STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNNIE EUGENE CHOATE,

Defendant-Appellant.

UNPUBLISHED
May 6, 1997

No. 183553
Sanilac Circuit Court
LC No. 94-004144-AR

Before: Jansen, P.J., and Young and R.I. Cooper*, JJ.

PER CURIAM.

Defendant appeals by leave granted from the circuit court's affirmance of his convictions by a jury of two counts of fourth-degree child abuse, MCL 750.136b(5); MSA 28.331(2)(5), in the district court. Defendant was sentenced to one year in jail, two years' probation, with sixty days of his jail time to be held in abeyance if he violated some aspect of his probationary sentence. We affirm.

Defendant first contends that the district court abused its discretion in admitting into evidence the hearsay testimony of the victim, Robert Choate (the defendant's son) under the excited utterance exception to the hearsay rule. MRE 803(2). The trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *People v Kowalak (On Remand)*, 215 Mich App 554, 558; 546 NW2d 681 (1996).

In this case, Robert (who was eleven years old) told his school principal, Lewis Hurley, that his father beat him the morning after the alleged incident. A police officer, Paul Cowley, was then called to the school, and Robert repeated the same allegation to him. Robert was unable to testify at trial because he had died in a house fire before trial. The district court admitted the statements as excited utterances under MRE 803(2). In order to admit testimony under the excited utterance exception, the statement must meet three requirements: (1) it must arise out of a startling occasion, (2) it must be made before there has been time to contrive and misrepresent, and (3) it must relate to the circumstances of the startling event. *People v Gee*, 406 Mich 279, 282; 278 NW2d 304 (1979), *People v Straight*,

* Circuit judge, sitting on the Court of Appeals by assignment.

430 Mich 418, 424; 424 NW2d 257 (1988). On appeal, defendant contends Robert's statements made to his school principal and the police officer do not fit the definition of an excited utterance under either prong one or prong two of the *Gee* test.

Defendant first asserts that there is no independent proof of the startling event which allegedly precipitated Robert's statements. We do not agree. The testimony of Robert's mother, Patricia Wilson, establishes that on the evening on which Robert stated the abuse occurred, she was attempting to sleep on the couch in the family's living room. Wilson stated that between 6:00 p.m. and 8:00 p.m. she heard defendant spank Robert in the same room where she lay on the couch. Therefore, independent proof of the startling event has been demonstrated.

Defendant also contends that Robert's statements were not made before he had time to contrive and misrepresent. The focus of MRE 803(2) is whether the declarant spoke while still under the stress caused by the startling event, requiring excitement but not contemporaneity. *People v Verburg*, 170 Mich App 490, 495; 430 NW2d 775 (1988). Here, the testimony offered by Hurley and Officer Cowley described Robert's demeanor as determined and defiant. In addition, Hurley testified that Robert told him he had made plans not to go home, further indicating that the time lapse between the event and the statements gave Robert time to deliberate and formulate a plan. Therefore, because the statements did not fit all the requirements of an excited utterance, they constituted hearsay and should not have been admitted into evidence.

This is not to say that time lapse alone is dispositive, because we recognize that a time lapse may be a significant factor; however, its significance depends largely on the character of the event. Thus, the focus of MRE 803(2), given a startling event, is whether the declarant spoke while still under the stress caused by the startling event. *Straight, supra,* p 425. It is the lack of capacity to fabricate rather than the lack of time to fabricate which justifies the determination of MRE 803(2). *Id.* This Court has held that statements made several hours after the event were admissible pursuant to the excited utterance exception. *People v Houghteling*, 183 Mich App 805, 807-808; 455 NW2d 440 (1990) (statements admissible made nineteen to twenty hours after the alleged sexual assault); *People v Draper*, 150 Mich App 481, 486; 389 NW2d 89 (1986), rev'd on other grounds on remand 188 Mich App 77; 468 NW2d 902 (1991) (statements admissible made one week after the incident); *People v Soles*, 143 Mich App 433, 438; 372 NW2d 588 (1985) (statement admissible made five days after alleged sexual assault). However, in this case, given the somewhat older age of the victim and the state of mind at the time that he gave the statements, there is evidence supporting defendant's contention that there was time to contrive and misrepresent.

