STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES EARL WILLIAMS,

Defendant-Appellant.

UNPUBLISHED
April 3, 1998

No. 199563
Muskegon Circuit Court
LC No. 96-1-39403 FC

Before: Markey, P.J., and Griffin and Whitbeck, JJ.

PER CURIAM.

A jury convicted defendant 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). The trial court sentenced defendant to life imprisonment without parole for the murder conviction and two years' consecutive imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

The charges against defendant arose out of the April 29, 1996, murder of Tonya Schwander, who was shot to death outside her apartment in Muskegon. Defendant and several other people had been at Schwander's apartment that evening drinking beer and playing cards. Defendant expressed a romantic interest in Schwander, which others who were present that evening testified was returned by Schwander until Toriano Martin arrived. At that point, Schwander turned her interest to Martin and defendant became angry. Shortly thereafter, a friend of Schwander's asked all of the guests to leave so that Schwander and Martin could be alone. Martin testified that after everyone left, there was a knock on the door. Schwander answered the door, and Martin saw defendant and heard a loud argument between the two out on the porch. Martin then heard Schwander cry "no" three times, heard three or four shots fired, and saw Schwander lying on the porch.

Martin testified that defendant took a shot at him, and that a fight between the two ensued. The struggle ended outside on the sidewalk, when a friend of defendant's, Bobby Walker, drove up. Walker struck Martin twice on the head and told defendant to shoot Martin. Martin testified that defendant could not shoot him because the gun was on defendant's chest, where Martin was holding it during the struggle. A police cruiser approached the scene, and defendant and Walker drove away

together, leaving Martin with the gun and Schwander's body. Defendant was subsequently arrested and charged with Schwander's murder.

Defendant contends the trial court erred in allowing Wendy Armstrong, Walker's girlfriend, to testify that Walker told her that he had witnessed defendant shoot Schwander. The trial court admitted the testimony as an excited utterance. The decision whether to admit evidence is within the sound discretion of the trial court, and we will not disturb it on appeal absent an abuse of discretion. *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993).

The excited utterance exception pertains to a "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). The statement must meet three criteria: (1) it must arise out of a startling event; (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 Hackney*, 183 Mich App 516, 522; 455 NW2d 358 (1990). Only the second requirement is at issue in the present case. Defendant contends that Armstrong's statements about what Walker told her are inadmissible hearsay because they occurred too remotely in time from the shooting, and therefore Walker had time to fabricate or contrive his story.

In *People v Straight*, 430 Mich 418, 424; 424 NW2d 257 (1988), the Court explained that the second prong of the excited utterance exception "does not contemplate a sequence in which the utterance necessarily follows immediately on the startling event, just as it does not contemplate admission of a statement made while under control, even though made contemporaneously." The focus is upon "lack of capacity to fabricate rather than lack of time to fabricate." *Id*. at 425. The *Straight* Court reasoned that the "crucial point is that the court must be able to find that the declarant's state at the time he made the declaration ruled out the possibility of conscious reflection." *Id*., quoting 4 Weinstein, Evidence, ¶ 803(2)[01], pp 803-91 to 803-94. Because of the wide variety of factual situations, a trial court is given wide discretion to determine whether a declarant was at the time of an offered statement still under the influence of an exciting event. *Id*. at 426, n 6.

In the instant case, it appears from the testimony that the time that elapsed between the shooting and Walker's statements to Armstrong was no more than twenty or thirty minutes. In addition, Walker did not perform any routine tasks that would indicate that the stress of the event had subsided. He transported defendant away from the murder scene and then went to Armstrong's house. Armstrong testified that Walker acted atypically and was visibly "shook up" through the course of the conversation, indicating that he was still under the stress of the event and did not have the capacity to fabricate a story in this time period. The fact that the utterance was made in response to an inquiry is but one factor to be considered in its admissibility. *Id*.; *People v Hungate*, 27 Mich App 496, 498; 183 NW2d 634 (1970). The present circumstances indicate that the prerequisites for admission of Armstrong's testimony as an excited utterance pursuant to MRE 803(2) were clearly met. We conclude that the trial court properly exercised its discretion in holding that the declarant was still under the stress of the shooting and that his emotional state ruled out the possibility of conscious reflection. *Straight, supra*. See also, *People v Clark*, 164 Mich App 224, 232; 416 NW2d 390 (1987).

Defendant next argues that the trial court erred by allowing the prosecution to rehabilitate Toriano Martin, a prosecution witness, by bringing out testimony of the prior consistent statements that he had made to police about Schwander's murder. Defense counsel questioned Martin extensively about the many prior statements that he had made to the police, some of which were consistent with his trial testimony and some of which were inconsistent. In his redirect examination, the prosecutor rehabilitated Martin by asking him to reiterate the statements that he had previously made that were consistent with his trial testimony. These were statements about which defense counsel had just questioned him during cross-examination.

