

FILED

MAR 09 1988

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed March 9, 1988

vs.

)

7-393
86-1502

367

FREDERICK LEON BOUTCHEE,

)

Defendant-Appellant.

)

Appeal from the Iowa District Court for Polk County (No. 31944), Richard Strickler, Judge.

Defendant appeals his conviction of sexual abuse in the second degree in violation of Iowa Code section 709.3(1). **AFFIRMED.**

Charles Harrington, Chief Appellate Defender, and Raymond E. Rogers, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Ann E. Brenden, Assistant Attorney General; and Nan Horvat, Assistant Polk County Attorney, for plaintiff-appellee.

Considered by Oxberger, C.J., and Hayden and Sackett, JJ.

OXBERGER, C.J.

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The defendant Frederick Boutchee appeals his conviction for sexual abuse in violation of Iowa Code section 709.3(1). He contends the trial court erred in admitting alleged hearsay testimony concerning the assailant's identity. We affirm.

On May 14, 1986, D.H. went to the basement of her apartment building to do her laundry. On the way to the basement she passed the defendant, the defendant's wife, and a neighbor in a hallway. While she was in the basement, a man carrying a knife attacked her from behind and dragged her into another room. D.H. testified that her attacker was a black man wearing dark clothing. Her attacker choked her to unconsciousness and then brutally assaulted her. As she regained consciousness, she saw the man leaving the room.

Partially clothed and bleeding, she ran to the building manager's apartment where she called her friends, the Aldridges. The police were also called. The police arrived prior to the Aldridges and questioned D.H. She gave the police a description of the defendant. The defendant was asked to come see D.H. for identification purposes. D.H. identified the defendant from the sound of his voice. The defendant was then arrested.

When the Aldridges arrived, Mrs. Aldridge asked D.H. what happened. Mrs. Aldridge testified that D.H. told her "she had seen a man on the second floor around apartment 209 talking with a Hispanic man and a woman, and that was the man who later had attacked her." The defendant objected to the admission of this statement and was overruled.

The physical evidence gathered by the police included a bloody towel and clothes found in the defendant's bathroom. Tests were run on the clothes. The tests indicated that the underwear worn by the defendant showed both seminal fluid and blood. The blood type was consistent with D.H.'s and not

the defendant's. The towel did not contain enough blood for blood-typing to be done. Additionally, the defendant's neighbor testified the defendant said he was "going to get some of that" after D.H. walked past.

The defendant's sole contention on appeal is that the trial court erred in admitting Mrs. Aldridge's statement concerning what D.H. told her about her assailant. He argues D.H.'s statement was hearsay and does not constitute an excited utterance. He also argues admission of the statement was extremely prejudicial since the issue at trial was the identity of the assailant.

We review this matter for the correction of errors at law. Iowa R. App. P. 4. The admission of evidence is a matter of discretion and will not be disturbed absent an abuse of that discretion. State v. Williams, 367 N.W.2d 310, 312 (Iowa App. 1985).

Iowa Rule of Evidence 803(2) excepts from the hearsay rule 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 exception applies generally to statements made under the influence of the excitement of an incident, rather than on reflection or deliberation. State v. Mateer, 383 N.W.2d 533, 535 (Iowa 1986); State v. Stevens, 289 N.W.2d 592, 596 (Iowa 1980). The admission of hearsay under this exception lies largely within the discretion of the trial court, which must initially determine whether the out-of-court statements were induced by the excitement caused by the startling event which is being described. Mateer, 383 N.W.2d at 535; State v. Ogilvie, 310 N.W.2d 192, 196 (Iowa 1981).

Several factors are considered in determining whether a statement is spontaneous. They include the lapse of time, the extent to which questioning elicited statements that otherwise would not have been volunteered, the age and condition of the declarant, the characteristics of the event being described,

and the subject matter of the statements. Mateer, 383 N.W.2d at 535. Statements which are elicited by questions qualify as excited utterances if they are not calculated to elicit information which would otherwise have been withheld. State v. Watson, 242 N.W.2d 702, 704 (Iowa 1976); see also State v. Ogilvie, 310 N.W.2d 192, 196 (Iowa 1981). Considering those factors and Watson, we conclude the trial court did not abuse its discretion in determining D.H.'s description of her assailant was admissible as an excited utterance.

The record shows that D.H. was assaulted near 11:00 p.m. and the police arrived at 11:15. At that time she told the police who her assailant was. The Aldridges arrived shortly thereafter. D.H. testified that when the Aldridges arrived she lost control again and began crying. She was still bleeding from her wounds and was wrapped in a blanket. It is clear that only a short period of time elapsed between the rape of D.H. and Mrs. Aldridge asking who did this to her. The time lapse involved does not mitigate the spontaneity of D.H.'s statements, especially considering she again lost control when the Aldridges arrived. See State v. Galvan, 297 N.W.2d 344, 347 (Iowa 1980) (statement made two days later still an excited utterance); State v. Stevens, 289 N.W.2d 592, 596 (Iowa 1980) (approximately an hour); State v. Paulsen, 265 N.W.2d 581, 586 (Iowa 1978) (two hours); State v. Stafford, 237 Iowa 780, 785-87, 23 N.W.2d 832, 835-36 (1946) (fourteen hours).

The other factors also support the trial court's ruling. D.H. was nineteen and was describing the man who had just brutally raped her. The statement also falls under the Watson rationale because Mrs. Aldridge's question was not calculated to elicit information which would otherwise have been withheld. D.H. had already told the police who her assailant was and this information would not ordinarily have been withheld.

There was no error in the trial court's admission of D.H.'s statement, and the defendant's conviction will stand.

AFFIRMED.