IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 41784

STATE OF IDAHO,	)	**2015 Unpublished Opinion No. 435**
	)	
Plaintiff-Respondent,	)	**Filed: March 25, 2015**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
JOHNNY WAYNE PHELPS,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Appellant.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the First Judicial District, State of Idaho, Kootenai County. Hon. Richard S. Christensen, District Judge.

Judgment of conviction for felony domestic violence, affirmed.

Sara B. Thomas, State Appellate Public Defender; Sally J. Cooley, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent.

GRATTON, Judge

Johnny Wayne Phelps appeals from the judgment of conviction entered after a jury found him guilty of felony domestic violence, Idaho Code §§ 18-903, 18-918(2). Phelps claims that the district court erred in admitting hearsay statements made during a videotaped interview between law enforcement and the victim. We affirm.

I.
FACTUAL AND PROCEDURAL BACKGROUND

Phelps and his live-in girlfriend, Robyn, engaged in an altercation during which Phelps pushed Robyn's head into a bathroom mirror, breaking the mirror. Robyn sustained several injuries as a result of the altercation, including a black eye, bloody lip, cut behind her ear, bruises, and an abrasion and bump on her head. Following the altercation, Robyn ran to a nearby bar where the bartender called 911 and police responded within minutes. Emergency medical personnel also arrived shortly thereafter.

Prior to trial, the State filed a motion in limine requesting admission of a video recording provided by the responding officer obtained upon his initial contact with Robyn. The video captured conversations between the officers, Robyn, and the emergency medical personnel. The State proffered several exceptions to the hearsay rule in support of its request to admit the video. Phelps objected to admission of the video in its entirety without identifying any particular statements to which specific objection applied. Phelps also argued that the video recording was cumulative and violated the Confrontation Clause of the Sixth Amendment.[1] The court deferred ruling on the motion until it had the opportunity to hear the foundational evidence presented at trial. Robyn and the responding officer testified at trial, and the court admitted the video into evidence.

The jury found Phelps guilty of felony domestic violence. The district court imposed a unified four-year sentence, with two years determinate, but suspended the sentence and placed Phelps on probation for two and one-half years. Phelps timely appeals.

II.

ANALYSIS

Phelps claims that the district court erred when it admitted, over objection, hearsay statements contained in the videotaped interview of Robyn. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." I.R.E. 801(c); *State v. Gomez*, 126 Idaho 700, 704, 889 P.2d 729, 733 (Ct. App. 1994). Hearsay is inadmissible unless otherwise provided by an exception in the Idaho Rules of Evidence or other rules of the Idaho Supreme Court. I.R.E. 802. The decision to admit hearsay evidence under an exception is reviewed for abuse of discretion. *State v. Moore*, 131 Idaho 814, 822, 965 P.2d 174, 182 (1998).

In seeking admission of the video recording, the State proffered the following hearsay exceptions: present sense impression, I.R.E. 803(1); excited utterance, I.R.E. 803(2); then existing mental, emotional, or physical condition, I.R.E. 803(3); statements for purposes of medical diagnosis or treatment, I.R.E. 803(4); and the residual exception to the hearsay rule, I.R.E. 803(24). Phelps argued that the hearsay exceptions did not apply to all statements on the video and, therefore, objected to the video generally and in its entirety. Phelps did not

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[1] Phelps withdrew his Confrontation Clause objection at trial, and does not raise this issue on appeal.

particularize his hearsay analysis and objection to any individual statements on the video. Phelps also argued that the video was cumulative because Robyn would be testifying at trial. Before admitting the video into evidence, the district court preliminarily noted that the exceptions argued by the State do not "apply across the board." However, after hearing testimony from Robyn and the responding officer, the court determined that proper foundation had been laid to justify the admission of the video.