Even if the district court abused its discretion in admitting Robert's testimony under the excited utterance exception to the hearsay rule, an error in the admission of evidence is not grounds for granting a new trial, for setting aside a verdict, or for vacating, modifying or otherwise disturbing a judgment unless refusal to take action would be inconsistent with substantial justice. MCR 2.613(A), MCL 769.26; MSA 28.1096. Here, ample evidence of defendant's abuse was presented at trial through photographs of Robert's back and buttocks, and through the testimony of Robert's mother and defendant, who admitted to "spanking" Robert three times on January 13, 1994. Therefore, the

admission of Robert's statements does not rise to the level where refusal to take action would be inconsistent with substantial justice because even if those statements were not admitted at trial, there is ample evidence to support defendant's conviction. Therefore, there is no showing that the error was prejudicial and reversal is not required. *People v Mateo,* 453 Mich 203, 214-215; 551 NW2d 891 (1996); *People v Foreman (On Remand),* 179 Mich App 678, 682; 446 NW2d 534 (1989).

Defendant next argues that the district court's decision to admit into evidence photographs which had been ordered to be produced by the prosecution to the defense before trial, but which were never produced, was reversible error. We review a trial court's decision in fashioning a remedy for noncompliance with a discovery order or agreement for abuse of discretion. *People v Taylor*, 159 Mich App 468, 487; 406 NW2d 859 (1987).

At a pretrial hearing, the district court ordered that copies of Polaroid photographs of Robert Choate's buttocks, taken by Officer Cowley and in the possession of the prosecution, be turned over to defense counsel before trial. However, at trial, when the prosecution attempted to admit into evidence enlargements of the photos, defendant informed the court that the prosecution had not complied with the court's discovery order. After a recess, the court ruled that the enlarged photos could not be admitted because they involved additional steps in the development process and were perhaps subject to photographic interpretation. However, the court admitted the original Polaroids, noting that defendant was on notice that the pictures existed through the various discussions at pretrial hearings, and that at one of the hearings the prosecutor had stated that defendant could review the photos at any time. In addition, the court stated:

> I am concerned, gentlemen, that the issue in this case, at least as developed to this point, appears to be whether or not we're dealing with a reasonable amount of parental discipline or whether or not we're dealing with an excessive use of force, constituting child abuse. Since we're dealing in a manner of degree, anything that would assist the jury in that light in making that determination I think would be helpful to the jury. And while we have witnesses who will express opinions I assume as to that matter, the photographs I think would also be helpful in this case. So I'm going to admit the three Polaroid photographs but not the enlargements.

This Court has held that in fashioning a remedy for a party's noncompliance with a discovery order or agreement, the court must exercise discretion to balance the interests of the courts, the public, and the parties. *Taylor*, *supra*, p 487. The district court properly took all of these interests into consideration in fashioning its remedy, and therefore the circuit court was correct in finding no abuse of discretion.

Defendant next asserts that the statements he made to police post-arrest, as well as a belt that was confiscated from him at booking, should be suppressed on two bases: first, that they are the fruits of an illegal warrantless misdemeanor arrest; and second, that his statements were obtained without benefit of warnings pursuant to *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Addressing defendant's claim that evidence should have been suppressed due to an illegal arrest, we review a court's ruling at a suppression hearing under a clearly erroneous standard. *People v Bordeau*, 206 Mich App 89, 92; 520 NW 2d 374 (1994).

Defendant contends that his warrantless arrest was illegal because he was charged with a misdemeanor, MCL 750.136b(5); MSA 28.331(2)(5), fourth-degree child abuse, with no allegation that the crime took place in the presence of the police. MCL 764.15(1); MSA 28.874(1). However, pursuant to statute, a police officer may arrest a person without a warrant if the officer has probable cause to believe that a felony has been committed and that the suspect committed the felony. MCL 764.15(1)(d); MSA 28.874(1)(d).

