IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

NOVEMBER SESSION, 1994

STATE OF TENNESSEE	)	
	)	
APPELLEE	)	NO. 01C0l-9406-CC-00203
	)	
	)	DAVIDSON COUNTY
	)	
V.	)	HON. WALTER C. KURTZ,
	)	JUDGE
	)	
	)	(Aggravated Rape)
	)	
MAURICE GORDON	)	
	)	
APPELLANT	)	

FOR THE APPELLANT:

Ross Alderman
Joan Lawson
Public Defenders
(At trial only)

Jeffrey A. DeVasher
Cynthia M. Fort
Public Defenders
(On appeal only)
l202 Stahlman Bldg.
Nashville, TN 37201

FOR THE APPELLEE:

Charles W. Burson
Attorney General

Kimbra Spann
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

Victor S. Johnson, III
District Attorney General

Renee Erb
Bill Reed
Asst. Dist. Attorneys General
Suite 500, Washington Square
222 2nd Ave., North
Nashville, TN 37201

AFFIRMED

OPINION FILED: _____

JERRY SCOTT, PRESIDING JUDGE

O P I N I O N

The appellant, Maurice Gordon, was convicted of the crime of aggravated rape of a child under thirteen. He was sentenced as a Range I, standard offender to fifteen years in the custody of the Department of Correction. In this appeal as of right, he raises three issues concerning the admissibility of evidence at his trial:

> (1) whether the trial court erred in finding the victim competent to testify at trial;
>
> (2) whether the trial court erred in allowing the victim's mother to testify regarding statements made by the victim pursuant to the excited utterance exception to the hearsay rule;
>
> (3) whether the trial court erred in allowing a nurse practitioner to testify regarding the history and statements taken from the victim by a child psychologist.

In all three issues, we affirm the decision of the trial court.

The victim, KH, who is the daughter of the appellant's sister, was three years old when the crime occurred.[1] On the evening of the aggravated rape, she and her older sister were staying at the home of their maternal grandparents which was also, at that time, the appellant's home. The testimony revealed that while the grandparents and the older sister watched television in one room of the house, the appellant and, for part of the time, a visiting cousin watched television in the appellant's room. The victim wandered between the rooms during the evening. The first indication that something was wrong occurred after the children had been at the home between two and three hours when the victim expressed pain while attempting to urinate. Following her return to her own home where she again experienced the same pain, her parents discovered injury to her vaginal area and elicited from her an identification that the child's uncle was the person who had injured her.

---

[1]It is the policy of this Court to refer to victims of child sexual abuse by initials or other identifiers, but never by name.

I.

By the time of the trial, the victim was five years old. She testified that her "Uncle Reese" had hurt her by touching her on the front part of her genital area. Before the victim gave her testimony, the trial judge questioned her outside the presence of the jury to determine if she was competent to testify. It is the appellant's contention that the trial judge erred by finding the five-year-old victim competent to testify at trial. He asserts that the trial judge failed to fully evaluate the competency of the victim pursuant to the Tennessee Supreme Court's three-prong test in State v. Ballard, 855 S.W.2d 557,560 (Tenn. 1993). There, the court stated that, "[w]hen examining a child's competency to testify a judge should determine whether the child understands the nature and meaning of an oath, has the intelligence to understand the subject matter of the testimony, and is capable of relating the facts accurately." (citing this Court's opinion in State v. Fears, 659 S.W.2d 370, 375 (Tenn. Crim. App. 1983)).

It is significant that in Ballard the court upheld the trial judge's determination of competency, finding that "[a]lthough the trial judge did not follow verbatim the requirements in State v. Fears (citation omitted), he did determine that the child appreciated the difference between truth and falsehood and that the child promised to tell the truth during questioning." Ballard, supra. In another recent Supreme Court case cited by the appellant, the court also upheld a trial judge's finding of competency. State v. Caughron, 855 S.W.2d 526, 537 (Tenn. 1993). The judge in Caughron deemed the witness competent to testify after he asked her general questions regarding "how she was doing in school and how her counselling was proceeding, and some questions about her awareness of her testimony." Id. There the appellant's complaint focused on the absence of questioning about the witness's understanding of the difference between a truth and a lie and the importance of the former. Id. In upholding the trial judge's decision, the court said "[s]o long as a witness is of sufficient capacity to understand the obligation of an oath or affirmation, and some rule or

statute does not provide otherwise, the witness is competent." Id. 855 S.W.2d at 538.

