IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DARRIUS EUBANKS — APPELLANT

VS. — NO. 2007-KA-1201

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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SUMMARY OF THE ARGUMENT

The trial court did not err in allowing the testimony of Inecia McNeil pursuant to the excited utterance exception to Rule 801 M.R.E. The trial court held that the Inecia was still under the stress of the event when her mother came to pick her up about two hours after Daviyon was found. The mere fact that the statement, as in this case, was in response to an inquiry, though bearing on the question of spontaneity, does not necessarily take a responsive statement outside the realm of admissible excited utterances." *Barnett v. State*, 757 So.2d 323, 330. Further, Eubanks' counsel narrowed his objection to hearsay since Inecia was not going to testify at trial and the testimony of the psychologist provided the court with ample indicia of Inecia's competence.

The trial court is predominately vested with the discretion to decide whether evidence is relevant and admissible. *White v. State*, 742 So.2d 1126 (Miss.1999). The trial court correctly granted the State's Motion in Limine to as to alleged prior abuse of the children by their mother Deyasha Johnson because such evidence was irrelevant and inadmissible. Eubanks is not entitled to present inadmissible evidence to prove his theory of the case.

ARGUMENT

I. The trial court did not err in allowing the testimony of Inecia McNeil pursuant to the excited utterance exception to Rule 801 M.R.E.

Eubanks asserts that the trial court erred in admitting the statements made by Inecia McNeil, age 2 years and 11 months, to her mother, Deyasha Johnson, within two hours of her mother's return to the their apartment as excited utterances. The record reflects that on November 19, 2003, Deyasha Johnson left her two children, Inecia McNeil, age 2 years and 11 months, and Daviyon Johnson in the care of her boyfriend, Darrius Eubanks while she went to the hospital to visit her Grandmother who was gravely ill. She left home at around 11:00 a.m. and returned at 6:00 in the evening. Johnson testified that the children were healthy when she left home that morning. When she returned home, she found Daviyon unconscious and laying on the floor. Inecia was standing near the wall and not moving, staring at her brother. Johnson was unable to revive her son. She took him in the bathroom and discovered that he had bruises on his body. She called her mother to return so that she could take Daviyon to the hospital. He was soiled with feces and Johnson removed Daviyon's clothes, cleaned him, wrapped him an a blanket and took him to the hospital.

Johnson left Inecia with a neighbor while she took Daviyon to the hospital. She returned to get her Inecia at about 7:30 p.m. When she got Inecia in the car, she asked her what had happened. Inecia replied, "Daddy hit [Daviyon] and he hit me." Inecia further told her mother that Eubanks hit Daviyon in the head with the stick a lot of times. Daviyon started crying and Eubanks did not stop hitting him. Then Daviyon stopped crying and he didn't move no more [sic]. Inecia became quiet and did not resume talking for about two days. Inecia, a usually

bubbly child, became very stand-offish, did not want to get out of her mother's lap, did not want to talk and did not want to interact with anyone. She appeared terrified and did not want to be separated from her mother.

The trial court allowed the statements that Inecia made to her mother shortly after the discovery of Daviyon. He ruled that Inecia was still under the stress of the event at the time she made the statements. (Tr. 50)

Hearsay statements are excluded under Mississippi Rule of Evidence 801(c), which defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." However, Mississippi Rule of Evidence 803(2) provides for an exception to the exclusion of hearsay evidence, namely a statement "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." The rationale for this exception is that one caught in a sudden, startling event lacks the capacity for calm reflection, tending to make such statements reliable. *Smith v. State*, 733 So.2d 793, 799 (Miss.1999). When evaluating whether a statement will qualify as an excited utterance, "it is important that there has been no intervening matter to eliminate the state of excitement and call into question the reliability of the utterance." *McCoy v. State*, 878 So.2d 167, 173 (Miss.Ct.App.2004).

