

COPY

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,

CASE NO.: 48-2008-CF-0015606-O
Chief Judge Belvin Perry, Jr.

Plaintiff,

v.

CASEY MARIE ANTHONY,

Defendant.

**DEFENDANT'S SUPPLEMENTAL MEMORANDUM REGARDING
ADMISSIBILITY OF CONTENTS FROM 911 CALLS**

COMES NOW the Defendant, CASEY MARIE ANTHONY, by and through her undersigned attorney, and files this her Supplemental Memorandum regarding the admissibility of certain contents of the 911 calls made by the Defendant's mother, CYNTHIA ANTHONY, and shows:

1. Prior Motions by both parties with Memorandum have been provided to the Court.
2. The purpose of this Supplemental Memorandum is an effort by your undersigned to digest down to the salient points those issues to be considered on these matters.
3. As with all matters of evidence, determinations of admissibility are for the Court. This Court has agreed with the most recent filings by the Defense that an evidentiary hearing should be held to determine the admissibility of the 911 statements. This is appropriate in accordance with Florida Statute § 90.105.
4. There are several approaches to the issue as to whether or not the statements made by Cynthia Anthony on the 911 calls should be admissible. Essentially, the State argues that the content of the statements, or "most" of them, should be admitted either as spontaneous statements as an exception to hearsay (Florida Statute § 90.803(1)) or excited utterances (Florida Statute §

90.803(2)).

5. Both excited utterances and spontaneous statements can be recognized as exceptions to the hearsay rule. There is no question that the statements, otherwise, are hearsay and but for recognized exceptions, sufficiently proven, would not be admissible.

6. It is the burden of the moving party (here, the State of Florida) to prove the admissibility of the attributed statements.

7. With respect to spontaneous statements, it is fundamental that there has to be substantial “contemporaneity”. This means that there cannot be a lapse of time between the event prompting the spontaneous statement, and the statement itself, that would allow for the declarant to have had “reflective thought”. Both the Defense and the State cite the Florida Supreme Court’s decision in *Hutchinson v. State*, 882 So.2d 943, 951 (Fla. 2004) (appeared that one hour has been ruled to lack spontaneity). Also see *Carter v. State*, 344 So.2d 1328 (1 DCA 1977), Cert. Denied, 352 So.2d 174 (Fla. 1977); Forty-five to sixty minutes has been ruled to be too long. *Burgess v. State*, 644 So.2d 589, 592 (4 DCA 1994); It has further been held that the time for an aggravated assault victim to drive home and then call the police to report the crime was not sufficiently spontaneous to allow the spontaneous statement exception to hearsay. *United States v. Cruz*, 765 F.2d 1020, 1024 (11 CCA 1985).

EXCITED UTTERANCE

Analyzing the circumstances in this case, the declarant’s statements, during her third 911 call, do not meet all of the elements of the excited utterance exception. For a statement to constitute an excited utterance, the Florida Supreme Court has stated that, “(1) there must be an event startling

enough to cause nervous excitement; (2) the statement must have been made before there was time to contrive or misrepresent and (3) the statement must be made while the person is under the stress of excitement caused by the event.” *State v. Jano*, 524 So.2d 660,661 (Fla. 1988) (citing *Jackson v. State*, 419 So.2d 394 (Fla. 2th DCA 1982)). See *Strong v. The State of Florida*, 947 So.2d 552,554 (Fla. 2006).

The element at issue is the second element to the excited utterance exception, which states “the statement must have been made before there was time to contrive or misrepresent.” This element is not satisfied because the statements made by Cynthia Anthony during the third 911 call were purposely contrived by Cynthia Anthony in order to get law enforcement to her home. Prior to this 911 call, Cynthia Anthony called 911 twice in attempt to get police assistance. In her second 911 call made at 8:44 pm, Cynthia Anthony calmly states, “I have a possible missing child. I have a three year old that’s been missing for a month.” (*Transcript of second 911 call, lines 14-15, attached hereto as Exhibit “A”*) . An hour goes by, and law enforcement still have not arrived to the Anthony home. At this point, Cynthia Anthony is tired of waiting on law enforcement, prompting her to make the third 911 call. Cynthia Anthony recounts, “I wanted them there, like, right now. I wanted them there an hour ago. And that was the only thing I could *think* of to get them there, like right now. Because the dispatcher made it sound like, on both the other calls, that they would take their time.” (*Deposition of Cindy Anthony, July 29, 2009, page 391, lines 6-12, attached hereto as Exhibit “B”*).

“Excited utterances are admissible because they contain sufficient guarantees of trustworthiness in that ‘the declarant does not have the reflective capacity necessary for conscious misrepresentation’ while in a state of excitement.” *Rogers v. State*, 660 So.2d 237, 240 (Fla.

