

IN THE UTAH COURT OF APPEALS

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Ruben Benitez,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Petitioner,	)	
	)	Case No. 20080957-CA
v.	)	
	)	F I L E D
Department of Health, Division	)	(September 11, 2009)
of Health Care Financing,	)	
	)	2009 UT App 250
Respondent.	)	

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Original Proceeding in this Court

Attorneys: Ian S. Davis, Salt Lake City, for Petitioner  
Mark L. Shurtleff and Brent A. Burnett, Salt Lake  
City, for Respondent

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Before Judges Greenwood, Thorne, and Davis.

DAVIS, Judge:

In August 2008, the Department of Health, Division of Health Care Financing (the Department) conducted a formal hearing regarding allegations that Ruben Benitez, while working as a certified nursing assistant (CNA), had sexually abused a patient, N.M. Following the hearing, the Department concluded that the allegations were substantiated by the evidence presented. Based on the hearing officer's recommendation, a negative finding for Benitez was placed on the state Nurse Aide Registry, which effectively precludes him from working as a CNA in Utah. Benitez filed a request for reconsideration, arguing that the Department erred by relying solely on inadmissible hearsay in making its determination. The Department denied the motion for reconsideration, and Benitez timely appealed.

As a preliminary matter, we note that "issues not raised in proceedings before administrative agencies are not subject to judicial review except in exceptional circumstances." Brown & Root Indus. Serv. v. Industrial Comm'n, 947 P.2d 671, 677 (Utah 1997). The Department's recommended decision, which was adopted in the final agency order, specifically concluded that the testimony and written statements offered as evidence during the hearing did not constitute inadmissible hearsay because the

evidence fell within well-recognized exceptions to the rule against hearsay. Moreover, in his motion for reconsideration, Benitez specifically argued that the Department improperly relied exclusively on inadmissible hearsay in making its determination. Accordingly, the issue was raised in the proceedings before the administrative agency and is thus preserved for appeal.

As to the merits of the appeal, it is well settled that hearsay evidence is admissible in administrative proceedings. See Utah Admin. Code R994-508-109(9) ("Oral or written evidence of any nature, whether or not conforming to the rules of evidence, may be accepted and will be given its proper weight."). Under the residuum rule, however, factual findings cannot be based exclusively on inadmissible hearsay but "must be supported by a residuum of legal evidence competent in a court of law." Prosper, Inc. v. Department of Workforce Servs., 2007 UT App 281, ¶ 10, 168 P.3d 344 (internal quotation marks omitted). On appeal, "all hearsay and other legally inadmissible evidence admitted by an agency is set aside by the reviewing court. There must then remain some . . . residuum of legally competent evidence [or] the agency action is reversed." Tolman v. Salt Lake County Attorney, 818 P.2d 23, 32-33 (Utah Ct. App. 1991) (citation omitted). "[W]hether evidence constitutes hearsay is a question of law that we review for correctness." Prosper, 2007 UT App 281, ¶ 8. "Whether the factual findings were based on a residuum of competent evidence is [also] a question of law which we review for correctness." Industrial Power Contractors v. Industrial Comm'n, 832 P.2d 477, 479 (Utah Ct. App. 1992).

Benitez contends that if this court sets aside all legally incompetent evidence that was presented at the hearing, there is no residuum of evidence remaining to support the decision made by the Department. We disagree. "The excited utterance exception excludes from the general hearsay rule '[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.'" Scott v. HK Contractors, 2008 UT App 370, ¶ 12, 196 P.3d 635 (alteration in original) (quoting Utah R. Evid. 803(2)), cert. denied, 205 P.3d 103 (Utah 2009). Utah courts utilize a three-part analytical framework to determine whether a statement qualifies as an excited utterance: "[A] statement constitutes an excited utterance only when (1) a startling event or condition occurred; (2) the statement was made while the declarant was under the stress of excitement caused by the event or condition; and (3) the statement relates to the startling event or condition." State v. Mickelson, 848 P.2d 677, 683 (Utah Ct. App. 1992). "Usually the most difficult issue in determining the admissibility of an excited utterance is whether the statement was uttered with a spontaneity produced by emotional excitement to a degree that provides a warrant of trustworthiness." State

v. Smith, 909 P.2d 236, 240 (Utah 1995). "Said another way, the 'declaration must be a spontaneous reaction to the event or condition, not the result of reflective thought.'" Scott, 2008 UT App 370, ¶ 13 (quoting Smith, 909 P.2d at 239).

