NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 1285

STATE OF LOUISIANA

VERSUS

WILLIAM DUANE FENDT

Judgment Rendered: FEB 11 2011

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APPEALED FROM THE TWENTY-THIRD JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF ASCENSION
STATE OF LOUISIANA
DOCKET NUMBER 24625, DIVISION "B"

THE HONORABLE THOMAS KLIEBERT, JR., JUDGE

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and
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BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

McClendon, J. Concurs with result reached by the majority

McDONALD, J.

The defendant, William Duane Fendt, was charged by bill of information with sexual battery, a violation of La. R.S. 14:43.1. The defendant entered a plea of not guilty and was found guilty as charged after a trial by jury. The trial court imposed a sentence of seven years imprisonment at hard labor, without the benefit of probation, parole, or suspension of sentence. The defendant now appeals, assigning error to the admission of hearsay testimony. For the following reasons, we affirm the conviction and sentence.

STATEMENT OF FACTS

On or about November 14, 2008, the fourteen-year-old victim, C.H., and her five-year-old stepsister visited the defendant's daughter and spent the night at the defendant's home.[1] C.H. testified during the trial, that when the defendant's wife and daughter were in the kitchen, the defendant began rubbing the victim's leg as she sat on a sofa next to him with the lower portion of her body covered by a blanket. The defendant got up and went to the bathroom and the victim went into the kitchen. The defendant was sitting on the sofa when the victim returned. After she sat down, the defendant put his arm underneath the blanket and touched what the victim called her "private part." She further specified that the defendant touched the part of her body that was covered by her panties and started "rubbing on it." C.H. further testified that the defendant's wife, Mrs. Fendt, kept looking at the defendant in the mirror in the kitchen and that the defendant would quickly move his hand away whenever she would look. The defendant's wife confronted the defendant and C.H., and an altercation between the defendant and his wife ensued. C.H. reported the incident to her father and the police.

[1] Herein, we reference the victim by initials and not by name. See La. R.S. 46:1844 W.

Deputies Jason Kling and John Poche of the Ascension Parish Sheriff's Office responded to the scene. According to the deputies, during an unrecorded interview, after being advised of his **Miranda** rights, the defendant informed the police that he dozed off while resting his hand on C.H.'s leg and that he may have touched her in an inappropriate manner, but when he woke up his hand was in the same spot as it was when he dozed off. The defendant confirmed getting off of the sofa to go to the bathroom and returning and stated that if he touched C.H. inappropriately, he did not remember doing so. The defendant did not testify at the trial.

ASSIGNMENT OF ERROR

In the sole assignment of error, the defendant argues that the trial court erred in permitting the State's witness, the defendant's neighbor, Courtney Cavalier, to present hearsay testimony regarding statements allegedly made by the defendant's wife during the argument with the defendant. Specifically, Ms. Cavalier contended that she heard Mrs. Fendt call the defendant a child molester and state that she saw the defendant touch the victim. The defendant contends that the hearsay testimony was grossly prejudicial. The defendant further argues that to the extent that the testimony is considered an exception to the hearsay rule, its probative value is outweighed by danger of unfair prejudice. Specifically, the defendant argues that the strong condemnation of the defendant by his own wife, if believed, certainly prejudiced the jury against the defendant and strongly influenced the jurors to view the defendant as a child molester. The defendant notes that Mrs. Fendt testified on behalf of the defense that she had been molested as a child and overreacted when she saw the defendant's hand on C.H.'s leg, and that she lost her temper when the defendant accidentally referred to her by his ex-wife's name during the confrontation. Finally, the defendant argues that the admission of the hearsay

testimony in question did not constitute harmless error, contending that the jury was almost certainly swayed by the testimony.

