Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2020-212

JULY TERM, 2021

State of Vermont v. Samuel Schaner*	}	APPEALED FROM:
	}	
	}	Superior Court, Windham Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 600-5-19 Wmcr
		Trial Judge: John R. Treadwell

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

Defendant appeals his conviction by jury of domestic assault, arguing that the trial court abused its discretion by admitting three hearsay statements as excited utterances and not granting his motion for a new trial in the interests of justice. We affirm.

As the result of an incident that occurred on the evening of May 23, 2019, defendant was charged with several offenses, including second-degree aggravated domestic assault for allegedly assaulting the putative victim in violation of an abuse-prevention order imposed to protect her. See 13 V.S.A. § 1044(a)(1)(A).[1] By the time the two-day trial on the domestic-assault charge began on August 21, 2019, the prosecutor had still not been able to serve a subpoena on the putative victim, despite attempting to do so on multiple occasions. The State called four witnesses on the first day of trial: the neighbor who telephoned 911 after hearing yelling at the adjoining apartment where defendant and the putative victim were living; the police dispatcher who took a 911 call from the putative victim shortly after the neighbor called the police; and two police officers who arrived at the scene to respond to the 911 calls.

The neighbor testified that she heard a loud and heated argument in the adjoining apartment between a man and a woman, with the woman sounding angry and upset. When the prosecutor asked the neighbor what specific statement she heard the woman make, defense counsel objected on hearsay grounds. After the neighbor was examined outside the presence of the jury, the trial court considered whether to admit, as excited utterances, both the statement that the neighbor heard—"What, are you going to hit me in the face again?"—and a statement that the putative victim made to defendant while she was speaking to the police dispatcher after making her 911 call—"Why, because you fucking punched me?" The court ruled that, considered together, the statements indicated that the putative victim was referring to a startling event that had occurred between her and defendant that evening before the 911 calls were made. After the jury was recalled, the neighbor testified to having heard the aforementioned statement by the putative victim, and a recording of part of the putative victim's 911 call was played for the jury. One of the police officers who responded to the 911 calls testified that he saw reddening and swelling on

[1] The other charges were severed, and the domestic-assault charge was tried separately.

the putative victim's mouth and reddening above one of her eyes. Photographs showing these marks were admitted into evidence.

The State rested at the conclusion of the first day of trial, but when the putative victim arrived at the courthouse the next morning after hearing that the trial was going forward despite her absence, the prosecutor subpoenaed her, and the court granted his motion to reopen the evidence so that he could call her as a witness. On direct examination, the putative victim testified that she did not recall telling a police officer that defendant punched her in the face or making either of the statements that the court had admitted as excited utterances. The prosecutor played her 911 call to refresh her memory, but she claimed she could not hear the statement she had allegedly made. When she denied telling the police that defendant hit her in the face and head that evening, the prosecutor told the court that he wanted to impeach her regarding this testimony with a portion of the body camera footage. Defense counsel initially objected, but then stated that he understood that anybody can impeach under the rules. Following the putative victim's testimony, including her claim that defendant did not punch her on the evening of May 23, 2019, the trial court permitted the prosecutor, pursuant to the excited-utterance exception to the hearsay rule, to recall one of the responding police officers and to play portions of the police body camera footage during which the putative victim stated to the officer, among other things, that defendant punched her in the face and head.

The jury found defendant guilty after the close of evidence, and defendant admitted to the enhancement factor elevating the offense to second-degree aggravated domestic assault. Defendant filed a motion for a new trial under Vermont Rule of Criminal Procedure 33, arguing that he was entitled to a new trial in the interests of justice because the trial court erred by: (1) allowing the State to reopen the evidence on the second day of trial; (2) failing to determine that the putative victim was an adverse witness before allowing the State to impeach her; (3) failing to allow the putative victim to explain or deny her prior inconsistent statements; and (4) admitting the putative victim's hearsay statements as excited utterances. The trial court rejected each of these arguments and denied defendant's motion for a new trial. On appeal, defendant argues that the trial court erred by admitting the putative victim's three hearsay statements as exited utterances and by denying her motion for a new trial.

