STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

CHARLES EMIL HENDRICKSON,

Defendant-Appellee.

UNPUBLISHED

No. 193713
Marquette Circuit Court
LC No. 95-31156-AR

Before: O'Connell, P.J., and Sawyer and Markman, JJ.

MARKMAN, J. (dissenting).

I respectfully dissent. I disagree with the majority's conclusion that the trial court's decision to admit the 911 tape into evidence constituted an abuse of discretion.

On appeal, plaintiff raises several claims regarding the circuit court's analysis of the district court's evidentiary rulings that resulted in its reversal of defendant's conviction. I note that here, as in many domestic assault cases, the alleged victim reported an assault, then later denied it and requested that charges be dropped. In such cases, it is not unusual that the *only* evidence of the assault will consist of hearsay. Accordingly, such cases frequently present difficult evidentiary issues regarding the admissibility of hearsay.

> The decision whether to admit or exclude evidence is within the trial court's discretion. This Court will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. [*People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994); citations omitted.]

MRE 104(a) states in pertinent part:

> Preliminary questions concerning the . . . admissibility of evidence shall be determined by the court . . . In making its determination it is not bound by the Rules of Evidence except those with respect to privileges.

Under MRE 104(a), the court's role is simply to decide the preliminary question whether to admit proffered evidence; the rules of evidence do not govern what evidence it may use in deciding this preliminary question. The jury is the sole judge of the facts; it alone is to weigh the evidence and decide questions of fact. *People v Palmer*, 392 Mich 370, 375; 220 NW2d 393 (1974). In deciding the preliminary question of admissibility, the court is not to usurp the jury's role of weighing the evidence.

Plaintiff claims that the trial court did not err in admitting the 911 tape. "'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). The 911 tape was offered to prove the truth of the matter asserted and was, accordingly, hearsay. MRE 803 sets forth exceptions to the rule prohibiting the admission of hearsay evidence. MRE 803(1) (present sense impression) states that "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter" is not excluded by the hearsay rule.[1] In *Hewitt v Grand Trunk Western R Co*, 123 Mich App 309, 317; 333 NW2d 264 (1983), this Court cited *US v Narciso*, 446 F Supp 252, 288 (ED Mich, 1976):

> "Underlying Rule 803(1) is the assumption that statements of perception *substantially contemporaneous* with an event are highly trustworthy because: (1) the statement being simultaneous with the event there is no memory problem; (2) there is little or no time for calculated misstatement; and (3) the statement is usually made to one who had equal opportunity to observe and check misstatements." (quoting Weinstein and Berger, Weinstein's Evidence, ¶ 803(1)[01].) (Emphasis added.)

Here, the 911 call appears to fit within the present sense impression exception.[2] On their face, Mueller's statements during the 911 call indicate that she is describing an assault just after it occurred. In the call, Mueller states that defendant "just" assaulted her and that "he is leaving the house now." Mueller's use of the past tense to inform the 911 dispatcher of the assault is obviously consistent with the need to describe an event, such as an assault upon oneself, immediately after it happens. For example, in *People v Slaton*, 135 Mich App 328, 334; 354 NW2d 326 (1984), this Court found that a 911 caller's statement that people "*had broken* into his basement" as well as his statement that they "were trying to break down the door separating him from the basement as he spoke" were present sense impressions. (Emphasis added.) Thus, in the 911 call at issue, Mueller appears to be describing the assault immediately after it occurred.

The substantial contemporaneity of the call to the assault indicates that it meets the first two criteria-- lack of a memory problem and little time for calculated misstatement-- set forth in *Hewitt* as underlying the present sense impression exception. I note that the 911 operator was not in a position to observe the circumstances and check Mueller's statements. However, the *Hewitt* Court only listed that third criteria as "usually" existing; thus, it is not an indispensable requirement for admission of a present sense impression. Of course, that a statement satisfies the *Hewitt* criteria does not necessarily mean that the statement is accurate. Even a statement describing an event *as it occurs* could be inaccurate, e.g., because the declarant has a poor vantage point or makes a calculated misstatement (despite the more limited time to reflect).