In determining whether the declarant's statement was truly spontaneous, that is, whether the declarant remained under the original stress of the emotion-provoking event, several factors are to be considered. See Smith, 909 P.2d at 240. These factors include "the likely effects of the declarant's age, the declarant's physical and mental condition, the circumstances and nature of the startling event, the subject matter of the statement, and the time lapse between the event and the utterance." Id.; see also West Valley City v. Hutto, 2000 UT App 188, ¶ 16, 5 P.3d 1 (noting that evaluation of the trustworthiness of a declarant's statement requires consideration of the factors outlined in Smith); Mickelson, 848 P.2d at 686 & n.8 (considering the age and mental condition of an elderly victim in concluding that statement made between two and five hours after the incident qualified as an excited utterance).

These factors are considered rather subjectively for each individual declarant, as no two declarants have the same reaction to a given set of events. [Accordingly, c]ourts need only concern themselves with the particular declarant's actual stress and excitement given all the factors, not a reasonable person's response to the same situation.

Hutto, 2000 UT App 188, ¶ 17 (footnote and citations omitted).

We conclude that under the circumstances in this case, these factors support the conclusion that at the time N.M. made the statements, she remained under the stress of the excitement caused by the triggering event. N.M. was eighty-two years old at the time the abuse occurred. Although N.M. was admitted to Arlington Hills for failure to thrive,<sup>1</sup> she was described as "alert and oriented." That she was lucid makes it unlikely, as Benitez suggested at the hearing, that the statements made to Maria Espinoza were the result of delusions or paranoia. See generally, Mickelson, 848 P.2d at 686 & n.8 (noting that elderly victim suffered from debilitating mental conditions that made her an unlikely candidate for fabrication).

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1. Failure to thrive as used here means that an individual is not eating or drinking and has lost the physical strength to get around independently.

Other factors suggest N.M.'s statements to Espinoza were spontaneous, including the circumstances and nature of the event. N.M. had never met Benitez and was unfamiliar with him because he was not her regular CNA but, rather, a temporary employee from an agency. This fact tends to negate any possibility that N.M. harbored ill will toward Benitez or had any incentive to fabricate a story to get him into trouble. Further lending reliability to her statements, N.M. consistently reported the abuse to several caregivers, including the director of nursing at the facility, and her story of what occurred never changed.<sup>2</sup>

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2. The concurrence points out that in an interview with an investigator from the Attorney General's office that took place a full ten days after the incident, N.M. reported that she was upset with Benitez because she did not want a male CNA helping her in the bathroom. Obviously, a report given to an investigator ten days after the triggering event has nothing to do with our excited utterance analysis under the facts of this case. What is relevant is that none of the initial reports made by N.M.'s caregivers immediately following the incident indicate that N.M. made any such statements about Benitez or their interaction.

Moreover, contrary to the concurring opinion's contention otherwise, N.M.'s statement to the investigator that all of the abuse occurred in the bathroom is consistent with N.M.'s reporting to her caregivers. N.M. spoke with three different caregivers from Arlington Hills within forty-eight hours of the abuse. Kristen Woodmanse, a CNA, spoke with N.M. just moments after the incident. According to Woodmanse's written statement, N.M. complained, "'[Benitez] fondled me in the bathroom with his fingers[,] then [N.M.] touched her breast and said 'and here too.'" (Emphasis added.) Kevin Saunders, the director of nursing at Arlington Hills, interviewed N.M. the next day. In his written statement, he reported that N.M. told him that while in the bathroom, Benitez penetrated her vagina with his finger and that he "then wanted to get me into a night gown and . . . started to play with my breast." There is no mention in either Woodmanse's or Saunders's statements that N.M. told them that the touching of her breast took place in her bed, but rather, she indicated that the incident occurred in the bathroom.

The "inconsistency" complained of by the concurrence relates to N.M.'s statements to Linda Harding, a social worker at Arlington Hills who interviewed N.M. two days after the incident. However, it appears that any discrepancy in the story is Harding's, not N.M.'s. Harding made two different "reports" of N.M.'s allegations, both completed and signed by her on April 21, 2008. The first, a written statement, indicates that N.M. reported that the vaginal penetration took place in the bathroom  
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Moreover, there was specific testimony elicited at the hearing that N.M. had never fabricated an allegation while a resident at the facility.

