STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SKYLEE KITZMAN,

Defendant-Appellant.

UNPUBLISHED
October 21, 1997

No. 197720
Gogebic Circuit Court
LC No. 95-000290-FH

Before: Murphy, P.J., and Hood and Bandstra, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(f); MSA 28.788(2)(1)(f), three counts of transporting a female with the intent to induce, entice, or compel that person to become a prostitute, MCL 750.459; MSA 28.714, and three counts of inveigling, enticing, encouraging, persuading, or procuring a female to leave the state for the purpose of prostitution, MCL 750.455; MSA 28.710. Defendant was originally charged with two counts of CSC I, along with the six other counts. Defendant was sentenced to concurrent terms of twenty to thirty years' imprisonment for the CSC I conviction, ten to twenty years' imprisonment for the three counts of transporting a female for the purpose of prostitution convictions, and ten to twenty years' imprisonment for the three pandering prostitution convictions. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred in denying his discovery request for the full name of one of the men that Stephanie identified from a police lineup in Wisconsin as someone with whom defendant arranged an act of prostitution. Defendant claims that the man was a res gestae witness and that he was prejudiced by not knowing the man's full name. We disagree. We review the grant or denial of a discovery motion for an abuse of discretion. *People v Valeck*, 223 Mich App 48, 51; 566 NW2d 26 (1997). An abuse of discretion exists only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling. *People v Laws*, 218 Mich App 447, 455; 554 NW2d 586 (1996).

MCR 6.201 governs the scope of criminal discovery. The prosecutor must comply within seven days of a discovery request. MCR 6.201(F). However, on good cause shown, the court may order a modification of the requirements and limitations of the rule. MCR 6.201(H). Here, because the man in question was the subject of an ongoing police investigation in Wisconsin, because the prosecutor from Wisconsin did not wish to divulge any information regarding that investigation until it was completed, because the prosecutor in the present case did not know the man's identity, and because the man would likely have claimed his testimonial privilege, we conclude that good cause was shown by the prosecutor for not allowing discovery of the man's full name. MCR 6.201(B)(2) and (H). Therefore, we conclude that the trial court did not abuse its discretion in denying defendant's discovery request. *Valeck, supra*.

Next, defendant argues that he is entitled to a new trial because the trial court erred in allowing defendant's father to assert his Fifth Amendment testimonial privilege in the jury's presence. We disagree.

It is inherently prejudicial to allow a witness who is intimately connected with the criminal episode at issue to assert a testimonial privilege in front of a jury. *People v Paasche*, 207 Mich App 698, 708; 525 NW2d 914 (1994); *People v Poma*, 96 Mich App 726, 733; 294 NW2d 221 (1980). However, in the present case, defendant points to nothing in the record that would indicate or suggest to the jury that the witness in question was "intimately connected with the criminal episode at issue." Apparently, defendant's father was brought forward as a character witness whose testimony would have been similar to testimony already given by other defense witnesses regarding, for example, that the defendant had never been seen physically abusing the victim. Unlike the cases relied upon by defendant, *People v Dyer*, 425 Mich 572; 390 NW2d 645 (1986), *People v Giacalone* 399 Mich 642; 250 NW2d 492 (1977), and *Poma, supra*, defendant's father was not an accomplice, codefendant, or other witness with firsthand knowledge regarding the criminal episodes at issue.[1]

To the extent that defendant argues that he was denied effective assistance of counsel because his trial attorney failed to object or request a cautionary instruction regarding this issue, we conclude that this argument is without merit. To prove ineffective assistance of counsel, the defendant must prove that trial counsel's performance was below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the outcome of the trial would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Assuming arguendo that counsel committed error in failing to object or request a cautionary instruction, we are not convinced that the outcome of the trial would have been different considering the overwhelming evidence against defendant.

Finally, defendant argues that the trial court abused its discretion in admitting hearsay statements that the victim made to her grandmother into evidence as excited utterances because the prosecutor failed to lay the proper foundation for such testimony. Even though the proper foundation was not laid before these statements were admitted, we conclude that any error was harmless.

The "excited utterance" exception to the hearsay rule encompasses any "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the

event or condition." MRE 803(2); *People v Jensen*, 222 Mich App 575, 581; 564 NW2d 192 (1997). Three foundational criteria must be met before a statement can be admitted into evidence as an excited utterance. *Id.* at 581-582. "First, the statement must arise out of a startling event; second, it must be made before there has been time for contrivance or misrepresentation by the declarant; and third, it must relate to the circumstances of the startling event." *Id.* at 582.

In the present case, the proper foundational requirements were not met before the statements were admitted into evidence as excited utterances. At the time of the court's ruling, the testimony of the grandmother did not indicate that the victim's statements were excited utterances. However, any error was harmless in light of the fact that the victim's testimony, which occurred later in the proceedings, established that the statements made to the victim's grandmother were excited utterances in that the statements were made only minutes after the startling abusive event and related to the circumstances of the startling event. The victim testified that immediately after defendant physically and sexually abused her, she quickly got dressed, gathered her child and keys, and fled from the home so as not to alert defendant, whereupon she met her grandmother at the door. The victim testified that about fifteen minutes elapsed from the time that the abusive episode ended to the time that she arrived at the police station. Thus, only minutes had elapsed from the time the abuse ended until the time that the victim made the statements to her grandmother. Under the circumstances, we believe that this was not enough time to contrive and misrepresent as argued by defendant. Cf. *People v Scobey*, 153 Mich App 82, 85; 395 NW2d 247 (1986) (the Court found that statements made two and five days after the alleged incidence were inadmissible as exited utterances as there was sufficient time to contrive and misrepresent); *People v Creith*, 151 Mich App 217, 225; 390 NW2d 234 (1986) (the Court found that the statements made between two and 9 ½hours after the event were inadmissible as excited utterances).

We affirm.

/s/ William B. Murphy
/s/ Harold Hood
/s/ Richard A. Bandstra

[1] The record suggests that the witness' concerns were with possible prosecution for matters unrelated to the charges against defendant.