Admission of Excited Utterance to Police Officer in Domestic Violence Case Upheld

June 14, 2004

Court of Appeals of Indiana, Aaron G. FOWLER v. Indiana, No. 49A02-0310-CR-930

ISSUE: CRAWFORD: "Excited Utterance"

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After being convicted of domestic battery, the defendant appealed arguing that the trial court erroneously admitted hearsay testimony from a police officer to recount statements made by the victim at the time of the defendant's arrest.

Facts at trial included that after receiving a 911 domestic disturbance call, police arrived at the defendant's home and confronted the defendant and his wife, the victim.

The police saw blood coming from the victim's nose and what appeared to be blood on her shirt and pants. Ten minutes after arriving at the residence, a police officer asked the victim to tell him what happened. The victim, who was moaning and crying, told the officer and his partner the defendant had punched her several times in the face.

At the time of trial, the victim refused to testify that defendant had battered her, exclaiming at one point, "I don't want to testify no more!"

The State then called the officer from the scene who recounted the victim's statements that the defendant had battered her.

The defendant argued on appeal that the statements did not fit the definition of an "excited utterance" and, therefore, were inadmissible hearsay.

The appellate court disagreed.

An "excited utterance" 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."

Indiana courts have distilled this rule into three distinct elements that the party seeking admission must prove: "(1) a startling event occurs; (2) a statement was made by a declarant while under the stress of excitement caused by the event; and (3) the statement relates to the event."

In this case, the officer testified that he arrived at the victim's residence approximately five minutes after receiving a domestic disturbance dispatch and that he had the opportunity to speak with the victim within ten minutes of his arrival.

At the time the statements were made, the victim was still crying and bleeding from the nose, claimed to be in pain, and was having trouble catching her breath.

It is reasonable to infer from this evidence that a startling event had occurred that resulted in the victim's bloody nose, that the victim was still under the stress caused by that event, and that her statement related to the event.

Thus, the statements were "excited utterances".

That the statements were "excited utterances" does not end the analysis because it must be determined whether the utterances are admissible under Crawford.

The U.S. Supreme Court held that when the prosecution seeks to introduce a "testimonial" out-of-court statement into evidence against a criminal defendant, the Confrontation Clause of the Sixth Amendment requires two showings: (1) that the witness who made the statement is unavailable; and (2) that the defendant had a prior opportunity to cross-examine the witness.

"Testimonial" statements of unavailable witnesses, even if also "excited utterances", are inadmissible unless the defendant had a prior opportunity for cross-examination.

If a statement is "non-testimonial," its admission in a criminal trial is left "to regulation by hearsay law...."

The majority in Crawford expressly declined to give a precise definition to the crucial word "testimonial" but it did give some guidance.

Testimonial statements need not necessarily be ones given under oath; unsworn statements may also be "testimonial". Examples of "testimonial" evidence include:

> ex parte in-court testimony or its functional equivalent ... such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially ... extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions ... statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

The Court added that statements made during a police "interrogation" would qualify as "testimonial" statements.

However, the Court declined to precisely define "police interrogation," aside from noting that it used "the term 'interrogation' in its colloquial, rather than any technical legal, sense."

Statements given to police do NOT qualify as “interrogation” simply because they are given to police. There must be evidence that the witness knowingly gave a recorded statement “in response to structured police questioning....”

The U.S. Supreme Court reasoned that “.... It appears to us that the common denominator underlying the Supreme Court’s discussion of what constitutes a “testimonial” statement is the official and formal quality of such a statement....”

The Supreme Court chose not to say that any police questioning of a witness would make any statement given in response thereto “testimonial”; rather, it expressly limited its holding to police “interrogation.”

“Interrogation” is defined in one common English dictionary as “To examine by questioning formally or officially.” The American Heritage College Dictionary 711 (3d ed.2000).

This appellate court further noted that “interrogation” carries with it a connotation of an at least slightly adversarial setting. See Roget’s Thesaurus II 556 (Expanded ed.1988) (Listing as first definition of “interrogate” as “To question thoroughly and relentlessly to verify facts: interrogate the captured soldier.”)

Thus, this court ruled that when police arrive at the scene of an incident in response to a request for assistance and begin informally questioning those nearby immediately thereafter in order to determine what has happened, statements given in response thereto are not “testimonial.”

Whatever else police “interrogation” might be, we do not believe that word applies to preliminary investigatory questions asked at the scene of a crime shortly after it has occurred. Such interaction with witnesses on the scene does not fit within a lay conception of police “interrogation,” bolstered by television, as encompassing an “interview” in a room at the stationhouse. It also does not bear the hallmarks of an improper “inquisitorial practice.”

The court further noted that the very concept of an “excited utterance” is such that it is difficult to perceive how such a statement could ever be “testimonial.”

“The underlying rationale of the excited utterance exception is that such a declaration from one who has recently suffered an overpowering experience is likely to be truthful.”

To be admissible, an excited utterance “must be unrehearsed and made while still under the stress of excitement from the startling event.”

“The heart of the inquiry is whether the declarants had the time for reflection and deliberation.”

An unrehearsed statement made without reflection or deliberation, as required to be an “excited utterance,” is not “testimonial” in that such a statement, by definition, has not been made in contemplation of its use in a future trial.

The victim's statement in this case "was not given in a formal setting even remotely resembling a formal police interrogation; it was not given during any type of pretrial hearing or deposition; it was not contained within a 'formalized' document of any kind."

Additionally, the officer's questioning of the victim at the scene of the incident just minutes after it occurred does not qualify as classic, "police interrogation" as referred to in Crawford.

Finally, the very nature of the victim's "excited utterance" places it outside the realm of "testimonial" statements.

CONCURRENCE

A concurring justice agreed with the result reached by the majority but disagreed that Crawford applied to the facts of the case.

This judge would hold that when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of prior statements – including "testimonial" hearsay.

Thus, while the victim in this case was uncooperative, she testified at trial and could have been recalled for cross-examination regarding the statements she made to the police at the scene of the crime. As such, the defendant was not denied an opportunity to confront the victim.

This concurring justice added: "The fallout from Justice Scalia's "clarification" of the Confrontation Clause in Crawford will reverberate through the evidentiary landscape for some time to come and will create countless dilemmas for trial and appellate courts, but I do not believe that we are necessarily faced with that dilemma here."

One such dilemma is that a "testimonial" / "non-testimonial" distinction based on the formality of police questioning may result in the exclusion of statements previously considered to be highly reliable (such as the sworn statements given in Clark) and the admission of statements that traditionally have been deemed less trustworthy.