Additionally, the nature of the triggering event is sexual abuse, a topic that may be particularly taboo and difficult to discuss for elderly victims. Described by her caregivers as shy, quiet, and private, N.M. was humiliated and embarrassed by what had happened. Indeed, Espinoza described N.M. as "very upset" and "was kind of like she wanted to cry." See generally Smith, 909 P.2d at 241 ("Certainly, one not need be hysterical for the [excited utterance] exception to apply."). Accordingly, we conclude that the circumstances and nature of the event suggest that her statements were made with a spontaneity that indicates trustworthiness.

The nature of the statement in this case also suggests spontaneity. Specifically, when Espinoza entered the room, N.M. asked her, "How come you let that guy come into my room[?]" Then, in response to Espinoza's open-ended question, "What happened?", N.M. told her that Benitez had "touch[ed] my breasts" and "st[u]ck his finger in my vagina." See generally Hutto, 2000 UT App 188, ¶¶ 17, 19 (holding that statement did not qualify as excited utterance because, inter alia, it was made in direct response to specific police questioning).

As to the time lapse between the statement and the event, the record is unclear exactly how much time passed before N.M. made the statements to Espinoza. By Benitez's own testimony, however, N.M. made the statements no more than an hour and a half after the abuse.<sup>3</sup> "[W]hile the passage of time is one measure of

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2. (...continued)

but that the fondling of her breasts took place in her bed. The second, an official Resident Abuse Investigation Report Form, recounts a different version of the events. In that report, Harding states that N.M. told her that, while in the bathroom, "[Benitez] was wiping her and stuck his finger in her [vagina]. When she told him to stop, he laughed and then tried to help her put on her night gown and started to p[llay with her breasts." (Emphasis added.) This version of N.M.'s story is consistent with her report to Woodmanse, Saunders, and the investigator. Moreover, the substance of her complaint--that Benitez penetrated her vagina with his finger and touched her breast--never changed.

3. It appears that the time lapse was actually much shorter. Benitez testified that he was having trouble getting N.M.'s nightgown on and summoned a different CNA--Woodmanse--in the

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whether a statement is the product of a startling occurrence, it is not the most reliable one." State v. Mickelson, 848 P.2d 677, 685 (Utah Ct. App. 1992). Indeed,

[i]n certain situations, the stress of an event may affect the declarant's mind long after the event itself has transpired. In recognition of this fact, courts have generally been willing to characterize statements as products of exciting occurrences despite a significant lapse in time . . . so long as adequate evidence suggests the declarant was still under the stress of the event at the time the statement was made.

Id. In light of the factors discussed above, as well as the fact that the statements were made no longer than an hour and a half after the triggering event, there is adequate evidence that N.M. remained under the stress of the original excitement at the time she told Espinoza that Benitez had sexually abused her.

We conclude that Espinoza's testimony falls within the excited utterance exception to the general rule against hearsay, and accordingly, there remains a residuum of non-hearsay evidence to support the Department's decision. Affirmed.

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James Z. Davis, Judge

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I CONCUR:

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Pamela T. Greenwood,  
Presiding Judge

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3. (...continued)  
hallway to have her assist him with that task. According to Espinoza's later testimony, Woodmanse was coming out of N.M.'s room as Espinoza was entering. Woodmanse said "[N.M.] wants to talk to you." Espinoza then testified that she "went to [N.M. and said] What do you need [N.M.]?"

THORNE, Judge (concurring in the result):

I concur in the result reached by the majority opinion, and I agree with its ultimate conclusion that N.M.'s statements to Espinoza fall within the excited utterance exception to the general rule barring hearsay evidence, see generally Utah R. Evid. 803(2). However, I write separately because of two elements of the majority analysis with which I do not agree.

