STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED November 20, 1998
v	No. 203217 Wayne Circuit Court
ZYIEDA ALI, Defendant-Appellee.	LC No. 96-626448 AR

PEOPLE OF THE CITY OF DEARBORN, Plaintiff-Appellant,	
v	No. 209881 Wayne Circuit Court
ZYIEDA ALI, Defendant-Appellee.	LC No. 97-713916 AR

Before: O'Connell, P.J., and Gribbs and Talbot, JJ.

PER CURIAM.

In Docket No. 203217, the prosecutor appeals by leave granted from an order of the circuit court reversing defendant's jury conviction of domestic assault, MCL 750.81(2); MSA 28.276(2), in the 19th District Court, for which he was sentenced to probation for one year. In Docket No. 209881, the prosecutor appeals by leave granted from another circuit court order reversing and vacating the order of the 35th District Court revoking defendant's probation in a prior case and sentencing defendant to ninety days in jail. These appeals have been consolidated for this Court's consideration.[1] We reverse the circuit court in both cases and reinstate the decisions of the respective district courts.

Docket No. 203217

The prosecutor first argues that reversal is required because of obvious bias and prejudice on the part of the circuit court judge. However, because the prosecutor's brief on appeal fails to develop this argument through application of facts in the record to applicable law, we deem this issue abandoned. A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim. *In re Hamlet (After Remand)*, 225 Mich App 505, 521; 571 NW2d 750 (1997); *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992).

Next, the prosecutor argues that the circuit court erroneously found that the district court erred in allowing defendant to proceed in propia persona without obtaining a valid waiver of counsel. We agree, albeit for reasons different from those that the prosecutor offers. The United States Constitution requires "*only* that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." *Scott v Illinois*, 440 US 367, 373-374; 99 S Ct 1158; 59 L Ed 2d 383 (1979) (emphasis added). This Court recognized this principle in *People v Richert (After Remand)*, 216 Mich App 186, 191-192; 548 NW2d 924 (1996), and regarded that limitation on the right to appointed counsel as equally applicable under the state constitution. *Id.* at 193-194, citing Const 1963, art I, § 20. See also *People v Reichenbach*, 224 Mich App 186, 190-193; 568 NW2d 383 (1997), lv granted 456 Mich 927 (1998); *People v Justice*, 216 Mich App 633, 642-643; 550 NW2d 562 (1996). In this case, assuming without deciding that the waiver procedure used in the district court was defective, because defendant was sentenced to a term of probation, not incarceration, there was no violation of defendant's right to counsel in district court. See MCR 6.610(D)(2).

The prosecutor next argues that the circuit court erred in ruling sua sponte that the district court abused its discretion in allowing two police officers to testify regarding a statement made by defendant's wife shortly after the charged offense. We agree. The statement in question was admitted under the excited-utterance exception to the hearsay rule. MRE 803(2). Although the question of the admissibility of this hearsay was raised in the district court, defendant waived review of the issue by declining to raise it on appeal to the circuit court. MCR 7.101(I)(1) and 7.212(C)(5); *People v Wilder*, 383 Mich 122, 125; 174 NW2d 562 (1970) (a reviewing court need not reach issues not presented within the statement of questions in the brief on appeal). In any event, we are satisfied from the record that there was a sufficient evidentiary foundation to enable the district court to conclude that defendant's wife made the statement after being violently pushed against a wall, and that she spoke while still under the excitement of that startling event and before she regained the capacity to fabricate. See *People v Smith*, 456 Mich 543, 550-554; 581 NW2d 654 (1998). Moreover, the occurrence of the startling event was independently corroborated by evidence independent of the hearsay declaration itself. See *People v Burton*, 433 Mich 268, 294; 445 NW2d 133 (1989). Close questions arising from the trial court's exercise of discretion on an evidentiary issue should not be reversed simply because the reviewing court would have ruled differently. *Smith*, *supra* at 550. For these reasons, the circuit court erred in ruling that the district court abused its discretion in admitting the hearsay evidence.