At trial, Mrs. Fendt (the sole defense witness) specifically testified that on the night in question the victim laid on the sofa next to the defendant. While glancing in the kitchen mirror, Mrs. Fendt observed the defendant's hand on the victim's knee, partially under the blanket. Mrs. Fendt confirmed that the victim's vaginal area was covered by the blanket. At the time, the victim was wearing "some little shorts." Mrs. Fendt asked the defendant why his hand was on the victim's knee and became angry when the defendant called her by his ex-wife's name. When Mrs. Fendt repeatedly questioned C.H., she initially indicated that nothing happened, but ultimately stated that the defendant touched her "down there." According to Mrs. Fendt's testimony, at the time of the trial she believed the defendant was innocent but "jumped to conclusions" on the night in question, noting that she had been molested by her father and grandfather as a child. She admitted she hit the defendant, raised her voice, and was irate, but did not remember calling the defendant a child molester.

The contested testimony took place during the State's direct examination of Courtney Cavalier. During a bench conference that took place before Ms. Cavalier began testifying, the State informed the defense attorney and the judge that Ms. Cavalier would testify as to what she heard the defendant's wife say.

The trial court informed the defense attorney the testimony was admissible as *res gestae*. Just before the trial court instructed the State to proceed, the defense attorney informed the trial court that she was "going to object" to the testimony. Ms. Cavalier and her friend, Tia Toms, were walking past the defendant's home on the night in question when Ms. Cavalier heard a loud noise that sounded like a door and saw the defendant and "the lady that lived there." Ms. Cavalier further testified that the defendant and the lady were arguing, fighting, and screaming at each other

and that the lady was hitting at the defendant. After Ms. Cavalier testified that the lady was screaming at the defendant and calling him a child molester, the defense attorney objected as follows: "We're going to object to this whole line obviously, Your Honor." Ms. Cavalier further testified that the lady screamed that she saw the defendant touch the victim, and the defendant shouted he did not. At that point, the defense attorney stated "Your Honor, objection." The trial court overruled the objection. Ms. Cavalier stated that she immediately called the police.

A contemporaneous objection is necessary to preserve the issue for appellate review. La. C.Cr.P. art. 841A; La.C.E. art. 103A(1). Additionally, it is well settled that the defense counsel must state the basis for his objection when making it and point out the specific error that the trial court is making. The grounds of objection must be sufficiently brought to the attention of the trial court to allow it the opportunity to make the proper ruling and correct any claim of prejudice. **State v. Brown**, 481 So.2d 679, 686 (La. App. 1st Cir. 1985), writ denied, 486 So.2d 747 (La. 1986). A defendant is limited on appeal to grounds for objection articulated at trial. A new basis for objection cannot be raised for the first time on appeal. **Brown**, 481 So.2d at 686-87. Likewise, an assignment reserved to a trial court ruling where no basis for the objection has been stated presents nothing for appellate review. **State v. McCutcheon**, 93-0488 (La. App. 1st Cir. 3/11/94), 633 So.2d 1338, 1344, writ denied, 94-0834 (La. 6/17/94), 638 So.2d 1093. Herein, the defense attorney objected without a statement for the record of a specific basis or reason in support of the objection. Thus, the defendant failed to object on the specific grounds argued on appeal and is precluded from raising these arguments on appeal.

At any rate, we find no merit to the arguments raised herein based on the following. Louisiana Code of Evidence article 803(2) provides that a statement

relating to a startling event or condition is not excluded by the hearsay rule[2] if it was made while the declarant was under the stress of excitement caused by the event. There are two basic requirements for the excited utterance exception. There must be an occurrence or event sufficiently startling to render normal reflective thought processes of an observer inoperative. Additionally, the statement of the declarant must have been a spontaneous reaction to the occurrence or event and not the result of reflective thought. There are many factors that enter into determining whether in fact the second requirement has been fulfilled and whether a declarant was at the time of an offered statement under the influence of an exciting event. Probably the most important of these is the time factor. In this connection the trial court must determine whether the interval between the event and the statement was long enough to permit a subsidence of emotional upset and a restoration of a reflective thought process. **State v. Hilton**, 99-1239 (La. App. 1st Cir. 3/31/00), 764 So.2d 1027, 1034-35, writ denied, 2000-0958 (La. 3/9/01), 786 So.2d 113.