At the suppression hearing, the arresting officer, Paul Cowley, testified that at the time of defendant's arrest, he believed felony child abuse had been committed. In order to prove a charge of first-degree, felony child abuse, the prosecutor must prove that the defendant knowingly or intentionally caused either serious physical or mental harm to the child. CJI 2d 17.18. Cowley stated that he based his belief on statements made to him by Robert by observing marks on Robert's buttocks, by speaking to Robert's mother, and by the fact that Cowley had arrested defendant on a child abuse charge two years previously. We find that this evidence justified Cowley's belief that a felony had been committed, and therefore defendant's arrest was proper. Consequently, defendant's statements made pursuant to arrest, and the belt confiscated as a result of the arrest were not obtained through an unlawful arrest.

Regarding defendant's contentions that his post-arrest statements were not voluntary because he was not given *Miranda* warnings, *Miranda* warnings are required when a suspect is subjected to custodial interrogation. *People v Anderson*, 209 Mich App 527, 532; 531 NW2d 780 (1995). Custodial interrogation is defined as words or actions on the part of police officers that they should have known would be reasonably likely to elicit an incriminating response. *People v Honeyman*, 215 Mich App 687, 695; 546 NW2d 719 (1996). Because the statements made by defendant were spontaneous remarks made after defendant asked a question of Officer Cowley, it is not reasonable to assume that Cowley should have known that his response to defendant's questions would elicit an incriminating statement. Therefore, because the exchanges between Cowley and defendant cannot be deemed interrogation, *Miranda* warnings were not required, and the district court did not err in admitting the statements into evidence.

Finally, defendant contends that on four occasions the conduct and statements of the prosecutor in the trial below violated his due process rights. If the issue of prosecutorial misconduct has been properly preserved by a timely and specific objection, we review the issue to determine whether defendant was denied a fair and impartial trial. *People v Stanaway*, 446 Mich 643, 687; 521 NW 2d 557 (1994). Where a defendant has failed to properly preserve, we review only for manifest injustice. *Id*.

Defendant first states that the prosecutor's failure to produce three Polaroid photos of Robert Choate's buttocks, taken at his school the morning after the alleged abuse, constituted prosecutorial misconduct. However, as discussed above, the lower court fashioned an appropriate remedy to the

prosecutor's noncompliance with the court's discovery order, ensuring that defendant was not denied a fair and impartial trial.

Defendant next asserts that the prosecutor committed misconduct by referring to a prior conviction of defendant during closing argument when he pointed to the "testimony defendant gave in 1992." A review of the record discloses that the issue of testimony related to defendant's prior child abuse conviction was the subject of an extensive discussion between the court and counsel out of the presence of the jury. The statement made by the prosecutor in closing argument was in complete compliance with the district court's ruling on how to handle defendant's prior inconsistent statements. Therefore, the prosecutor's conduct did not amount to misconduct.

Defendant next asserts that throughout the trial, the prosecutor referred to "spankings" as "beatings" in an attempt to inflame the passions of the jury. Because defendant did not object to these remarks at trial, we will review only for manifest injustice. *Stanaway*, *supra*.

It is permissible for a prosecutor to comment about and suggest reasonable inferences from the evidence, and the inferences need not be stated in the blandest terms possible . *People v Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993). At trial, several witnesses referred to the punishment inflicted by defendant upon Robert as "beatings" and "whippings." Therefore, the prosecutor's interchanging of the terms "spanking" and "beating" was a reasonable comment and inference from the evidence presented at trial, and these remarks do not constitute manifest injustice.

Finally, defendant asserts that the prosecutor committed misconduct by leaving a belt in plain view, and by laying an improper foundation for the belt's inclusion in evidence. A review of the record discloses that the belt was sitting out in the open, in view of the jury, for approximately the first hour of trial, and that the prosecutor immediately removed it from the jury's view upon request by defense counsel. In addition, when the prosecutor introduced the belt as an exhibit and offered it in evidence, defendant objected on the basis of foundation, with the trial court overruling defendant's objection and admitting the belt into evidence. Therefore, although defendant may disagree with the court's ruling, he has failed to demonstrate how the prosecutor's conduct denied him the right to a fair and impartial trial, and has not established prosecutorial misconduct.

Finally, we order that defendant's appeal bond be revoked and that defendant begin to serve his sentence forthwith.

Affirmed.

/s/ Kathleen Jansen
/s/ Robert P. Young, Jr.