Defendant contends on appeal that Martin's prior consistent statements were inadmissible because they were not made before the motive to fabricate arose. MRE 801(d)(1)(B); *People v Rodriquez (After Remand)*, 216 Mich App 329, 331-332; 549 NW2d 359 (1996). We disagree.

The present situation is analogous to *People v Sayles*, 200 Mich App 594; 504 NW2d 738 (1993), in which the defendant was convicted of first-degree criminal sexual conduct. On appeal, the defendant argued that the trial court improperly allowed the victim's testimony to be buttressed by the introduction of a prior consistent statement she made accusing defendant of the crime. This Court, *supra* at 595, rejected defendant's argument, stating:

> Defendant impeached the girl's credibility by introducing portions of the prior statements to show how they were inconsistent with her trial testimony. Under these circumstances, the prosecution must be allowed to explore the extent of the inconsistencies by showing how those statements were consistent with the girl's trial testimony.

Similarly, in the instant case, defense counsel emphasized in his cross-examination that even though Martin had information about the incident, he either kept silent or substituted other information for what he allegedly knew was correct. The prosecution, in rebuttal, emphasized the fact that Martin did not keep silent about a number of facts in his previous statement and, therefore, his testimony at trial was not the result of recent fabrication. Because defense counsel brought out Martin's consistent statements on cross-examination in an attempt to impeach his testimony, the prosecution committed no error by reiterating defense counsel's questions. *Id.* A party waives review of the admission of evidence which he introduced, or which was made relevant by his own placement of a matter in issue. *People v McConnell*, 124 Mich App 672; 335 NW2d 226 (1983); *City of Troy v McMaster*, 154 Mich App 564, 570-571; 398 NW2d 469 (1986). The trial court therefore properly exercised its discretion in admitting the prior consistent statements.

Finally, defendant argues that the trial court erred by not declaring a mistrial after the officer in charge of the case testified about a pretrial identification of the defendant that had not been disclosed to the defense. On cross-examination, Detective Michael Ferrier testified that when he booked defendant, Martin, who was in a nearby holding cell, identified defendant as the man who had murdered Schwander. Ferrier stated that this information was not contained in any of his written police reports.

In criminal cases tried after January 1, 1995, MCR 6.201 governs discovery. Subsection (A)(2) of this court rule requires a party to provide all other parties, upon request, any written or recorded statement by a lay witness whom the party intends to call as a witness at trial, except that a defendant is not obliged to provide his own statement. Additionally, subsection (B) of MCR 6.201 requires a prosecutor to provide the defendant with any exculpatory information, police report, and any written or recorded statements by the defendant, an accomplice or a codefendant. The information in the case at bar does not fall under the categories of discoverable material articulated in MCR 6.201.

In *People v Tracey*, 221 Mich App 321; 561 NW2d 133 (1997), this Court held that the trial court erred when it found intentional prosecutorial misconduct under facts in which the complainant in a criminal sexual conduct case made an oral statement to the prosecutor the night before trial which the prosecutor used in its opening statement without disclosing it to the defense. This Court found that the statement was not contained in any written or recorded document, and that it was inculpatory rather than exculpatory. *Id*. The *Tracey* Court, *supra* at 324, also concluded:

> [I]n *People v Canter*, 197 Mich App 550, 568-569; 496 NW2d 336 (1992), this Court identified three situations in which a defendant's due process rights to discovery may be implicated: (1) where a prosecutor allows false testimony to stand uncorrected; (2) where the defendant served a timely request on the prosecution and material evidence favorable to the accused is suppressed; or (3) where the defendant made only a general request for exculpatory information or no request and exculpatory evidence is suppressed. None of these situations applies here; the statement was neither favorable to defendant nor exculpatory and was not known to be false.

Similarly, none of these conditions exists in this case. The information concerning the identification was neither written nor exculpatory, and was not withheld by the prosecution when a discovery order existed. *Id*. Defendant argues that he was operating under an informal discovery arrangement because he had been provided with other police reports. However, he had not made additional requests from the prosecution. The prosecution provided him with the mandatory information, and he was equally capable of discovering this information on his own, if he had interviewed these witnesses. We conclude that the trial court did not abuse its discretion in denying defendant's motion for a mistrial. *People v Manning*, 434 Mich 1; 450 NW2d 534 (1991).

Affirmed.

/s/ Jane E. Markey
/s/ Richard Allen Griffin
/s/ William C. Whitbeck