IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC10-1837

BOBBY LEE AIKEN

Petitioner,

vs.

STATE OF FLORIDA

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant and Respondent was the prosecution in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. Petitioner was the Appellant and Respondent was the Appellee in the Fourth District Court of Appeal ("Fourth District"). In this brief, the parties shall be referred to as they appear before this Honorable Court. The Respondent may also be referred to as the "State".

Citations to the record will be designated by "V" (for volume) followed by the volume number, and either "R" (for record) followed by the page number(s) of the record, or "T" (for transcript) followed by the page number(s) of the transcript. Volumes 4-7 of the record consist of transcripts.

STATEMENT OF THE CASE AND FACTS

The Respondent presents the following statement of the case and facts for the convenience of the Court.

Appellant was tried by a jury and convicted of Count I: Burglary with assault or battery, Count II: Sexual battery and Count III: Unlawful sexual activity with a minor. (T. 48-50). Appellant filed a direct appeal, arguing that the trial court erred by admitting the victim's telephone call to 911 under the exited utterance exception to hearsay. The Fourth District Court of Appeals issued an opinion finding the trial court did not abuse its discretion in admitting the evidence. Aiken v. State, 35 Florida Law Weekly D1836 (Fourth District Court of Appeals, August 11, 2010).

On September 22, 2010, Petitioner filed a Jurisdictional Brief and filed an Appendix, pursuant to this Court's Order on October 5, 2010. Respondent filed its Response to Juris Brief on November 2, 2010. On March 11, 2011, this Court accepted jurisdiction, appointed counsel and dispensed with oral argument. On May 5, 2011 Counsel filed its Merits Brief. This Response Follows.

Trial Testimony

T.S. the seventeen year old victim testified at trial that around 4:00am on the night in question, she was awakened when she felt a gloved hand on her neck. (T. 282). A man held her down and covered her face with a blanket. When she tried to get

up, he threatened to kill her, so she stopped fighting. (T. 280-286). He told her there were two other people in her home. (T. 284). He ordered her to take off her clothing and made her turn over on her back. When she tried to remove the shirt or blanket that was covering her face, he put his hand over her face. (T. 286). He positioned himself on top of her and attempted to penetrate her vagina with his penis. (T. 288). He made her put lotion in her hand and made her "jack him off." (T.288-289). After rubbing his penis for five to ten minutes, he kissed her breast and then forced his penis inside her vagina. (T289). He was inside her for 30 to 45 minutes. (T. 289). He asked her if she was enjoying it and she answered that she did not. (T. 290)

When he was finished, he kept his hand on her neck while he got dressed (T. 290). He brought her to the bathroom and made her shower. (T. 290-1). When she got out, he made her take the towel she was using on her body and place it over her face. (T. 291-2). He ordered her to write a note stating that the sexual activity was consensual and he made her date and sign it. (T. 293-4). He put the bed sheets in a plastic bag. (T. 294). He took her keys and told her that if she told anyone what happened, he would hurt her, her mother and her grandmother. (T.294-5).

She was afraid for her life during the attack. (T. 296). He reminded her that there were two other people in the house, but she did not hear anyone else. (T. 294-5). When he left, she

locked the door. Within 5 to 10 minutes, she called her mother. (T. 296). Her mother called the police first and then she called the police herself. (T.296). She did not call 911 immediately because she was afraid something might happen to her and because Appellant threatened her family. (T. 296-7).

Defense counsel objected to the admission of the victim's 911 call to police, arguing it did not qualify as an exited utterance because the victim waited five to ten minutes, that she called her mother first, and that she may have had time to engage in reflective thought. (T. 298). The prosecutor argued that the call was made within ten minutes of the event and call itself that the victim was extremely upset, crying, gasping and in tears, which showed she was still under the excitement of the moment. (T. 298-9). The trial court overruled the objection. (T. 299).