Spontaneity is essential to admit a statement into evidence as an excited utterance. However, "[t]he mere fact that the statement, as in this case, was in response to an inquiry, though bearing on the question of spontaneity, does not necessarily take a responsive statement outside the realm of admissible excited utterances." *Barnett v. State*, 757 So.2d 323, 330 (Miss.Ct.App.2000). Where the alleged excited utterance is prompted by a simple question, even

from an officer, such as "What happened?" or "What's wrong?" the statement may still be held to fall under the exception. *Carter v. State*, 722 So.2d 1258, 1260 (Miss.1998). In *Bankson v. State*, 907 So.2d 966 (Miss.Ct.App. 2005), the Mississippi Court of Appeals head that a witness's statement upon being questioned by the police was still admissible as an excited utterance. The Court in Bankson ruled that since the witness was clearly still under the stress of the situation, his statements a law enforcement officer did qualify as excited utterances.

Whether a statement was made while under the stress of an event is a decision best resolved by the trial court in its sound discretion. *Davis v. State*, 611 So.2d 906, 914 (Miss.1992). The trial judge has discretion to either accept or reject evidence offered. *Austin v. State*, 784 So.2d 186, 193 (Miss.2001). Mississippi Appellate Court's will only reverse a trial court's decision when an abuse of discretion results in prejudice to the accused. *Id.* at 193-94 . Here, the trial judge found the testimony was admissible under Rule 803(2) of the Mississippi Rules of Evidence, as an exception to the hearsay rule. The record supports the trial court's decision since Johnson's testimony clearly established that Inecia was still under the stress of the event at the time Johnson asked her what happened. Johnson testified that Inecia, a usually lively child was very subdued and quiet and clung to her mother. Therefore, the trial court did not err in allowing Inecia's testimony. *Stokes v. State*, 797 So.2d 381, 386 (Miss.Ct.App.2001). This issue lacks merit.

Eubanks argues on appeal that even if Inecia's statements were excited utterances that the trial court was required to hold a competency hearing to determine if Inecia was competent to testify and if she could recall the events of November 19, 2003. However, during the hearing on pretrial motions, counsel for Eubanks waived or withdrew his request for a competency hearing.

The record reflects the following argument by Eubank's counsel:

The Court:	And the objection by the defendant was?
Mr. Knapp:	Your Honor, there are actually two or three motions that all centered around the same issue. Our position is, Your Honor that a two-year-old child is highly suspect in testimony. It's the province [sic] of the court to determine if a child is able to testify competently and make a decision at that point in time.
The Court:	Let me be sure, because you are saying two things. One is an issue of hearsay and then the other is the issue of giving testimony. Now what issue are we on with the child? Are we on the hearsay issue or are we dealing with the issue of the child testifying in court?
Mr. Knapp:	The child is not going to testify in court is my understanding, Your Honor, what I'm told. Your Honor, to some extent they blend a little bit. **What I'm trying to show is I object to the hearsay testimony of the child. That's my motion.**
The Court:	Right.
Mr. Knapp:	Your Honor, and part of my objection is that, one, I have a right to confrontation, but also hearsay – with the child testifying is a little bit shakier than hearsay if an adult was talking. For example, if we're talking about a present sense impression or excited utterance, a lot of things that a two year old would say are excited utterances that aren't excited utterances in an adult. I'm saying that the hearsay testimony should not be allowed having heard this child make statements without the child being here. **I've not actually filed a competency hearing per se because the child is not going to testify.**

(Tr. 7,8)

The State proposed to call Dr. Katherine Dixon at trial and to introduce into evidence her interview with Inecia some two weeks after the events of November 19, 2003. Dr. Dixon, a licensed psychologist, and the director of the Mississippi Children's Advocacy Center, testified that she interviewed Inecia. (Tr. 10) Dr. Dixon testified that Inecia identified Eubanks as the person who hurt her and her brother and that Eubanks hit her with a stick. (Tr. 17) Dr. Dixon

opined that Inecia was able to identify the person who caused injury to her and her brother and that she did so in an age appropriate manner. (Tr. 10, 19) Dr. Dixon assessed Inecia's credibility as good for the information she produced. (Tr. 24) The Trial Court then viewed the video tape of the Dr. Dixon's interview with Inecia.

The Trial Court ruled that Dr. Dixon's testimony and the videotape were inadmissible, since they did not qualify as excited utterances. However, the Trial Court reviewed the circumstances of the statement's made by Inecia less than two hours after her mother came home and discovered Daviyon's condition and heard testimony from Johnson about the circumstances of Inecia's statements.