1995)(citing Charles W. Erhardt, Florida Evidence § 803.2 (1994 ed.)). See *Strong v. The State of Florida*, 947 So.2d 552, 554 (Fla. 2006). “In analyzing excited utterances: probably the most important of the many factors entering into this determination is the time factor. If the statement occurs while the exciting event is still in progress, Courts have little difficulty finding that the excitement prompted the statement. But as the time between the event and the statement increases, so does the reluctance to find the statement an excited utterance...Perhaps an accurate rule of thumb might be that where the time interval between the event and the statement is long enough to permit reflective thought, the statement will be excluded in the absence of some proof that the declarant did not in fact engage in a reflective thought process.” *State of Florida v. Jano*, 524 So.2d 660, 662 (Fla. 1988).

Cynthia Anthony did, in fact, engage in reflective thought when she made the statements in the third 911 call. After two unsuccessful calls to 911, Cynthia Anthony knew she had to say something shocking, since reporting a missing three year old in her second 911 call did not get law enforcement to her home. In the second 911 call Cynthia even states that the three year old has been missing for a month, prompting the 911 dispatcher to ask, “Have you reported that?” in which Cynthia Anthony responds, “I’m trying to do that now ma’am.” (*Transcript of second 911 call, lines 18-19, attached hereto as Exhibit “A”*).

When Cynthia Anthony makes the third 911 call she is frantic and has lost all patience with law enforcement. Cynthia Anthony is mad because her three year old granddaughter is missing and law enforcement is not coming to help her. “The fact that a declarant long after the occurrence of a startling event once again becomes excited in the course of telling about it would not permit the statement to be introduced as an excited utterance.” *State of Florida v. Jano*, 524 So.2d 660, 663

(Fla. 1988). “Florida law is clear that the fact that a declarant becomes excited while making the statement is insufficient to transform the statement into an excited utterance.” See *Mariano*, 933 So.2d at 117 (“The mere fact that [the victim] was still upset and crying is not sufficient to show that reflective thought has not occurred.”); *Brandenburg*, 890 So.2d at 270 (“After reviewing the record in this case, we conclude that the State went no further than showing that both [declarants] were excited when they spoke with [the police officer.]”); *Charlot v. State*, 679 So.2d 844,845 (Fla. 4th DCA 1996) (“A statement as to what occurred does not become admissible merely because the victim is still in an excited state.”). See *Strong v. The State of Florida*, 947 So.2d 552, 556 (Fla. 2006).

That is exactly what happened in the third 911 call. Cynthia Anthony became excited in order to get the police to her home. Cynthia Anthony was frustrated, angry, and desperate for help. This is evident in Cynthia’s tone of voice during the third 911 call. The State is trying to say that Cynthia Anthony’s “excited” state was because she had just learned, prior to the third 911 call, that her granddaughter was missing. The State is incorrect. Cynthia Anthony acted just like any other reasonable person would after two prior 911 calls yielded no response from law enforcement.

LAY OPINION

Part of the 911 recordings that the State seeks so vigorously to introduce is a declaration by Cynthia Anthony that her car smells like there has been a “dead body” in there. This is a statement of an opinion by a lay witness, which is governed by Florida Rules of Evidence 90.701(1). As a general rule, witnesses are not allowed to testify in terms of opinion, or inferences, and, particularly, where such inference could mislead a jury or lead to prejudice to the (Defendant), then 90.701(1)

would prohibit its admission. A specialized or particular knowledge of the subject matter would be required in order to allow non-expert lay opinion testimony. *Wingfield v. State*, 751 So.2d 134, 136 (2 DCA 2000). In *Wingfield*, the police officer was not allowed to state opinion testimony as to the value of damage resulting to his police cruiser by the Defendant, absent the particular knowledge of the value and cost of repair, etc. As a general rule, the Florida Courts require that the offering party (State) demonstrate that the lay witness (Cynthia) has an adequate foundation for the opinion (i.e., smells like a dead body). The predicate is a demonstration of a sufficient basis for opinion, rather than presuming that all the lay persons have that knowledge. *Pittman v. State*, 51 Florida 94, 41 Southern 385, 393 (1906). There are many circumstances that are subject to lay opinion testimony, with the normal predicate, such as distance, time, size, weight, speed of a vehicle (for drivers). More particularly, lay witness opinion has been allowable in court to testify that a bag smelled like marijuana. *State v. Raulerson*, 403 So.2d 1102 (5 DCA 1981) [Even where the familiarity of the smell was acquired after the subject incident.]; Even testimony that a child sex abuse victim “smelled like sex” has been admitted for the obvious common experience predicated. See *Duncan v. State*, 583 So.2d 439, 440 (4 DCA 1991).

A lay witness may not be allowed to rely on hearsay in forming an opinion (such as Cynthia alleging that George said the car smelled like a dead body). *Barnes v. State*, 415 So.2d 1280, 1283 (2 DCA 1982), review denied, 424 So.2d 760 (Fla. 1982).