In this case, the trial judge thoroughly examined the victim before allowing her to testify. It is true that she initially exhibited some confusion by the court's question, "[w]ell, if you lie about something, do you tell the truth or not tell the truth?" The victim responded, "[t]ell the truth." Subsequent to this, she correctly identified whether the judge was telling the truth or a lie regarding the color of some pens. She understood the consequences of not telling the truth when asked what would happen if she lied, she consistently responded that she would get in trouble. Also, when asked by the court whether something good or something bad happened to one who lies, she said, "bad." The victim stated that when she told her story in court, she was going to tell the truth, she would not tell any lies and she would not make up anything. Furthermore, after the judge asked her what it meant when she raised her hand at the beginning of her testimony, the victim replied, "[t]o tell the truth." The court's examination was certainly adequate to determine that the victim understood the difference between truth and falsehood and as well as the meaning of the oath.

As to the determination of the victim's intelligence and ability to communicate the facts, we also find that the court's inquiry was sufficient. The judge asked and the victim responded to questions about the name of her school and teacher, her age and birthday, the street and city where she lived, and the names of other children who sat at her table in school. She said that she was in court to tell the judge about something that happened at her grandmama's a long time ago. The issue of competency is a matter within the trial court's discretion and we do not find that this discretion was, in any way, abused by the judge's determination that the victim was competent to testify.

Caughron, 855 S.W.2d at 538; Arterburn v. State, 391 S.W.2d 648, 657(Tenn. 1965). This issue has no merit.

II.

In the appellant's second issue, we must decide whether the trial court erred in allowing the victim's mother, Diane Holt, to testify about the victim's statements made to her pursuant to the excited utterance exception to the hearsay rule. The evidence presented at trial revealed that the victim implicated the appellant in the presence of her immediate family after she had left the home of her grandparents and was at her own home. According to Ms. Holt, she went to pick up her children at their grandparents' home when her older daughter telephoned to tell her that something was wrong with the victim. When Ms. Holt arrived, the victim appeared to be fine; therefore, she visited for about twenty minutes and then took the children home. Within thirty minutes of arriving home and after she had given the victim a bath, the victim again expressed pain while attempting to urinate. In the presence of her husband and her other daughter, Ms. Holt examined the victim's vagina, discovering tears and bits of dried blood. When she asked the victim who had done this to her, the victim "ducked her head" and did not want to say. After the questioning continued, the victim responded that it was her "Uncle Reese." Ms. Holt testified that the amount of time which elapsed between the latter expression of pain and the implication of the appellant was not over two minutes.

The appellant contends that Ms. Holt's testimony regarding her daughter's implication of him is inadmissible hearsay. While he concedes that the victim's "hollering" would be admissible, he argues that the subsequent implication would not be. The excited utterance exception, found at Tenn.R.Evid. 803(2), excepts from the hearsay rule statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." "The reason for this exception is the lack of reflection-- and potential

fabrication-- by a declarant who spontaneously exclaims a statement in response to an exciting event." Neil P. Cohen et. al., Tennessee Law of Evidence § 803(2).1. (2d ed. 1990).

We first address the appellant's contention that the elicitation of the victim's statement by her mother is a factor weighing against its admissibility. The Tennessee Supreme Court has made it clear that excited utterances made in response to the questioning of the declarant may still qualify for this hearsay exception. State v. Smith, 857 S.W.2d 1, 9 (Tenn. l993). In a recent case involving aggravated rape, this court held admissible the child victim's affirmative response to her mother's inquiry as to whether the defendant had "messed" with her. State v. Rucker, 847 S.W.2d 512, 517 (Tenn. Crim. App. 1992). While the mother's question and the victim's response immediately followed the rape in Rucker, in this case the victim's statement was made somewhere between one to three hours after the rape and within thirty minutes of the time that the victim was alone with her parents and sister. The victim was asked only twice within moments who had caused the injury to her vaginal area. There was no evidence that her parents suggested the appellant's name or even that they had any suspicion that the appellant had caused the victim's injury. We find that, in this case, the victim's mother's questions did not detract from the spontaneity and lack of reflection which are the underpinning justifications for this hearsay exception.