The prosecutor further argues that the circuit court erred in holding that the evidence presented in district court was legally insufficient to support a conviction for domestic assault. We agree. When reviewing the sufficiency of evidence in a criminal case, a court must view the evidence in the light most

favorable to the prosecution and determine whether a rational trier of fact could find that the elements of the crime were proved beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). "[A]bsent exceptional circumstances, issues of witness credibility are for the jury, and the trial court may not substitute its view of the credibility 'for the . . . jury determination thereof.'" *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998), citing *Sloan v Kramer-Orloff Co*, 371 Mich 403, 411; 124 NW2d 255 (1963). In this case, two police officers testified that they heard yelling and arguing as they approached defendant's residence, heard a "large thump" by the front door just before knocking, and then saw defendant's wife crying after defendant answered the door. Defendant's wife told them that defendant had pushed her twice, including once into a wall just before the officers knocked. Viewing the evidence in the light most favorable to the prosecution, and deferring all credibility questions to the trier of fact, we find this evidence sufficient to support the jury's conclusion that defendant had battered his spouse for purposes of finding him guilty of domestic assault under MCL 750.81(2); MSA 28.276(2). Accordingly, we hold that the circuit erred in concluding otherwise.

Next, the prosecutor argues that the circuit court erred in holding sua sponte that reversal was required because the district court improperly failed to instruct the jury on specific intent. We agree. An appellate court may raise issues on its own motion, but that power should be exercised sparingly. *Vermeylen v Knight Investment Corp*, 73 Mich App 632, 642-643; 252 NW2d 574 (1977). Because defendant neither objected to the jury instructions at his trial in district court nor raised the issue before the circuit court, the issue was waived, and appellate relief was not warranted absent a miscarriage of justice. MCL 768.29; MSA 28.1052; MCL 769.26; MSA 28.1096; *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997). "Manifest injustice occurs when an erroneous or omitted instruction pertains to a basic and controlling issue in the case." *Id*. There was no manifest injustice here. The jury was instructed that to convict defendant of domestic assault it had to conclude that defendant "intended either to injure [his wife] or intended to make [her] reasonably fear an immediate battery." The defense theory at trial was that defendant never pushed his wife, not that he did so without the required intent. Because defendant did not request a specific instruction on intent that would have been inconsistent with his posture at trial, and because the instructions actually given covered the intent requirement of the charged offense and otherwise fairly presented the issues to be tried and sufficiently protected defendant's rights, the circuit court erred in deciding sua sponte that the lack of a specific-intent instruction required reversal. See *People v Perez-DeLeon*, 224 Mich App 43, 53; 568 NW2d 324 (1997) (imperfect instructions do not require reversal if they fairly presented the issues to be tried and adequately protected the rights of the accused).

Finally, the prosecutor argues that the circuit court erred in holding sua sponte that the district court violated the res gestae rule by not requiring the prosecutor to call defendant's wife as a witness at trial. We again agree.

First, because, again, defendant did not raise this issue at trial or on appeal to the circuit court, it was waived. See *People v Jacques*, 215 Mich App 699, 702; 547 NW2d 349 (1996), rev'd on other grounds 456 Mich 352; 572 NW2d 195 (1998). Second, the res gestae rule does not apply in misdemeanor cases initiated by complaint rather than by information.[2] *People v Ball*, 150 Mich App

535, 537-538; 389 NW2d 122 (1986). Third, under current statute, "[t]he prosecutor's duty to produce res gestae witnesses has been replaced with an obligation to provide notice of known witnesses and reasonable assistance to locate witnesses on defendant's request." *People v Burwick*, 450 Mich 281, 288-289; 537 NW2d 813 (1995), citing MCL 767.40a; MSA 28.980(1). "The purpose of the 'listing' requirement is merely to notify the defendant of the witness' existence and res gestae status." *People v Lawton*, 196 Mich App 341, 347; 492 NW2d 810 (1992), citing *People v Calhoun*, 178 Mich App 517, 523; 444 NW2d 232 (1989). Further, "[a] new trial is not automatically warranted simply because the prosecution has failed to exercise due diligence in the production of a missing res gestae witness. The key issue . . . is whether the defendant is prejudiced." *People v Pearson*, 404 Mich 698, 724; 273 NW2d 856 (1979). Here, it is obvious that the identity and whereabouts of defendant's wife, along with her res gestae status, were known to defendant. Because defendant does not argue to the contrary, he is unable to demonstrate any prejudice from the prosecutor's failure to list his wife as a possible witness. Accordingly, the circuit court erred in reversing sua sponte the district court on this issue.

In light of the foregoing, we reverse the order of the circuit court and reinstate defendant's conviction and term of probation.