The 911 tape was played in open court (T. 299-305). The recording depicts that the victim blurted out that she had been raped and that initially, the operator had difficulty understanding her because she was so distraught. The victim told the 911 operator that it just happened and that the perpetrator told her there were three men there, but she did not know.(T. 300-1). The 911 operator heard a knock and the victim told her that it was her grandmother who came into the room. (T. 301). The victim stated to the operator that the perpetrator told her

that he would hurt her and her grandmother and her mother if she called police. (T. 303). The victim was still on the phone with the 911 operator when Officer Mooney arrived. (T. 304). Officer Mooney testified that when he arrived, the victim was hysterically crying and having difficulty telling her story. (T. 437-444).

SUMMARY OF THE ARGUMENT

THIS COURT SHOULD DECLINE JURISDICTION AS THE FOURTH DISTRICT'S OPINION DOES NOT CONFLICT WITH ANY DESCISION OF THIS COURT OR ANY OTHER DISTRICT COURT. ON THE MERITS, THE FOURTH DISTRICT DID NOT ABUSE ITS DISCRETION WHEN IT AFFIRMED THE TRIAL COURT'S ADMISSION OF THE 911 TAPE UNDER THE EXITED UTTERANCE EXCEPTION TO HEARSAY. ANY ERROR WAS HARMLESS AS THERE IS REASONABLE POSSIBILITY THAT THE EVIDENCE CONTRIBUTED TO THE CONVICTION.

Respondent maintains that this Court does not have jurisdiction, under Rule 9.030(a)(2)(iv), as the Fourth District's opinion does not expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law. On the merits, Respondent argues that the Fourth District did not abuse its discretion when it affirmed the trial court's admission of the victim's call to 911, under the exited utterance exception to hearsay. Further, as the district court found, even if the admission of the evidence was found to have been error, it was harmless as there was no reasonable possibility that the error contributed to the conviction, at it corroborated the victim's own trial testimony.

ARGUMENT

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Respondent maintains that this Court does not have jurisdiction, under Rule 9.030(a)(2)(iv), as the Fourth District's opinion does not expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law. On the merits, Respondent argues that the Fourth District did not abuse its discretion when it affirmed the trial court's admission of the victim's call to 911, under the exited utterance exception to hearsay. Further, as the district court found, even if the admission of the 911 tape was found to have been error, it was harmless as there was no reasonable possibility that the error contributed to the conviction, at it corroborated the victim's own trial testimony.

Standard of Review

The "excited utterance" exception to the hearsay rule allows the admission of a hearsay statement "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." § 90.803(2), Florida Statute (2010). "[T]here must be "an event startling

enough to cause nervous excitement," "the statement must have been made before there was time to contrive or misrepresent," and "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).

The statement must have been made before there was time for reflective thought, as the absence of time to contrive the facts, ensures the reliability for such statements. Hayward v. State, 24 So.3d 17, 29 (Fla.2009). The exact amount of time between the event and the statement which will justify a finding that the declarant engaged in "reflective thought" will depend on the specific facts of each case and may vary substantially between cases. *See, e.g.,* Henyard v. State, 689 So.2d 239 (Fla.1996). Although the court will consider the time interval between the "startling event" and the statement, no fixed amount of time has been set, as this is subjective that depends on the circumstances of each case. Rogers v. State, 660 So.2d 237, 240 (Fla.1995); State v. Jano, 524 So.2d 660, 661 (Fla.1988)."Factors that the trial judge can consider in determining whether the necessary state of stress or excitement is present are the age of the declarant, the physical and mental condition of the declarant, the characteristics of the event and the subject matter of the statements." Hayward, 24 So.3d at 29 (*quoting* Hudson v. State, 992 So.2d 96, 108 (Fla.2008)).