The rationale behind the present sense impression exception is that statements describing an event while it is being perceived or immediately thereafter are trustworthy because the opportunity for memory lapses or calculated misstatements is *minimized*, not that it is removed altogether or that such statements are infallibly accurate. The majority opinion focuses on evidence that raises questions regarding when the injuries at issue were incurred and Mueller's motive to lie. These are appropriate considerations in weighing the evidence and such evidence was properly admitted here under MRE 806. However, the existence of such evidence, which called into question the veracity of Mueller's statements in the 911 tape, did not render the trial court's decision to admit the 911 tape as a present sense impression an abuse of discretion. I believe that the trial court would have been acting within its discretion if it had determined, as does the majority, that the 911 tape was inadmissible as a present sense impression because of uncertainty that the statement was made immediately after perceiving the event; however, I also believe that it was acting within its discretion in admitting the 911 tape as a present sense impression. This Court has previously found tape recordings of 911 calls admissible under the present sense impression exception to the hearsay rule. See *City of Westland v Okopski*, 208 Mich App 66, 77; 527 NW2d 780 (1994); *Slaton*, *supra* at 334. Because Mueller's statements in the 911 call at issue indicate that she is describing an event immediately after it occurred, the trial court's determination that the 911 call was admissible under the present sense exception is not an abuse of discretion, in my judgment. While the majority disagrees with this determination of the trial court, it has not demonstrated that there was "no justification or excuse" for the trial court's ruling. See *McAlister*, *supra*.

The parties frame this issue differently than does the majority. Defendant contends (and the circuit court operated under the assumption) that the present sense impression exception requires independent evidence of the incident giving rise to the impression. This contention is rooted in *People v Burton*, 433 Mich 268; 445 NW2d 133 (1989). *Burton* examined the excited utterance exception, MRE 803(2), not the present sense impression exception, and reversed the defendant's convictions of two counts of first-degree criminal sexual conduct. The complainant accused the defendant of committing such offenses in a statement to the police but later recanted and attempted to have the charges dropped. The issue in *Burton* was whether extrajudicial statements sought to be admitted into evidence as excited utterances (there, the complainant's initial statement to the police) may be admitted "when there is no independent evidence, direct or circumstantial, of the underlying startling event to which the statements relate." *Id*. at 271. The Court held at 294:

> In short, the prosecution has established neither a majority rule nor a disposition on the part of Michigan courts to allow an excited utterance to prove the underlying event when there is no independent proof, direct or circumstantial, that the event ever took place. Absent independent proof of the startling events--the sexual assaults--the complainant's statements were not admissible.

It held that the question is whether evidence, other than the excited utterance, "independently support[s] the startling event to which the excited utterances relate." *Id*. at 298.

Justice Boyle wrote a dissent in *Burton*, with which Justices Riley and Griffin agreed regarding the issue of corroboration.[3] Justice Boyle stated at 317:

> The majority purports to acknowledge that the "extrinsic" evidence available to the trial court in determining admissibility under MRE 104 is not limited to evidence that would be admissible at trial and that a trial judge is not bound by the Rules of Evidence except those with respect to privileges when resolving preliminary factual questions concerning the admissibility of extrajudicial declarations under MRE 104(a). However, because the majority proceeds on the erroneous assumption that the trial judge must determine whether the startling event occurred without considering the statement itself, it has converted the Rule 104 inquiry into a corpus delicti rule in which the trial judge must find "independent evidence" of the happening of the event in order to permit the jury to determine whether the event occurred.

She outlined her disagreement with the majority at 322:

> What divides us is the majority's assumption that MRE 104 requires that the startling event must be shown *independently* of the statement. *Ante*, p 295. While it is true that a minority of jurisdictions hold that a startling event cannot be shown from the making of the statement, these cases do not stand for the proposition that the trial court may not consider the fact that the statement was made in deciding preliminary admissibility.

She concluded at 326:

> In sum, whether statements will be admitted under the excited utterance exception is within the trial court's sound discretion. Under the facts of this case, it cannot be said that the trial court abused that discretion in admitting the victim's statements as spontaneous or excited. The trial court as well as the Court of Appeals on remand correctly noted that there was more evidence than the victim's declaration itself that a startling event had occurred. Accordingly, the statements were properly admitted at trial.

Both the majority and the minority decisions in *Burton* require some evidence, beyond the hearsay statement itself, that a startling event occurred in order to admit hearsay under the excited utterance exception. The majority requires that independent evidence establish the startling event, without consideration of the hearsay statement itself. The minority requires only that the independent evidence, in combination with the hearsay statement, establish the startling event.

