

IN THE SUPREME COURT OF THE STATE OF DELAWARE

VERNON ABNER,	)	
	)	No. 280, 1999
Defendant Below,	)	
Appellant,	)	Court Below – Superior Court of
	)	the State of Delaware, in and
v.	)	for New Castle County
	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee,	)	

Submitted: May 30, 2000

Decided: June 29, 2000

Before **VEASEY**, Chief Justice, **WALSH**, and **HARTNETT**, Justices.

**ORDER**

This 29<sup>th</sup> day of June 2000, upon consideration of the briefs of the parties, it appears to the Court that:

(1) Following a three-day jury trial, the defendant-appellant, Vernon Abner (“Abner”), was convicted of second degree burglary, attempted theft, and criminal mischief in the Superior Court. Subsequent to the verdicts the defendant moved for judgment of acquittal and for a new trial. Both motions were denied and he was sentenced as a habitual offender on June 11, 1999 to life imprisonment without parole. This is his direct appeal. We find that it is without merit and **AFFIRM**.

(2) Abner claims that the Superior Court abused its discretion in permitting the admission of hearsay statements by the victim concerning the burglary through the testimony of a police officer as a present sense impression or excited utterance under the DRE 803(1) and (2). Abner also contends that the trial court erred in denying his motion for judgment of acquittal on the grounds of insufficient evidence and his motion for a new trial.

(3) Kim Wigington, the victim of the crime, did not testify at trial. She had moved and could not be located. Police Officer Christina Ruiz testified as to the statements of Wigington when she discovered the burglary in her apartment. The testimony was admitted as exceptions to the hearsay rule as a “present sense impression” and an “excited utterance”. DRE 803(1) & (2).

(4) Under DRE 803(1), the requirements for a hearsay statement to qualify as a “present sense impression” are: the declarant must have personally perceived the event described; the declaration must be an explanation or description of the event, rather than a narration; and the declaration and the event described must be contemporaneous. The statements, however, need not be precisely contemporaneous with the triggering event but must be in response to it and occur within a short time after the stimulus.<sup>1</sup>

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<sup>1</sup> *Paskins v. State*, Del. Supr., No. 341, 1981, order at ¶5, Quillen, J. (Jan. 17, 1983).

(5) Officer Ruiz testified that when Wigington arrived at her apartment she was in an excited and confused state, and within minutes of her arrival, while on a walk through the apartment unit, she told Officer Ruiz that items were not in their usual location. The statements given to Officer Ruiz were detailed observations of the crime scene. Officer Ruiz also asked Wigington if she knew the man who had been taken into custody, to which Wigington responded that she did not know him and had not given him permission to be in her premises.

(6) Abner argues that the victim's knowledge of, or familiarity with, his identity was not a present sense impression. He asserts that a present sense impression is a perceived sensory reaction that does not extend itself to identification of individuals and when used in this capacity there is an opportunity for misrepresentation and calculated misstatements. He further contends that the victim could have had a motivation of concealment, such as not wanting the landlord to know she was moving covertly.

(7) We disagree and find that the trial court did not abuse its discretion in admitting Wigington's statements because the state satisfied each element necessary for a present sense impression.

(8) In addition, under DRE 803(2), the requirements for a hearsay statement to qualify as an "excited utterance" are: The excitement of the declarant must have been precipitated by an event; the statement being offered as evidence must have

been during the time period while the excitement of the event was continuing; and the statement must be related to the startling event.<sup>2</sup>

(9) The trial court did not abuse its discretion in, alternatively, allowing the admission of Wigington's statement by Officer Ruiz under DRE 803(2). Officer Ruiz testified that when Wigington arrived at her apartment and found police present she was excited and confused. She made several excited inquiries as to why the police and bystanders were in front of her apartment. Her emotional state was obviously affected by the events that were occurring. Abner argues that the event was not continuing, and that when Wigington arrived the police were already present, signifying the end of the event. Police presence does not, in and of itself, signify an end to an event. While one of the police functions is to protect, their presence is not limited to this end. Wigington, from the moment she arrived, was yelling, "what is going on?" and wanted to know who Abner was. The discovery of the scene before her would naturally induce a state of excitement.

(10) Moreover, the walk through of the apartment took place only minutes after Wigington's arrival. Officer Ruiz testified that Wigington's emotional state continued as they walked into the apartment unit, and that Wigington remained confused and excited, as she asked what was going on. As they walked through the apartment, Wigington made comments as to the condition of her apartment,

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<sup>2</sup> *Gannon v. State*, Del. Supr., 704 A.2d 272, 274 (1998).

such that items had been repositioned, and that the window had been broken. Additionally, she stated that she did not know Abner. These statements given at a time in which the victim was still excited and confused satisfy the elements of an excited utterance under DRE 803(2) because they relate to the event that triggered the excitement, and occurred only minutes after the victim's arrival.

(11) The trial court, therefore, did not abuse its discretion in admitting Wigington's statement, alternatively, through the testimony of Officer Ruiz as an "excited utterance" within the meaning of Rule 803(2).

(12) Nor did the trial court err in denying Abner's motion for judgment of acquittal or for a new trial on the grounds of insufficient evidence. Based on the evidence presented at trial, both direct and circumstantial,<sup>3</sup> a reasonable jury could have found that Abner had unlawfully entered Wigington's apartment to commit theft.<sup>4</sup> From the totality of the evidence, the jury's verdict can be supported when viewed in a light most favorable to the State.

(13) In conclusion, we have carefully reviewed the record and conclude that Abner's appeal is without merit. The Superior Court correctly admitted Wigington's statements under Rule 803(1) & (2) as present sense impressions or excited

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<sup>3</sup> The court does not distinguish between direct and circumstantial evidence. *Monroe*, 652 A.2d at 563.

utterances. When considering the totality of the evidence, both direct and circumstantial, a reasonable jury could have found that Abner had unlawfully entered Wigington's apartment to commit theft.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

S/Maurice A. Hartnett, III

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*Justice*

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<sup>4</sup> *Albury v. State*, Del. Supr., 551 A.2d 53, 60 (9188) (citing *Tyre v. State*, Del. Supr., 412 A.2d 330 (1980); *Williams v. State*, Del. Supr., 539 A.2d 164, 168 (1987), *cert. denied*, 488 U.S. 969 (1988).