Although the court did not explicitly hold that statements on the video were all admissible as excited utterances under I.R.E. 803(2), it made factual findings to this effect. The excited utterance exception allows admission of hearsay that is 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." I.R.E. 803(2). To fall within this exception, there must be a startling event that renders inoperative the normal reflective thought process of the observer, and the declarant's statement must be a spontaneous reaction to that event rather than the result of reflective thought. *State v. Parker*, 112 Idaho 1, 4, 730 P.2d 921, 924 (1986); *State v. Hansen*, 133 Idaho 323, 325, 986 P.2d 346, 348 (Ct. App. 1999). In considering whether a statement constitutes an excited utterance, the totality of the circumstances must be considered, including the nature of the startling condition or event, the amount of time that elapsed between the event and the statement, the age and condition of the declarant, the presence or absence of self-interest, and whether the statement was volunteered or made in response to a question. *Hansen*, 133 Idaho at 325, 986 P.2d at 348. Whether to admit a statement as an excited utterance is committed to the trial court's discretion, *State v. Bingham*, 116 Idaho 415, 421, 776 P.2d 424, 430 (1989), and that decision will not be disturbed on appeal absent an abuse of that discretion. *Id.* at 877, 103 P.3d at 971.

The district court found that the contact between Robyn and the responding officer occurred in close proximity both physically and temporally to the incident such that "by the time the officer was on the scene and recording the video, [Robyn] had been subjected to what I think clearly qualifies as a startling event." As to the physical proximity, the court found that Phelps and Robyn's apartment was located "just a matter of a few feet, if you will," from the bar where the police made contact with Robyn. As to the temporal proximity, the court found that "the police station was just minutes away," the call from the bartender "went out almost immediately," and the police arrived "relatively quickly." The court further found that the facts

and circumstances surrounding the video recording provided sufficient indicia of reliability to justify its admission. Accordingly, the court determined that because "the statements were recorded almost immediately in connection or soon thereafter to the troubling event," the video was admissible. The district court's findings are supported by substantial evidence, which we will not disturb. [2]

On appeal, as he did below, Phelps objects to the admission of the video in its entirety. However, in addition to his general objection, Phelps objects to one specific statement made by Robyn at the end of the video where she says, "[Phelps] needs to be arrested and he needs to go to jail." Assuming, without deciding, that this statement should have been redacted from the video, admitting Robyn's statement as part of the video was harmless error because Phelps was in fact arrested, charged, and facing trial, all of which was known to the jury.

This Court will not parse out individual statements to determine error in application of hearsay exceptions when the appellant has not done so. However, the hearsay exceptions argued by the State, including excited utterance pursuant to I.R.E. 803(2), and others apply to various statements on the video. Since clearly at least several of the statements fall within a hearsay exception, Phelps' general objection to the entire video is without merit. Therefore, we cannot say that the court erred in any particular manner in admitting the video.

Moreover, even if we assume error by the district court in admitting the video, any error is harmless. In fact, Phelps acknowledges that most of what was seen and heard on the video was also described and heard by the jury as a result of Robyn's and the officer's testimony and the admission of pictures into evidence reflecting Robyn's injuries. Consequently, Phelps has failed to demonstrate that the district court erred in admitting the video recording into evidence.

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[2] Phelps, relying on the police report to suggest that approximately twelve minutes had elapsed from the time of the incident to when the police made contact with Robyn, also argues that the incident was not sufficiently close in temporal proximity to qualify the hearsay statements as excited utterances. Phelps did not raise this objection below, and issues not raised below generally may not be considered for the first time on appeal. *State v. Fodge*, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992). Moreover, other evidence indicates that the time stated in the police report was erroneous, the actual time lapse being two minutes instead of twelve minutes. The court relied on the testimony of the parties to determine proximity. The approximation of the time of the incident within the police report does not take away from the sufficiency of the evidence.

III.

CONCLUSION

Phelps has failed to show that the district court erred in admitting the video recording. Accordingly, Phelps' judgment of conviction is affirmed.

Judge LANSING and Judge GUTIERREZ **CONCUR.**