I have found no Michigan authority imposing a similar corroboration requirement on the present sense impression exception and do not believe that *Burton* is dispositive on this issue. However, the present case does not require us to reach that question. Assuming arguendo that the present sense impression exception requires independent evidence of the circumstances underlying the statement, the trial court still did not abuse its discretion in admitting the 911 tape because such evidence exists here.

Here, there is evidence, other than Mueller's statement on the 911 tape itself, that defendant assaulted Mueller. The photographs of Mueller taken approximately six hours after the alleged assault show fresh injuries to her face, lip, and neck. These photographs constitute circumstantial evidence that

plaintiff had, in fact, been assaulted at the time she called 911. The photographs also suggest that her injuries were recently incurred. Defendant testified that plaintiff fell in a parking lot. (I note that, in light of the natural reaction to break a fall with one's hands, a fall is unlikely to result in injuries to the face and neck with no noticeable injuries to the arms and hands.) The jury was, of course, free to believe defendant's version of what happened that night. But the photographs nonetheless constitute circumstantial evidence that plaintiff had recently been assaulted at the time she called 911. In the context of determining whether there is sufficient evidence to support a conviction, this Court has held that a prosecutor need not "negate every reasonable theory consistent with the defendant's innocence"; a prosecutor is only obligated to prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provides. *People v Carson*, 189 Mich App 268, 269; 471 NW2d 655 (1991). I believe this principle also applies in determining the preliminary question of the admissibility of evidence.

The existence of this circumstantial evidence of assault distinguishes the present case from *Burton*. In *Burton*, the Court held that the circumstantial evidence-- complainant's disheveled appearance and anxious demeanor; the defendant's attempt to remove her shoes and underpants from his house; and the discovery of the complainant's brassiere in the defendant's house-- established "at most a stressful event with sexual overtones" that was only elevated to a sexual assault when the utterance itself was considered. *Burton*, at 297-298. It found that "the sole substantive evidence" that a sexual assault occurred was the complainant's initial statement to the police. *Id*. at 272. In contrast, here, the photographs constitute substantive evidence that an assault occurred.[4] Accordingly, even if it is assumed that the rule in *Burton* applies to the present sense impression exception, there was sufficient independent evidence of an assault for the trial court to determine that Mueller's 911 call was admissible as a present sense impression. Therefore, I believe that the trial court did not abuse its discretion in admitting the 911 tape on this basis and that the circuit court erred in so finding.

Because the majority of the circuit court's other conclusions in this case flowed from its erroneous determination that the 911 tape was inadmissible, I would remand this matter to the circuit court for reconsideration of its reversal of defendant's judgment of sentence in accordance with this opinion.

/s/ Stephen J. Markman

[1] The 911 tape at issue is also arguably admissible under the excited utterance exception. MRE 803(2). However, I will not address this exception because plaintiff has not argued that it applies here.

[2] I note that the only issue before us with respect to the 911 tape is whether it was admissible under the present sense impression exception. MRE 901 governs authentication of tape recordings; a tape may generally be authenticated by having a knowledgeable witness identify the voices on the tape. *People v Berkey*, 437 Mich 40, 50; 467 NW2d 6 (1991). Here, defendant's counsel stated that she "agreed to the foundational requirements" and did not object on the basis of a failure to identify the voice on the 911 tape as Mueller's. Rather, defendant's counsel objected to admission of the 911 tape on the basis that there was no direct evidence that the incident occurred or when it occurred. Objections on one

ground do not preserve an appellate attack based on a different ground. *People v Redman*, 188 Mich App 516, 518; 470 NW2d 676 (1991).

[3] Justice Boyle has further expounded on this issue in *People v Bushard*, 444 Mich 384, 395, n 8; 508 NW2d 745 (1993) and in *People v Slattery*, 448 Mich 935, 936-937; 531 NW2d 713 (1995).

[4] Although not necessary to this analysis, I additionally note that the photographs of the injuries resulting from the March and April incidents reveal similar injuries to the neck. Evidence of these other acts may be admissible to show "a system in doing an act" under MRE 404(b). Therefore, these photographs arguably provide additional circumstantial evidence that defendant assaulted Mueller on October 9, 1994.