Merits

The Respondent argues that the Fourth District applied the analysis established by this Court, when it affirmed the trial court's admission of the victim's statement under the exited utterance exception to hearsay, over defense objection. In case factually similar to the case at bar, this Court, held in Rogers v. State, 660 So.2d 237 (Fla.1995) that a statement given eight to ten minutes after the shooting was admissible as an exited utterance. This Court reasoned that although there was "conceivably" time to engage in reflective thought, the record indicated the declarant was "hysterical," and remained "very excited," and never calmed down as she recounted the event. Id. at 240. Likewise, in the case at bar, Fourth District reasoned,

> While the victim may have had an opportunity to engage in reflective thought, we cannot say that the trial court abused its discretion by allowing the introduction of the 911 tape. The record does not clearly refute the contention that the victim spoke to the 911 operator "under the stress of excitement caused by" her rape. As "reasonable men could differ as to the propriety" of the admission of the phone call, we affirm the trial court's ruling. Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla.1980).

Aiken v. State, 44 So. 3rd 152 (Fla. 4th DCA 2010).

In the case at bar, the State presented evidence that the victim did not engage in reflective thought in the short period between Appellant exiting her home and her call to 911. T.S., the seventeen year old victim, testified that she was awakened

around 4:00 am, when she felt a gloved hand on her neck. (T. 282). Petitioner held her down and covered her face with a blanket. When she tried to resist, he threatened to kill her, so she stopped fighting. (T. 280-286). He told her there were two other men in her house. (T. 284). After committing a brutal sexual battery which lasted approximately 45 minutes, Petitioner made her shower and write a letter stating that she consented to sex. (T285-294). He took her keys and warned that if she told anyone, he would hurt her, her mother and her grandmother. (T.294-6).

When Petitioner left, she locked the door and called her mother within 5 to 10 minutes. (T. 296). Her mother called the police and told her to call 911. (T.296). She did not call 911 immediately because she was afraid something might happen to her and because Appellant threatened her family. (T. 296-7).

Further, the recording of the 911 call demonstrated that the victim was extremely upset during the call. Initially the operator had difficulty understanding the victim, but apparently blurted out that she had been raped. (T. 299-301). The victim told the operator that the “rape” had just happened, and the rapist told her that there were two others. (T. 300-1). The operator heard a knock and the victim said that her grandmother came into the room. (T. 301). The victim stated that the perpetrator threatened to hurt her, her grandmother and her

mother if she called police. (T. 303). Officer Mooney arrived while the victim was still on the phone with the operator. He testified that when he arrived, the victim was hysterically crying and having difficulty telling him what happened. (T. 437-444).

Petitioner argues that the decisions of the Fourth District and from other District Courts conflict with the instant opinion in that they found statements were inadmissible as exited utterances. The Respondent argues the District Courts all apply this Courts analysis, which requires a subjective analysis of the facts and surrounding circumstances of each case. Respondent argues that the cases cited by Petitioner which found statements inadmissible under the exited utterance exception are factually distinguishable from the case at bar.

Fourth District

In Beck v. State, 937 So. 2d 821 (Fla. 4th DCA 2006), more than an hour passed before declarant called police, and she called non emergency before calling 911 and spoke in a narrative form during the emergency call. The Beck Court found no record support for ruling the statement was admissible under exited utterance and the state failed to secure such a ruling from the trial court. Id. at 823. In Mariano v. State, 933 So. 2d 111,116 (Fla. 4th DCA 2006), the Court found that the statement, made 30 to 90 minutes after the "startling event," was long enough for

reflective thought, noting that the fact that the declarant was upset at the time of her statement, alone, was insufficient to warrant admission of the statement. Id.

The time frame between the event and the 911 in the case at bar was less than ten minutes, significantly shorter than Beck and Mariano. Further, the victim here, did not call non emergency first, nor did she speak in a narrative. The state's evidence in the instant case established that the victim was still under the excitement of the startling evident and did not engage in reflective thought. Although the victim testified that she called her mother before calling 911, she did so because Petitioner threatened to kill her and harm her mother and grandmother if she told police. Further, the victim's voice and demeanor during the call shows that she was in an acute emotional state. When 911 answered, although her response was unintelligible, it is apparent that she blurted out that she had been raped, because the operator's response was, "do you know who raped you?" The victim's statement was in a narrative, but difficult to understand and follow. In order to learn more information, the operator had to ask follow up questions and the victim spontaneously stated that her attacker threatened to harm her family. Also, unlike Beck, the trial court in the instant case, overruled the defense objection, after hearing argument on whether the statement qualified for admission as an exited

utterance.