"The rule against hearsay prohibits the admission of out-of-court statements offered to prove the truth of the matter asserted." State v. Kelley, 2016 VT 58, ¶ 25, 202 Vt. 174; see also V.R.E. 801(c) (defining hearsay). Vermont Rule of Evidence 803(2) provides a hearsay exception for "statement[s] relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." "Under the exception, the contents of an excited utterance are considered trustworthy because a person's powers of reflection and fabrication will be suspended when she is subject to the excitement of a startling event." Kelley, 2016 VT 58, ¶ 25 (quotation omitted).[2] "Although the statement need not be made immediately after the startling event, the declarant's excited condition, which is the key inquiry, must be caused by the startling event." Id. (quotation omitted). Thus, two conditions must be satisfied for the excited-utterance exception to apply: "(1) a startling event or condition, and (2) a spontaneous utterance in reaction to the event or condition made under the stress of excitement and not as a result of reflective thought." State v. Solomon, 144 Vt. 269, 272 (1984).

[2] Defendant states that the psychological underpinnings of the excited-utterance exception have long been questioned. In making this statement, defendant does not ask this Court to dispense with the exception, and he made no such argument in the proceedings before the trial court. Accordingly, we do not consider the statement as raising a claim of error.

"The trial court determines the admissibility of evidence, including preliminary questions of whether statements fall within exceptions to the hearsay rule." State v. Verrinder, 161 Vt. 250, 256 (1993). "We will disturb the trial court's discretionary ruling only if that discretion has been abused," and thus "[t]he ruling will stand if it has a reasonable basis." Id.; see also State v. Jackson, 2008 VT 71, ¶ 9, 184 Vt. 173 ("Our review of trial court evidentiary rulings is deferential, and we reverse only when there is an abuse of discretion resulting in prejudice.").

Upon review of the record, we discern no basis to overturn the trial court's discretionary rulings in admitting as excited utterances each of the three challenged hearsay statements made by the putative victim. We first consider the putative victim's statement, "What, are you going to hit me in the face again," which the neighbor testified the putative victim made immediately before the neighbor called 911. Defendant has not explained why the trial court could not consider other statements made by the putative victim in determining whether this statement satisfied the excited-utterance exception; however, even putting aside her statement to defendant during her later 911 call, there was ample circumstantial evidence that her statement reported by the neighbor was a spontaneous utterance under the stress of excitement in reaction to a startling event—namely, being struck in the head and face by defendant. The neighbor heard the putative victim make the statement, in a voice indicating that she was angry and upset, shortly before she herself called 911 and soon thereafter spoke to the police, who observed reddening and swelling on her face and head. The evidence strongly indicates that the challenged statement was the result of a recent startling event, and not the product of reflective thought.

The same is true of the putative victim's second statement to defendant during her 911 call: "Why, because you fucking punched me?" As the trial court found, notwithstanding the putative victim's initial calm demeanor during the call, the tone of her voice indicated that she was emotionally responding to a recent startling even when she made the statement to defendant. Cf. Kelley, 2016 VT 58, ¶ 26 ("The 911 recording provide[d] direct evidence that the complainant was in an excited condition, distraught and crying."). While the putative victim's statements to defendant during her 911 call were difficult to make out, both the trial court and defense counsel indicated that they heard the challenged statement.

Similarly, the trial court did not abuse its discretion in admitting the putative victim's statement to the police, as captured by police body camera footage, reporting that defendant struck her in the face and head. Notwithstanding the passage of time before police arrived, during which the putative victim showed at times a calm demeanor, the officer who spoke to her testified that she appeared disheveled, upset, and fearful, with trembling hands and reddening and swelling on parts of her face. Again, there was ample evidence in support of the trial court's discretionary ruling that the putative victim's statement to the police was made spontaneously, without reflection, as the result of a recent startling event—being struck by defendant. Cf. State v. Ayers, 148 Vt. 421, 423 (1987) (citing police officer's testimony that putative victim was upset, bordering on tears, with her voice quivering, as "ample evidence from which the court could find that the declarant was under the stress of excitement of the event").

Defendant also briefly argues that the trial court abused its discretion by not granting his motion pursuant to Vermont Rule of Criminal Procedure 33 to grant him a new trial in the interests of justice. See State v. Desautels, 2006 VT 84, ¶ 10, 180 Vt. 189 (stating that our review of trial court's ruling on Rule 33 motion "is limited to whether the trial court abused its discretion"). According to defendant, the court was compelled to grant a new trial because of its "misuse of the excited utterance doctrine" and its "willingness to allow the case to go forward on three excited utterances" despite what the putative victim wanted. We find no merit to this argument. As explained above, the trial court did not abuse its discretion in admitting the putative victim's

challenged statements as excited utterances. Moreover, this Court has long recognized that "[v]ictims of domestic abuse are likely to change their stories out of fear of retribution, or even out of misguided affection," State v. Sanders, 168 Vt. 60, 63 (1998); accordingly, prosecutors have the discretion to move forward with domestic-abuse charges involving recanting putative victims.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

William D. Cohen, Associate Justice