First, in discussing the spontaneity of N.M.'s statement, the majority states that "N.M. consistently reported the abuse to several caregivers . . . and her story of what occurred never changed." See supra para. 7. Assuming that consistency has some place in the excited utterance analysis,<sup>1</sup> I cannot agree with the majority's statement that N.M.'s version of events never changed. Although she consistently repeated her central allegation that Benitez had abused her, there were variations in the details of the incident. For example, there is at least some evidence that, in her April 21, 2008 statement to Linda Harding, N.M. stated that Benitez "took me to my bed and touched my breasts," while on April 29, she told an investigating officer that all of the abuse happened in the bathroom. Also on April 29, N.M. related for the first time that the alleged abuse was preceded by a verbal dispute between N.M. and Benitez: N.M., apparently upset about being toileted by a male CNA, had told Benitez to get out of the bathroom, but he insisted on helping her.

None of these variations contradict N.M.'s central allegation that Benitez abused her, but they are inconsistencies and this court's analysis should reflect as much. Further, N.M.'s admission of a dispute between her and Benitez seems to

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1. I am not necessarily convinced that injecting consistency or other reliability factors into the excited utterance analysis is wise. The elements of the excited utterance exception are clear, see State v. Mickelson, 848 P.2d 677, 683 (Utah Ct. App. 1992), and it is the meeting of these elements that provides the reliability necessary to overcome the rule against hearsay, see id. ("Such statements, called excited utterances, are admissible on the ground that, since they are made at a time when the declarant is under the influence of a startling event and therefore unlikely to have the wherewithal to fabricate falsehoods, the circumstances surrounding the making of the statement provide sufficient assurance that the statement is trustworthy and that cross-examination would be superfluous." (internal quotation marks omitted)). It seems to me that the excited utterance test itself establishes reliability, and that it is therefore unnecessary to consider consistency or other external indicia of reliability.

conflict with the majority opinion's statement discounting the "possibility that N.M. harbored ill will toward Benitez or had any incentive to fabricate a story to get him into trouble," see supra para. 7. I do not find these inconsistencies to be so great that they preclude the application of the excited utterance exception, but I do believe that their existence should be acknowledged in our treatment of this matter.

Second, in evaluating the time lapse between the alleged abuse and N.M.'s statements to Espinoza, the majority relies on Benitez's testimony to the effect that "N.M. made the statements no more than an hour and a half after the abuse." See supra para. 10. As explained in the majority's footnote three, see supra para. 10, note 3, the record actually suggests that the time lapse was much shorter. Immediately after the abuse incident, Benitez summoned Kristen Woodmanse to assist in getting N.M.'s nightgown on. Woodmanse assisted N.M., and Espinoza entered the room to speak with N.M. as Woodmanse was leaving. Thus, it appears that the conversation between N.M. and Espinoza took place, at most, only a few minutes after the abuse occurred.

In light of the short actual time lapse between the abuse and N.M.'s hearsay statements, I agree with the majority opinion that the statements fall within the excited utterance exception. However, if the time lapse was closer to the hour and a half period relied on by the majority, I would not be able to reach the same conclusion under the circumstances of this case. As noted by the majority, N.M. was elderly, but "'alert and oriented'" and "lucid." See generally State v. Smith, 909 P.2d 236, 240 (Utah 1995) (listing the declarant's age and physical and mental condition as factors in the excited utterance analysis). Even given the serious and startling nature of the alleged abuse, see generally id. (listing the circumstances and nature of the startling event as additional factors), ninety minutes seems to me to be too much time to reasonably exclude the possibility of "reflective thought" on the part of N.M., see Scott v. HK Contractors, 2008 UT App 370, ¶ 13, 196 P.3d 635 ("[T]he declaration must be a spontaneous reaction to the event or condition, not the result of reflective thought." (internal quotation marks omitted)), cert. denied, 205 P.3d 103 (Utah 2009). Thus, had an hour and a half actually passed between the abuse and N.M.'s statements, I would have to conclude that those statements were not "uttered with a spontaneity produced by emotional excitement to a degree that provides a warrant of trustworthiness" sufficient to avoid the strictures of the hearsay rule. See Smith, 909 P.2d at 240.

In sum, I agree with the majority opinion's conclusion that the excited utterance exception applies in this case, and I concur in the resulting refusal to disturb the Department's

ruling below. However, I cannot agree with the majority's assessment that N.M.'s story regarding the abuse never changed, nor its suggestion that, under the circumstances, N.M.'s statement would be admissible as an excited utterance if it was made an hour and a half after the abuse. For these reasons, I concur only in the result reached by the majority.

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William A. Thorne Jr.,  
Associate Presiding Judge