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

APPELLATE CASE NO: 2012-AP-15-A-O
Lower Case No.: 2011-MM-909-A-A

MARCO ANTONIO ROMERO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

Appeal from the County Court
for Orange County, Florida
Kenneth A. Barlow, Jr., County Court Judge

Robert Wesley, Public Defender
and Molina Arena-Randall, Assistant Public Defender
for Appellant

Lawson Lamar, State Attorney,
and Dugald McMillan, Assistant State Attorney
for Appellee

Before DOHERTY, SCHREIBER, WHITE, J.J.

PER CURIAM.

FINAL ORDER AFFIRMING IN PART, REVERSING IN PART

Appellant, Marco Antonio Romero, appeals from his convictions and sentences for battery on the victim Oscar Saucedo and Resisting Officer without Violence, after a jury verdict. He was sentenced to two years county jail consecutive, with credit for time served. The trial court granted a judgment of acquittal as to the third charge, assault on the victim

Eduardo Patricio. We find that the trial court abused its discretion and reverse as to Points II and III.[1] We affirm as to the remaining points.

Point II: The Appellant alleges that the trial court erred when it denied the Appellant the opportunity to inquire about the bias and motive during the cross-examination of the victim, Oscar Saucedo. The Appellant argues that the State opened the door during direct examination. The State argues that the Appellant's question was irrelevant.

On direct-examination, the victim, Oscar Saucedo, testified that he did not do anything to provoke the Appellant before he committed the battery. Mr. Saucedo further testified that he had never had any prior interactions with the Appellant. On cross examination, counsel for the Appellant asked Mr. Saucedo if he knew what the middle fingers meant, to which he responded, "yes." Counsel then placed his middle finger in the air, and asked Mr. Saucedo again if he knew what the middle finger represented, to which he responded, "yes." The State objected based upon relevancy and a sidebar was conducted. Counsel for the Appellant argued that his client's testimony would show that the victim taunted the Appellant by flicking him off with his middle finger. The Court sustained the objection. The Court ruled that the Appellant had not yet testified and that the middle finger was not a provocation for physical violence. The Appellant argues that the trial court impermissibly denied defense counsel the right to cross examination Mr. Saucedo and to establish motive or bias.

A trial court's decision to exclude evidence is reviewed by utilizing the abuse of discretion standard; however, the court's discretion is limited by the rules of evidence.

[1] As the remaining points are affirmed, the Court only addresses Points II and III in this Order. Furthermore, the Court labels the Appellant's claims in the same manner as the Appellant for the sake of clarity.

Alexander v. State, 103 So. 3d 953 (Fla. 4th DCA 2012). "A criminal defendant has a strong interest in discrediting a crucial state's witness by showing bias, an interest in the outcome, or a possible ulterior motive for his in-court testimony." *Barrows v. State,* 805 So. 120, 123 (Fla. 4th DCA 2002). Furthermore, because liberty is at risk in a criminal case, a defendant is afforded wide latitude to develop the motive behind a witness' testimony. *Id.* "Courts should even allow inquiries that might at first blush appear to be lacking any basis at all thus far in the trial, so long as counsel states a basis tending ultimately to show such bias." *Id.*

Here, on direct-examination, Mr. Saucedo was questioned about whether or not he knew the Appellant. Mr. Saucedo testified that he did not know the Appellant and that he had only seen him around the neighborhood. Mr. Saucedo testified that the Appellant choked him around his neck. Mr. Saucedo stated that he did not do anything to provoke the attack by the Appellant. We find that the Appellant should have been given the opportunity to question Mr. Saucedo about whether or not he provoked the Appellant before the alleged battery. Although the trial court correctly noted that sticking up a middle finger is not provocation for physical violence, it is relevant to show bias against the Appellant or a motive to lie. *See Conley v. State*, 592 So. 2d 723, 729 (Fla. 1st DCA 1992) (cross-examination of defense witness concerning statement of witness to victim that victim was "going to pay, bitch" was admissible to show the bias of the witness.); *see also Hannah v. State*, 432 So. 2d 631, 632 (Fla. 3d DCA 1983) (ill-feeling between witness and a family member of the accused is admissible to discredit witness.). Based upon the foregoing, the trial court's failure to allow counsel to question Mr. Saucedo about his bias and/or motive was an abuse of discretion and reversal is necessary.

Point III: The Appellant alleges that the trial court erred by allowing the 911 call into evidence. Specifically, the Appellant asserts that the State failed to lay the proper foundation for the excited utterance exception and that the testimony was cumulative, bolstering, and prejudicial. The State alleges that it did in fact lay the necessary predicate to enter the 911 call as an excited utterance.

In order for an excited utterance to be admissible, the following requirements must be met: (1) there must have been 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 have been made while the person was under the stress of excitement caused by the startling event. *Stoll v. State,* 762 So. 2d 870, 873 (Fla. 2000). A proper foundation to admit a hearsay statement under the excited utterance exception must be laid by showing that the statement meets the *Stoll* test. *See Thomas v. State,* 125 So. 3d 928 (Fla. 4th DCA 2013).

If faced with an objection to an excited utterance, a trial court should conduct a hearing outside the presence of the jury to consider the necessary evidence and make findings of fact essential to determine whether the statement constitutes an admissible excited utterance. *See Tucker v. State*, 884 So. 2d 168, 173-174 (Fla. 2d DCA 2004) (citing section 90.105(1), Florida Statutes, and other authorities). To admit the excited utterance statement, the trial court must also conclude that the preponderance of the evidence supports the factual circumstances permitting the introduction of the statement as an excited utterance. *See id; see also Hargrove v. State,* 530 So. 2d 441,442 (Fla. 4th DCA 1988) (evidence to be considered and findings required); *Miller v. Keating,* 754 F. 2d 507, 510-512 (3d Cir. 1985) (same).

In the instant case, defense counsel objected to the admittance of the 911 call. Rather than conducting a hearing outside of the presence of the jury, the trial court overruled the objection and allowed the 911 call to be published and entered into evidence. The trial court failed to follow the required procedures necessary to admit the 911 call. The trial court also failed to consider evidence and find that the State proved by a preponderance of the evidence that the factual foundation existed to allow the introduction of the 911 call as an excited utterance.[2] Therefore, reversal is warranted.

For all of the foregoing reasons, it is hereby **ORDERED AND ADJUDGED** that the judgment and sentence on the charge of Battery is reversed.

REVERSED and REMANDED for a new trial on the charge of Battery.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 23rd day of October, 2014.

/S/
PATRICIA A. DOHERTY
Presiding Judge

SCHREIBER and WHITE, J.J., concur.

[2] *See Johnson v. State*, 108 So. 3d 707, 710 (Fla. 5th DCA 2013) (the trial court's obligations under section 90.105(1) are triggered whenever a party offers any form of evidence that requires a factual foundation for admission).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order was furnished on this 24th day of October, 2014, to the following by U.S. mail/ email: **Molina Arena-Randall, Assistant Public Defender**, 435 N. Orange Avenue, Ste. 400, Orlando, Florida 3280; and **Dugald McMillan, Assistant State Attorney**, 415 N. Orange Ave., Orlando, Florida 32801.

/S/_____
Judicial Assistant