Any argument that Inecia's testimony is unreliable because of her age was waived by defense counsel's statement that he his objection was to the hearsay testimony of the child. (Tr. 7, 8) His objection to hearsay presumes the competency of the witness making the statement. Had he wished to challenge the competency of the child, he would have requested a competency hearing, which he specifically declined to do. (Tr. 7, 8) Further, the Trial Court did have the benefit of hearing from a licensed psychologist who had interviewed the child and had assessed her ability to relate truthfully the events of November 19, 2003 and to identify the person who harmed her brother and herself. This certainly provided the Trial Court with ample indicia of the competence of the child where no competency hearing has been requested. This issue is without merit and the ruling of the Trial Court should be affirmed.

II. The trial court correctly granted the State's Motion in Limine to as to alleged prior abuse of the children by their mother Deyasha Johnson because such evidence was irrelevant and inadmissible.

The State moved in limine to exclude allegations by proposed witnesses about the way Deyasha Johnson treated the children. The Stated argued that the statements were irrelevant because the alleged events happened prior to the day of the actual crime. (Tr. 65) There was a further motion for the Defendant to exclude a prior complaint of child abuse against Eubanks. The trial court ruled that unless there was a reason given to indicate a connection between the alleged prior acts of the Eubanks or Johnson with the occurrences of November 19th, the testimony was irrelevant and would be excluded. The Trial Court instructed the parties that if there were evidence that was connected to the events of November 19th, they could raise it at the appropriate time. (Tr. 67) Eubanks argues that he was entitled to present the testimony of witnesses who alleged that Johnson mistreated her children. However, he did not raise the issue in his case in chief and did not proffer any testimony to show that it was in any way related to the death of Daviyon on November 19, 2003. Eubanks argues that he was entitled to present his theory of the case. However, the trial court is predominately vested with the discretion to decide whether evidence is relevant and admissible. *White v. State*, 742 So.2d 1126 (Miss.1999).

For example, the Mississippi Supreme Court has held that a trial court is not required to allow a proffered expert to testify solely because such testimony goes to a defendant's theory of the case. *Turner v. State*, 726 So.2d 117, 130 (Miss.1998). Mississippi Rule of Evidence 702 charges the trial court with the role of "gatekeeper" in determining whether an expert's testimony is both relevant and reliable prior to allowing it to be presented to a jury. M.R.E. 702 cmt.; *Giannaris v. Giannaris*, 960 So.2d 462, 469-70 (Miss.2007).

Further, in *Blocker v. State*, 809 So.2d 640 (Miss. 2002), the Mississippi Supreme Court opined:

> Blocker now contends that evidence as to the crack house may have been enough to raise a presumption of reasonable doubt as to her involvement in the shootings. She also says that her Sixth Amendment guarantee of the right to compel witnesses to testify also includes the right to present her theory of defense. While we have upheld a defendant's right to present her theory of the case and have the jury instructed on it, there was no error here. Manuel, 667 So.2d at 593. The trial court was within her discretion in deciding to exclude this evidence. The crack house testimony, by itself, was probative of nothing. Had issues regarding the crack house been an integral part of Blocker's defense, all she had to do was make a proffer of what she intended to prove and how she intended to prove it. We have previously held that a trial court will not be reversed for limiting cross-examination where "no proffer was made of the testimony nor was a statement dictated into the record to indicate what was proposed to be shown by the examination." *McGee v. State*, 365 So.2d 302, 304 (Miss.1978).

Blocker at 645-6.

Clearly, the trial court was correct in ruling that this testimony was irrelevant. Further, it was inadmissible pursuant to Rule 404(b) of the Mississippi Rules of Evidence. Where the testimony is inadmissible as irrelevant the defendant is not entitled to present the evidence in support of his theory of the case. This issue is without merit and ruling of the Trial Court should be affirmed.

CONCLUSION

The assignments of error presented by Eubanks are without merit and the rulings of the trial court should be affirmed.

Respectfully submitted,

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Certificate of Service

I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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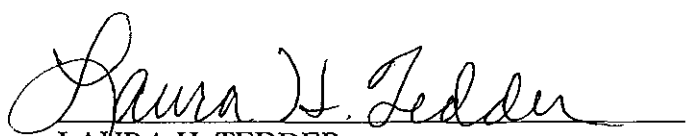
This the 17th day of November, 2008.



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