First District

In Blandenberg v. State, 890 So. 2d 267 (Fla. 1st DCA 2004), the court found declarants statements were not admissible as exited utterances as they both expressed concern about whether the defendant, their mother, would be arrested, indicating that they had engaged in reflective thought. The court recognized that a speaker's ability to engage in reflective thought may be affected by the stress or excitement he or she endured during the event and therefore, a statement made well after the event may be deemed excited utterances. But "the common thread running through those cases ... is that at the time of the statement, the declarants were either 'hysterical,' severely injured, or subject to some other extreme emotional state sufficient to prevent reflective thought." Id. at 270 (and cases cited therein). In the case at bar, the victim endured a sexual battery which lasted nearly an hour and Petitioner threatened her life and to harm her family if she told police. The recording itself established the victim was in extreme emotional distress and continue to cry hysterically when the officer arrived and had difficulty telling him what happened.

Second District

In J.A.S. v. State, 920 So. 2d 759 (Fla. 2nd DCA 2006), the Court held that a father's statement made to police at least 15

minutes after the event, did not qualify as an exited utterance because as an adult, even 15 minutes was enough time to engage in reflective thought. J.A.S.'s father was injured, but not severely. He was not hysterical, shaking, screaming, crying, or displaying any physical or mental signs of excitement. The deputy testimony that he was upset was a subjective observation did not prove that he had no time for reflective thought. Conversely, in the case at bar, the state presented evidence that the 17 year old victim was in acute mental distress throughout the relevant time interval and that she blurted out that she had been raped, but had difficulty imparting additional information about the events.

Third District

In Strong v. State, 947 So. 2d 552 (Fla. 3rd DCA 2007), the court found the victim's statement inadmissible as an exited utterance. The Court found that because the victim was in contact with paramedics and hospital personal and had spoken to the defendant during the four to five hour time interval between the event and the statement, she had time to engage in reflective thought. Id. at 555. Conversely, the time interval here was less than ten minutes and the 17 year old victim's brief call to her mother was limited to her mother calling the police and instructing the victim to call 911. Further, the victim's statement in the instant case was not inconsistent with her trial

testimony. However, the victim in Strong, died before trial commenced.

Fifth District

In Pressley v. State, 968 So. 2d 1039, 1041-2 (Fla. 5th DCA 2007), the thirteen year old victim called her mother and told her she had to tell her something, but did not tell her mother about the crime until she arrived home 45 to 60 minutes later. The Court found that the declarant was no longer under the stress of the startling event, and therefore the statement was not admissible as an exited utterance. Again, the time interval in the instant case was under ten minutes and evidence that the victim remained under the stress of the event during at all relevant times was presented at trial.

Harmless Error

In the case at bar, the Fourth District held that even if they found that the admission of the tape to be error, it was harmless where the contents of the 911 recording merely corroborated the victim's trial testimony. Therefore, the was no reasonable possibility that the error contributed to the conviction." *See* State v. DiGuillio, 491 So. 2d 1129, 1131 (Fla. 1986).

CONCLUSION

WHEREFORE, based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests that this Court

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing "Respondent's Answer Brief" has been furnished by mail on June 2, 2011 and sent by US Mail to Carlos Gonzalez, DIAZ, REUS & TARG, LLP, 100 Southeast Second Street, 2600 Miami Tower, Miami, Florida 33131.

_____
LAURA FISHER

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Fla. R. App. P. 9.210, the undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New Type.

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LAURA FISHER