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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

VICTOR ALFONSO CARRILLO,

Defendant and Appellant.

2d Crim. No. B271648
(Super. Ct. No. 2015027814)
(Ventura County)

Victor Alfonso Carrillo, a MPLS gang member, appeals his conviction by jury of two counts of domestic battery (counts 1 & 2; Pen. Code, § 243, subd. (e)(1))¹, disturbing the peace by fighting (§ 415, subd. (1)), and attempted second degree robbery with a gang enhancement (§§ 664/211; 186.22, subd. (b)(1) & (2)). The trial court sentenced appellant to seven years state prison. Appellant contends that the trial court erred in

¹ All statutory references are to the Penal Code unless otherwise stated.

admitting the victim's out-of-court statement that appellant grabbed her wrist and said "give me [your cell] phone" during the attempted robbery. We affirm. (Evid. Code, § 1240.)

Facts

On August 30, 2015, appellant slept with his girlfriend, Jessica Rodriguez, in her car. Appellant woke Rodriguez shortly after midnight, dragged her out of the car, and took it without her permission.

Rodriguez went to work the next day and ignored appellant's phone calls. That afternoon, appellant confronted Rodriguez at the Dollar Tree store in Moorpark. Rodriguez was working the cash register. Appellant yelled, "[Y]ou fuckin' bitch. Why didn't you call me, you fuckin' bitch." Appellant threw a store item at Rodriguez, striking her face. Scared and embarrassed, Rodriguez called for assistance and went to the back of the store.

Appellant continued throwing things, left in a rage, and reentered the store demanding to know where Rodriguez went. Shelley Yee a store customer, told appellant to leave and that the police had been called. Angry, appellant yelled, "[W]ho the fuck are you, bitch? I ain't afraid of no cops. Fuck you."

Yee's son, Canaan Yee, asked appellant to leave. Appellant challenged him to fight and threatened to "kick [his] ass." When Yee followed appellant outside, appellant lunged at him with what appeared to be a pocket knife. Shelley Yee pulled her son back into the store and held the door shut until the store manager locked the door. Appellant screamed profanities, banging on the windows and kicking the door.

Ivette Salas, a store customer, retrieved a cell phone from her car and took pictures of appellant throwing gang signs.

Appellant yelled “[T]ake all the pictures you want you bitch, MPLS.” Appellant held up his arms, showed off his gang tattoos, and chased Salas back to the store. Appellant grabbed Salas’s wrist as she ran through the front door and tried to take her cell phone. Salas held on tight to the cell phone as the store cashier slammed and locked the door. Appellant yelled “you bitch, you bitch” and ran off to nearby Poindexter Park where he was arrested minutes later.

Store surveillance videos and still photos show appellant chasing Salas and reaching for her cell phone. Appellant defended on the theory that it was a simple battery, not an attempted robbery.

Ventura County Sheriff’s Deputy John Eisenhard, a gang expert, testified that appellant was an active member of MPLS, a criminal street gang. In response to a hypothetical that included case-specific facts, the deputy opined that the attempted robbery was committed for the benefit of a criminal street gang and to instill fear in the community.

Spontaneous Statement

Appellant contends that the trial court erred in admitting Salas’ out-of-court statement that appellant said “give me the phone, give me the phone.” Salas did not recall making the statement. Ventura County Sheriff’s Deputy David Anaya, the first officer on the scene, briefly spoke to Salas. Salas was “traumatized and shaken to the core.” Deputy Anaya questioned Salas less than thirty minutes later. Salas was still shaken by the events and concerned about her son and her own safety. Over defense objection, Deputy Anaya testified that Salas said that appellant demanded “give me the phone, give me the phone.”

Salas's statement was admitted as a spontaneous statement pursuant to Evidence Code section 1240.²

We review for abuse of discretion. (*People v. Merriman* (2014) 60 Cal.4th 1, 65.) For a statement to be admissible under the spontaneous statement exception, “(1) [T]here must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it.” [Citations.]” (*People v. Poggi* (1988) 45 Cal.3d 306, 318.)

Appellant claims that Salas's statement does not qualify as a spontaneous statement because it was made 30 minutes after appellant fled. Citing *People v. Guiterrez* (2009) 45 Cal.4th 789, appellant argues that there was no spontaneous statement unless it was made at the “first secure opportunity for disclosure’” (*Id.* at p. 812.) There, our Supreme Court concluded that a child's statement about her mother's murder was not spontaneous because it was made two months after the murder. (*Ibid.*)

Salas was “traumatized and shaken to the core” when Deputy Anaya first contacted her. The deputy took her

² Evidence Code section 1240 provides: “Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.”

statement less than 30 minutes later but Salas was still “shaken by the event,” suffered from a bruised and swollen wrist, and was distraught and feared for safety. Deputy Anaya stated that it still seemed to be affecting her emotionally. The trial court did not err in admitting the out-of-court statement. “[T]he discretion of the trial court is at its broadest” when it determines whether an utterance was made while the declarant was still in a state of nervous excitement. [Citation.]’ [Citation.]” (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1271.) Substantial evidence supports the finding that Salas’s statements were “made under the stress of excitement and while the reflective powers were still in abeyance.” [Citation.]” (*People v. Banks* (2014) 59 Cal.4th 1113, 1163-1164, overruled on other grounds in *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

Appellant argues that too much time elapsed even though it was no more than 30 minutes. Much longer periods of time have been found not to preclude application of the spontaneous utterance hearsay exception. (See *People v. Brown* (2003) 31 Cal.4th 518, 541 [two and one-half hours]; *People v. Raley* (1992) 2 Cal.4th 870, 893 [18 hours]; *In re Emilye A.* (1992) 9 Cal.App.4th 1695, 1713 [one to two days].) Appellant argues that the out-of-court statement was in response to the deputy’s questions but this does not show that the statement lacks spontaneity. (*People v. Banks, supra*, 59 Cal.4th at p. 1164.)

“Here the record supports the finding of spontaneity. First, although [Salas] made the statements at issue about 30 minutes after the attack, it is undisputed that she was still under its influence. Second, it is also undisputed that she remained excited as she made the statements, even though she had become calm enough to speak coherently. Finally, the fact that the

statements were delivered in response to questioning does not render them nonspontaneous. . . . [Deputy Anaya's] questions appear to have been simple and nonsuggestive - in substance, 'What happened?'" (*People v. Poggi, supra*, 45 Cal.3d at pp. 319-320.) The trial court reasonably concluded that Salas was scared and distraught, and was in no condition to fabricate or make a self-serving statement. (*People v. Raley, supra*, 2 Cal.4th at p. 894.)

The judgment is affirmed.

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YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Mark S. Borrell, Judge

Superior Court County of Ventura

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