Even if the evidence established that some of the statements made in the Cynthia Anthony 911 calls would fall in the category of exceptions to the hearsay rule as either spontaneous statements or excited utterances, the Court is still required to consider the additional rules of evidence that would control. Other evidence rules may clearly result in exclusion of excited utterances. *Harmon*

v. *State*, 854 So.2d 697, 699-700 (Fla. 5 DCA 2003).

As with all evidence, the Court is required to do a balancing test as to the relevancy under § 90.401 and prohibition due to prejudice under § 90.403.

There is no predicate, nor ability to have a predicate, that Cynthia Anthony, ever smelled a decomposing body or had any basis, therefore, to state a lay opinion. There is no predicate that George ever did, even if his statement were not double hearsay, when Cynthia reported to others that George had said he thought it smelled like a dead body. Speculation such as this is not permissible. The prejudice is clear.

REDACTION

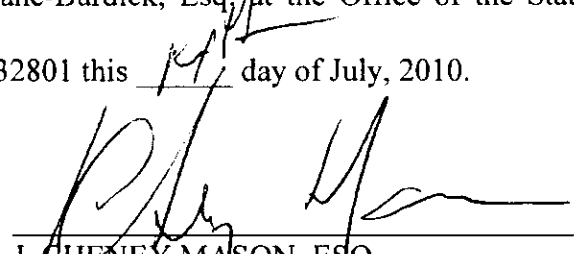
The State has candidly conceded, in their papers, that redaction may be appropriate as to some of the content of the 911 calls. The Defense concurs. Clearly, the statements related to stealing of a car, stealing money, and the like, set forth by Cynthia (in apparently the second 911 call) were neither excited utterances nor spontaneous statements. The prejudice, however, under § 90.403, and inadmissibility under § 90.404, would prohibit those statements from being included, even in the event anything else from that call was deemed admissible over the obvious objections to hearsay.

Statements in the calls related to allegations heard by the Defendant may, or may not, be determined relevant at the time of trial, as statements against interest for state of mind exceptions, depending on how the evidence would be presented. The Defense submits that the State's extrapolation of this theory to overcome the hearsay is severely stretched.

Given the lack of appropriate predicate, as to excited utterance, spontaneous statement, and lay opinion testimony, statements related to smell or odor clearly must be prohibited.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to Jeff Ashton, Esq. and Linda Drane-Burdick, Esq. at the Office of the State Attorney, 415 N. Orange Avenue, Orlando, Florida 32801 this 14th day of July, 2010.



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1 **TRANSCRIBED RECORDING OF FIRST 911 CALL MADE BY**

2 **MRS. CYNTHIA ANTHONY ON JUNE 15, 2008**

3 **CASE AGENT: CORPORAL YURI MELICH**

4 **CASE NUMBER – 08-069208**

5 **OP – 911 OPERATOR**

6 **CA – MRS. CYNTHIA ANTHONY**

7 **OP:** 911. What is the address of your emergency?

8 **CA:** 4937 Hope Spring Drive, Orlando.

9 **OP:** 4937 Hope Springs Drive?

10 **CA:** (Inaudible.)

11 **OP:** Okay, what's happening?

12 **CA:** Uhm, I have someone here that I need to uhm, be arrested in my home.

13 **OP:** They're there right now?

14 **CA:** And I have a possible missing child. I have a three year old that's been missing
15 for a month.

16 **OP:** A three year old?

17 **CA:** Yes.

18 **OP:** Have you reported that?

19 **CA:** I'm trying to do that now ma'am.

20 **OP:** Okay, what did the person do that you need arrested?

21 **CA:** My daughter.

22 **OP:** For what?

23 **CA:** For stealing an auto and stealing money. I already spoke with someone. They
24 said they would patch me through the Orlando uhm, Sheriff's Department and
25 have a deputy here. I was in the car. I was going to drive her to the police

1 shake her and I couldn't. I don't even know if I put
2 my hands on her, but I couldn't. I just -- I didn't
3 know what to do. So that's when I made the last call.

4 Q Okay. Now, in that 9-1-1 call, the smell in
5 the car has now --

6 A Yeah. Because I wanted them there, like,
7 right now. I wanted them there an hour ago.

8 Q Right. But this --

9 A And that was the only thing I could think of
10 to get them there, like, right now. Because the
11 dispatcher made it sound like, on both the other calls,
12 that they would take their time. And at that point,
13 when I heard she was missing, I didn't know what to
14 tell them. I mean --

15 Q Are you putting those things together in your
16 head, though, at that time?

17 A I don't --

18 Q Smelling car, missing child, I need the
19 police and I need them right now?

20 A I don't know what I thought at that point.
21 All I wanted was the police department there. I would
22 have said someone was holding a gun to me if I needed
23 to have them there at that point. I didn't care. I
24 just wanted them there.

25 Q All right.