Herein, the contested statements were alleged to have been made before a significant amount of time passed after the moment Mrs. Fendt observed the defendant's hand on the victim's leg and began questioning the defendant and the victim. It is obvious that the time lapse was not long enough for Mrs. Fendt's emotional state to diminish, or long enough to allow her to reflect on the events. Thus, the statements in question fall under the excited utterance exception to the hearsay rule and were admissible. See **State v. Yochim**, 496 So.2d 596, 599-601 (La. App. 1st Cir. 1986).

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[2] Hearsay is an oral or written assertion, other than one made by the declarant while testifying at the present trial, offered in evidence to prove the truth of the matter asserted. La. C.E. art. 801A and C. Hearsay evidence is not admissible except as otherwise specified in the Louisiana Code of Evidence or other legislation. La. C.E. art. 802.

We also agree with the trial court's finding in that under La. C.E. art. 801D(4), Mrs. Fendt's statements were admissible as part of the *res gestae* and, therefore, were not hearsay.[3] Article 801D(4) incorporates what was formerly La. R.S. 15:447 and 448, known as the *res gestae* exception to the hearsay rule. *Res gestae* is defined as events speaking for themselves under the immediate pressure of the occurrence, through the instructive, impulsive and spontaneous words and acts of the participants. This doctrine includes not only spontaneous utterances and declarations made before and after commission of a crime, but also includes testimony of witnesses pertaining to what they heard or observed before, during or after the commission of the crime if the continuous chain of events is evident under the circumstances. See **State v. Castleberry**, 98-1388 (La. 4/13/99), 758 So.2d 749, 765, cert. denied, 528 U.S. 893, 120 S.Ct. 220, 145 L.Ed.2d 185 (1999). The statement made by Mrs. Fendt was part of a continuous chain of events that began when she observed the defendant's hand on the victim's leg and began questioning them.

Even assuming, arguendo, that the testimony in question constituted inadmissible hearsay, confrontation errors are subject to a harmless-error analysis. **Delaware v. Van Arsdall**, 475 U.S. 673, 684, 106 S.Ct. 1431, 1438, 89 L.Ed.2d 674 (1986); **State v. Millican**, 2003-1065 (La. App. 1st Cir. 2/23/04), 874 So.2d 211, 215. The verdict may stand if the reviewing court determines that the guilty verdict rendered in the particular trial is surely unattributable to the error. **Sullivan v. Louisiana**, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993); **State v. Broadway**, 96-2659 (La. 10/19/99), 753 So.2d 801, 817, cert. denied, 529

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[3] La. C. E. art. 801D(4) provides that a statement is not hearsay if:

> **Things said or done**. The statements are events speaking for themselves under the immediate pressure of the occurrence, through the instructive, impulsive and spontaneous words and acts of the participants, and not the words of the participants when narrating the events, and which are necessary incidents of the criminal act, or immediate concomitants of it, or form in conjunction with it one continuous transaction.

U.S. 1056, 120 S.Ct. 1562, 146 L.Ed.2d 466 (2000). Factors to be considered by the reviewing court include the importance of the testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. **Van Arsdall**, 475 U.S. at 684, 106 S.Ct. at 1438; **State v. Wille**, 559 So.2d 1321, 1332 (La. 1990), cert. denied, 506 U.S. 880, 113 S.Ct. 231, 121 L.Ed.2d 167 (1992).

When hearsay testimony is improperly introduced into evidence, it will be considered harmless error if it is found to be cumulative and corroborative of other properly admitted evidence and did not contribute to the verdict. **Hilton**, 764 So.2d at 1035. Herein, direct and cross-examination of the declarant, Mrs. Fendt, regarding the alleged statements was permitted. Given the evidence of the defendant's guilt, including the testimony of the victim and Mrs. Fendt, the testimony by Ms. Cavalier at issue was cumulative and corroborative of other evidence establishing the defendant's guilt. Thus, any error in this regard would be considered harmless beyond a reasonable doubt. See La. C.Cr.P. art. 921. Based on the foregoing, the sole assignment of error lacks merit.

CONVICTION AND SENTENCE AFFIRMED.