

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALVINO RAY SINQUEFIELD,

Defendant-Appellant.

UNPUBLISHED

December 16, 1997

No. 195024

Ingham Circuit Court

LC No. 95-069554 FC

Before: McDonald, P.J., and Wahls and J. R. Weber*, JJ.

MEMORANDUM.

Defendant appeals by right his jury convictions of first degree murder, MCL 750.316; MSA 28.548 and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant contends the trial court erred in admitting the testimony of Rachel Rogers to the effect that the victim, immediately after an angry phone call with defendant, asserted that defendant had threatened to kill him. Witnesses who heard the conversation from defendant's end testified that defendant had threatened to beat him. Defendant contends that the trial court erred in relying on *People v Kowalak* (On Remand), 215 Mich App 554, 558; 546 NW2d 681 (1996), in finding Rogers' testimony admissible under the excited utterance exception of the hearsay rule, MRE 803(2). Defendant contends that *Kowalak* is distinguishable, because there the death threat was made to an elderly woman by her son, whereas here the death threat was "merely" one between two young men. This Court need not directly address this questionable distinction as a matter of law, since it is clear that the trial court did not abuse its discretion in finding sufficient indicia of a startling event, and absent an abuse of discretion reversible error has not occurred. *People v Creith*, 151 Mich App 217, 223; 390 NW2d 234 (1986).

This Court further concludes that, even if the evidence were improperly admitted, it was harmless in the context of the entire record. Six eyewitnesses saw the subsequent, fatal confrontation between defendant and the victim. It was essentially undisputed that defendant walked up to the victim,

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

who was seated in his automobile, and punched the victim with his right hand, while defendant was carrying a pistol in his left hand. Defendant therefore initiated a violent and armed confrontation, and whether the victim fired first or defendant fired first was a matter of insignificant legal difference, MCL 750.319; MSA 28.551. What is clear is that whether defendant threatened merely to beat the victim or instead to kill him, in light of what later occurred, it was not a significant trial issue.

Affirmed.

/s/ Gary R. McDonald

/s/ Myron H. Wahls

/s/ John R. Weber