

NEW YORK COURT OF APPEALS

People v. Hernandez

28 N.Y.3d 1056 (2016) · Decided December 15, 2016

SUMMARY

The New York Court of Appeals affirmed the defendant’s convictions for first-degree sexual abuse and endangering the welfare of a child. The court held that the child’s initial statements to her parents were properly admitted as excited utterances and that any error in admitting later hospital statements was harmless because the evidence of guilt was overwhelming.

CASE DETAILS

COURT	New York Court of Appeals
WRITING FOR THE COURT	Chief Judge DiFiore; Judge Pigott; Judge Rivera; Judge Abdus-Salaam; Judge Stein; Judge Fahey; Judge Garcia
JURISDICTION	New York
DECIDED	December 15, 2016
DISPOSITION	affirmed
PROCEDURAL POSTURE	Defendant appealed from an Appellate Division order affirming his jury convictions for first-degree sexual abuse and endangering the welfare of a child.
STANDARD OF REVIEW	The admission of hearsay as an excited utterance is reviewed for abuse of the trial court's sound discretion. Any nonconstitutional trial error is harmless if proof of guilt was overwhelming and there was no significant probability that the jury would have acquitted absent the error.
PRECEDENTIAL VALUE	Published New York Court of Appeals memorandum; binding precedent on the stated evidentiary and harmless-error principles.
PARTIES	Hernandez v. People of the State of New York

TOPICS

- hearsay
- evidence
- criminal procedure

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether the child's initial statements and gestures to her parents, made within approximately 30 minutes of the incident while she remained highly emotional, were admissible under the excited utterance exception to the hearsay rule.
2. Whether admission of the child's later statements and gestures at the hospital constituted harmless nonconstitutional error.

HOLDINGS

1. The trial court properly admitted the child's initial statements and gestures as excited utterances because they were made shortly after a startling event while she remained under the stress of excitement and lacked the reflective capacity necessary for fabrication.
2. Even assuming that the child's stress of excitement had abated when she made the later statements at the hospital, any error in admitting them was harmless nonconstitutional trial error.

KEY QUOTATIONS

"Above all, the decisive factor is whether the surrounding circumstances reasonably justify the conclusion that the remarks were not made under the impetus of studied reflection" (28 N.Y.3d at 1056)

"whether (1) proof of guilt was overwhelming; and (2) there was no significant probability that the jury would have acquitted had the proscribed evidence not been introduced" (28 N.Y.3d at 1058)

FACTUAL BACKGROUND

Defendant was convicted after a jury found that he sexually touched a three-year-old girl on a bus he drove. Shortly after the incident, the child was highly emotional, crying inconsolably, and made statements and gestures to her parents; she repeated them approximately three hours later at a hospital. The trial evidence also included defendant's DNA in the child's underwear, testimony that defendant altered his bus route so the child was alone with him for about 30 minutes, observations concerning the child's clothing and distress, and medical evidence of genital trauma.

PROCEDURAL HISTORY

After a jury trial, defendant was convicted of one count each of sexual abuse in the first degree and endangering the welfare of a child. The Appellate Division affirmed, and the New York Court of Appeals affirmed the Appellate Division's order in a memorandum.

DISPOSITION

affirmed

CASES CITED

- People v. Johnson, 1 N.Y.3d 302, 306 (2003)
- People v. Edwards, 47 N.Y.2d 493, 497 (1979)
- People v. Brown, 70 N.Y.2d 513, 518 (1987)
- People v. Crimmins, 36 N.Y.2d 230, 241-242 (1975)
- People v. Kello, 96 N.Y.2d 740, 743-744 (2001)

OPINION

PER CURIAM.

OPINION OF THE COURT Memorandum. The order of the Appellate Division should be affirmed. Defendant was convicted, after a jury trial, of one count each of sexual abuse in the first degree and endangering the welfare of a child for sexually touching a three-year-old girl on the bus defendant drove.

On appeal, he argues that the trial court erred in allowing the child's mother and father to testify about certain statements the child made to them shortly after the alleged abuse occurred and then several hours later at a hospital, both under the excited utterance exception to the hearsay rule. That exception permits a court to admit an out-of-court statement made in response to a startling or upsetting event, if the circumstances surrounding the statement reveal that it was made while the declarant was under the stress of excitement and "lack[ed] the reflective capacity essential for fabrication" (see People v Johnson, 1 NY3d 302, 306 [2003]).

The decision to admit hearsay as an excited utterance is left to the sound judgment of the trial court, which must consider, among other things, the nature of the startling event, the amount of time between the event and the statement, and the activities of the declarant in the interim (see People v Edwards, 47 NY2d 493, 497 [1979]). "Above all, the decisive factor is whether the surrounding circumstances reasonably justify the conclusion that the remarks were not made under the impetus of studied reflection" {id.}.

We discern no error in the admission of the child's initial statements to her mother and father as excited utterances. The evidence established that the child was in a highly emotional state when she first stepped off the bus and that she continued to cry inconsolably as she uttered the phrase "Señor Bus" to her mother and father at home and made a licking gesture with her tongue.

Those statements were made within a half hour of the startling event, while the child was still under the stress of excitement, and therefore were properly admitted at trial (see People v Brown, 70 NY2d 513, 518 [1987]).

The child repeated the same phrase and gesture to her parents three hours later at a hospital and also pulled her *1058mother's hand to the child's genital area. Even accepting defendant's contention that the stress of excitement had sufficiently abated by the time the child made those

later statements, any error in their admission was harmless (see *People v Crimmins*, 36 NY2d 230, 241-242 [1975]).* Forensic testing confirmed the presence of defendant's DNA in the child's underwear, and the bus matron provided unrefuted testimony that defendant had altered his bus route in such a way that the child was alone with defendant for approximately 30 minutes on the day of the incident.

Additionally, the child's mother testified that the child ran into the house screaming and crying as soon as she got off the bus, and that the child's underwear had been pulled down and were bunched up inside the leg of her pants.

The emergency room doctor found redness and a sore on the child's genital area that he believed were the result of external trauma, i.e., touching. This and other evidence at trial provided overwhelming proof of defendant's guilt, and there was no significant probability that the jury would have reached a different conclusion if the hearsay statements from the hospital had been excluded (see *Kello*, 96 NY2d at 743-744).

Chief Judge DiFiore and Judges Pigott, Rivera, Abdus-Salaam, Stein, Fahey and Garcia concur. Order affirmed, in a memorandum. Because defendant did not object to the admission of the child's statements on constitutional grounds, the proper standard of harmless error analysis is that of nonconstitutional trial error—i.e., “whether (1) proof of guilt was overwhelming; and (2) there was no significant probability that the jury would have acquitted had the proscribed evidence not been introduced” (*People v Kello*, 96 NY2d 740, 744 [2001]).