IN THE SUPREME COURT OF THE STATE OF NEVADA

JASON T. MATHIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52547

FILED

JUN 30 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of conspiracy to commit murder and two counts of first-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

Over objection at trial, the district court allowed the State to elicit testimony from a detective concerning an ex-girlfriend's statement that Appellant Jason Mathis had "killed two people in Las Vegas [and] they're looking for him down there." The ex-girlfriend did not testify at trial. Mathis contends that the admission of this evidence was error for two reasons: (1) the statement was hearsay that did not fall within an exception and (2) admission of the statement violated his Confrontation Clause rights under the Sixth Amendment to the United States Constitution.[1] We disagree.

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[1]Mathis also contends that: (1) the district court committed other evidentiary errors, (2) his Sixth Amendment right to counsel was violated by a search of his jail cell, (3) the State committed prosecutorial misconduct, (4) there is insufficient evidence to support his convictions, and (5) cumulative error requires reversal. Having thoroughly reviewed Mathis's contentions, we conclude that they are without merit. Additionally, Mathis argues that he received ineffective assistance of

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Hearsay

A statement is hearsay if it is "offered in evidence to prove the truth of the matter asserted." NRS 51.035. Generally, hearsay statements are inadmissible unless they fall within an exception to the hearsay rule. See NRS 51.065. One such exception is recognized in NRS 51.095, which provides that an out-of-court "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition is not inadmissible under the hearsay rule." To determine whether a "declarant is still under the stress of excitement caused by the event . . . district courts must examine all of the facts and circumstances surrounding a statement in addition to the time elapsed from the startling event." Medina v. State, 122 Nev. 346, 352, 143 P.3d 471, 475 (2006).

The declarant in this case was Mathis's ex-girlfriend, and the mother of his child. Mathis went to her residence in San Francisco to visit his son. However, when Mathis arrived at his ex-girlfriend's home with another woman, the two ladies began to quarrel. During the quarrel, Mathis threatened to murder his ex-girlfriend, and told her brother—in front of the ex-girlfriend—that "You better get your sister or it's gonna be another murder." Because Mathis already told the ex-girlfriend about how he killed two people in Las Vegas, she was afraid that he might follow

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counsel; however, such claims are not appropriate for review on direct appeal from a judgment of conviction, and we therefore decline to address Mathis's arguments in this regard. See Pellegrini v. State, 117 Nev. 860, 883, 34 P.3d 519, 534 (2001).

through with his threat. Accordingly, when police arrived to break up the domestic dispute, she told them that Mathis had "killed two people in Las Vegas [and] they're looking for him down there." A responding police officer testified that at the time the ex-girlfriend made the statement, she was "[v]ery agitated, upset."

In concluding that the statement fell within the excited utterance exception to the hearsay rule, the district court observed several facts. First, the district court noted that at the time the ex-girlfriend made the statement "she is very excited because this isn't an idle threat from somebody that isn't capable of doing that. This is a threat from somebody that she knows without doubt has done it." Moreover, the district court concluded that the statement was related to the event which caused her excitement—Mathis's threats to kill her—because "the threat that he is presenting to her at the moment that causes her to seek help from an authority figure is made very real by the fact that she knows he's engaged in this kind of conduct before." "[I]t is abundantly clear to [the district court] that [she] is scared to death of [Mathis], and the reason she's scared to death of [Mathis] is because she knows he's killed in Las Vegas."

The district court summed up these facts as follows: "The excited utterance occurs while she's seeking help from an authority figure, and she is, according to the testimony, in an excited state and explaining why she's in an excited state. Why is she afraid? I.e., he's killed people in Las Vegas."

We agree with the district court's well-reasoned analysis and conclude that the district court did not abuse its discretion in admitting the testimony under the excited utterance exception to the hearsay rule.

See Mclellan v. State, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008) (stating that this court reviews a district court's decision to admit evidence for an abuse of discretion). The record shows that the ex-girlfriend was excited at the time she made the statement, and her statement related to the reason for her excitement—Mathis' credible threats to kill her.

The Confrontation Clause

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI; see also Pointer v. Texas, 380 U.S. 400, 403 (1965) (holding that this right applies to the States through the Fourteenth Amendment).

In Crawford v. Washington, 541 U.S. 36 (2004), the United States Supreme Court held that the Confrontation Clause bars the use of a testimonial statement made by a witness who is unavailable for trial unless the defendant has had an opportunity to previously cross-examine the witness regarding the witness's statement. Id. at 68. To determine whether a statement is testimonial, this court looks at "whether the statement would, under the circumstances of its making, 'lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" Harkins v. State, 122 Nev. 974, 987, 143 P.3d 706, 714 (2006) (quoting Flores v. State, 121 Nev. 706, 719, 120 P.3d 1170, 1178-79 (2005)); see also Davis v. Washington, 547 U.S. 813, 822 (2006) (explaining that a court should evaluate the "primary purpose" of a statement to determine whether it is testimonial).

This court has refined this general rule to provide "a nonexhaustive list of factors for courts to consider in determining whether a statement is testimonial." Harkins, 122 Nev. at 987, 143 P.3d at 714. This court considers:

> (1) to whom the statement was made, a government agent or an acquaintance; (2) whether the statement was spontaneous, or made in response to a question (e.g., whether the statement was the product of a police interrogation); (3) whether the inquiry eliciting the statement was for the purpose of gathering evidence for possible use at a later trial, or whether it was to provide assistance in an emergency; and (4) whether the statement was made while an emergency was ongoing, or whether it was a recount of past events made in a more formal setting sometime after the exigency had ended. No one factor is necessarily dispositive, and no one factor carries more weight than another.

Id. See also Michigan v. Bryant, 562 U.S. ___, 131 S.Ct. 1143 (2011) (refining the "primary purpose" test for determining when a statement should be considered testimonial under Davis).

In the instant case, we conclude that the ex-girlfriend's statement was non-testimonial in light of the above factors. Although the statement was made to a government agent, it did not result from any government inquiry, and was not solicited for possible use at a later trial. Rather, the woman made the statement during an ongoing emergency, and the statement related to the cause of the emergency. "[T]he primary purpose [of the ex-girlfriend's statement was] to enable police assistance to meet an ongoing emergency" by impressing upon them the seriousness of Mathis's threats to kill her. See Harkins, 122 Nev. at 988, 143 P.3d at 715. Because the statement at issue was not testimonial in nature, we conclude that the district court did not violate Mathis's Sixth Amendment

right to confrontation.[2] See Chavez v. State, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009) (stating that whether a defendant's Confrontation Clause rights were violated is a question of law reviewed de novo). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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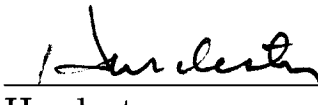

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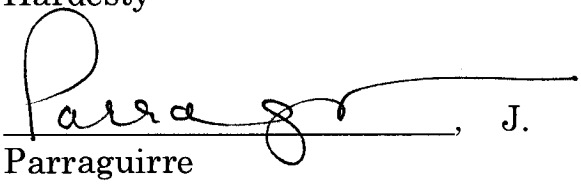

_____, J.
Parraguirre

cc: Hon. Stewart L. Bell, District Judge
Kristina M. Wildeveld
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[2]Because we conclude that the statement was not testimonial, we do not reach the State's alternative "forfeiture by wrongdoing" argument.