Though the appellant concedes that the victim's "screaming and hollering" only two minutes before were admissible excited utterances, his primary argument for the exclusion of the subsequent implication of him is that there was no proof that the victim was excited at the moment she spoke the appellant's name. The pain experienced by the victim was the startling event causing the stress of excitement. See State v. Carpenter, 773 S.W.2d 1,9 (Tenn. Crim. App. 1989) (where this court found that the defendant's return to

the scene of a theft he had committed the previous day, and not the actual theft, was the startling event which prompted the victim's comments to someone on the telephone with her). See also State v. Person, 781 S.W.2d 868, 872 (Tenn. Crim. App. 1989) (where an adult rape victim's identification of the car wherein she had been assaulted while she was later being taken to the hospital was deemed an excited utterance "triggered by passing the scene.") Merely because the victim was no longer crying a couple of minutes later, there is no reason to believe that the stress of excitement from experiencing this intense and unusual pain caused by being raped by a trusted uncle had been alleviated.

Considering the seriousness of the victim's pain and her very young age, the circumstances surrounding the utterance fairly establish that it was not made as the result of a conscious fabrication or reflection. See generally Neil P. Cohen et. al., Tennessee Law of Evidence § 803(2).2. (2d ed. 1990). Instead, it is clear that her statement was provoked by the pain she experienced from attempting to urinate. We believe that her mother's questions did not induce a false statement, but merely made her young daughter feel comfortable to communicate this personal information. We conclude that the victim's implication of the appellant was made while she was still under the stress of excitement from the rape and the pain caused thereby and was, therefore, an admissible excited utterance. This issue has no merit.

III.

In the appellant's final issue, he asserts that the trial court erred by allowing a nurse practitioner to testify regarding the history and statements taken from the victim by a child psychologist. When the victim first arrived at Our Kids Clinic on the morning after the rape, a child psychologist interviewed her to get a medical history. In that interview, the victim told the psychologist that the appellant had touched her with his finger inside her clothes. The statements made by the victim during this interview were admitted at trial based upon

Tenn.R.Evid. 803(4), which provides that statements made for purposes of medical diagnosis and treatment are excepted from the hearsay rule.

The appellant argues that the state failed to establish that the victim's statements to the doctor were made by her for purposes of diagnosis and treatment. At trial, he argued this issue outside of the presence of the jury and suggested that the victim's young age would prohibit her from having the state of mind that Rule 803(4) requires, i.e., the desire for medical diagnosis and treatment. The trial judge allowed the evidence, finding that an inference could be drawn that the victim gave her statements for purposes of diagnosis and treatment under the circumstances of this case-- the child was taken immediately to an emergency room, after experiencing pain while urinating on the night of the rape and these statements were made the day following the rape.

Despite the appellant's assertion that there is no evidence that the victim was in pain or discomfort during her interview, testimony revealed that she held her urine to avoid the intense pain which occurred each time she urinated. Moreover, we do not attach the significance that the appellant does to the doctor's failure to explain to the victim that her questions arose from a desire to medically diagnose and treat her. The victim, who had undoubtedly visited doctors before, was well aware that something was wrong with her. By the time of the interview, she had already experienced intense pain twice while attempting to urinate, and, while at the clinic, she had refused to attempt to urinate again.

Lastly, the caselaw cited by the defendant to support his argument is not persuasive. In W.C.L. v. People, 685 P.2d 176, 181 (Colo. 1984), a child victim's statements concerning the identification of her rapist were found inadmissible under this hearsay exception. However, in that case, the child, who

was not experiencing any pain, was referred to the Department of Social Services some weeks after the rape, not for treatment, but as a preliminary step in law enforcement proceedings. See also, Morgan v. Foretich, 846 F.2d 941(4th Cir. 1988) (where the dissenting opinion was cited by the defendant but the majority supports the prosecution in holding that a young rape victim's statements to psychologists were admissible under 803(4) even though the child, unlike the victim in this case, was incompetent to testify at trial). This issue has no merit.

Finding no merit to any issue, the judgment is affirmed.

_____
JERRY SCOTT, PRESIDING JUDGE

CONCUR:

_____
JOE B. JONES, JUDGE

_____
JOE D. DUNCAN, JUDGE