 call was obviously a close question, and we are therefore reluctant to find an abuse of discretion or second-guess the ruling of the trial court, who was obviously in a better position to evaluate the testimony and weigh the evidence. We need not ultimately decide whether the statements were properly excluded, however, as the record—summarized earlier—demonstrates beyond dispute that they were largely cumulative of an abundance of other properly admitted statements to the same effect. See State v. Wigg, 2005 VT 91, ¶ 26, 179 Vt. 65 (recognizing that among the factors to be analyzed in determining whether the exclusion of evidence was harmless is "whether the testimony was cumulative") (quoting Delaware v. Van Arsdell, 475 U.S. 673, 684 (1986).

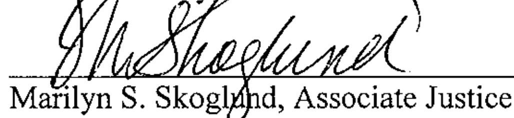
Defendant maintains that D.M.'s statement that defendant "came in and he told me that [C.A.] went after him" was essential to his claim of self-defense. As noted, however, multiple statements to this effect had been previously admitted during the State's case, beginning with D.M.'s statement at the beginning of the 911 call—which was admitted by stipulation of the parties—that C.A. "was going to attack [defendant]." Defendant is also heard in the background making the same claim, which is repeated multiple times thereafter, on defendant's 911 call, in the police cruiser, and at the police barracks, all of which were heard by the jury. Hence, any possible error in the exclusion of the statements was plainly harmless beyond a reasonable doubt. Id. ¶ 25 (we may affirm a judgment despite evidentiary error if the record supports a conclusion that the error was harmless beyond a reasonable doubt). Defendant further asserts that it was critical for the jury to hear D.M.'s statement that defendant said he was "going to shoot" the victim, to correct her earlier testimony that defendant said he was going to "kill" the victim. On cross-examination, however, the witness expressly acknowledged that she had actually used the word "shoot" during the 911 call. Accordingly, we discern no basis to conclude that defendant was prejudiced by the ruling excluding the statements in question, and thus no grounds exist to disturb the judgment.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice



Marilyn S. Skoglund, Associate Justice