Docket No. 209881

The prosecutor first argues that the circuit court erred in stating that the prosecutor was without jurisdiction or authority to appear at defendant's probation violation hearing in district court. We agree. A prosecutor has "broad discretion" in determining which charges to bring and when to bring them—including whether, when, and how to proceed on an alleged probation violation—and "the judiciary is not to usurp that authority." *People v Farmer*, 193 Mich App 400, 402; 484 NW2d 407 (1992).

Next, the prosecutor argues that the circuit court erred in finding that defendant's procedural rights were violated because the second written notice of probation violation, which added two new charges, was undated and unsigned. We agree. First, it was improper for the circuit court to reach this issue because defendant neither raised it in the district court nor presented it as a question on appeal to the circuit court. See MCR 7.101(I)(1) and 7.212(C)(5); *Providence Hospital v National Labor Union Health & Welfare Fund*, 162 Mich App 191, 194; 412 NW2d 690 (1987); *Wilder*, *supra*; *Vermeylen*, *supra*. In any event, this issue does not afford a basis for relief. "What process is due in a particular proceeding depends upon the nature of the proceeding, the risks and costs involved, and the private and governmental interests that might be affected." *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997). Here, the prosecutor announced on the record that defendant was sent notice of the new charges. Defense counsel, in response, indicated that defendant denied the new allegations, but did not claim lack of notice or request additional time to prepare. On the contrary, defense counsel specifically said "we're ready to proceed." Because defendant received written notice and an opportunity to contest the charges, he received all the process he was due. Cf. *People v Rial*, 399 Mich 431, 435; 249 NW2d 114 (1976) (a probationer has "more limited due process rights . . . because he has been convicted of a crime"). See also MCL 771.4; MSA 28.1134 (revocation hearings are to be informal and not subject to the rules governing pleadings in trials, and "the method of hearing and presentation of charges accorded shall lie within the court's discretion"). Because the

written notice at issue apprised defendant of his need to respond, the circuit court erred in reversing on the basis of technical defects in the form of that notice.

Finally, the prosecutor argues that the circuit court erred in holding that there was insufficient evidence to support a finding that defendant violated his probation by either pushing his wife or by failing to report his arrest for the domestic assault episode. Again, we agree.

"[A] probation revocation hearing consists of two steps: (1) a factual determination that the violation charged in the notice has occurred, and (2) a discretionary determination that the proven charges warrant revoking probation." *People v Hall*, 138 Mich App 86, 92; 359 NW2d 259 (1984). "[E]vidence is sufficient to sustain a conviction of probation violation if, viewed in the light most favorable to the prosecution, it would enable a rational trier of fact to conclude that the essential elements of the charge were proven by a preponderance of the evidence." *People v Ison*, 132 Mich App 61, 66; 346 NW2d 894 (1984). Credibility of witnesses is a matter for the trier of fact to ascertain and should not be considered anew on appeal. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990).

In this case, it is clear from the record that the circuit court overstepped the boundaries of the applicable standard of review by viewing the evidence in a light most favorable to defendant, and by substituting its judgment for that of the district court on matters of witness credibility and on the ultimate issue whether to revoke defendant's probation. The circuit court cited *People v Givens*, 82 Mich App 336; 266 NW2d 815 (1978), for the proposition that "a finding of guilt for a violation of probation may not be based solely on hearsay evidence." In *Givens*, the defendant's probation was revoked where the only charged offense was failure to meet with his probation officer. *Id.* at 340. The probation officer did not appear at the hearing, but the court accepted testimony from a representative of the probation department concerning what the officer had said. *Id.* at 338. This Court held that under those facts "[d]efendant was denied his due process confrontation rights." *Id.* at 340. However, this Court did not reverse the order of revocation solely because of the hearsay problem, additional grounds being that the trial court had failed to consider the defendant's explanation for his failure to meet his probation officer, and that the court based its decision in part on uncharged conduct, *id.* at 340-341, these latter concerns not being at issue here. *Givens* is further distinguishable in that whereas the hearsay at issue in *Givens* apparently fell under none of the exceptions that would render such testimony admissible at a trial, in this case the hearsay at issue, as discussed above, was competent evidence at any proceeding as an excited utterance. Further, to the extent that *Givens* implied that reliance on hearsay was improper at a probation revocation hearing, that holding has been overruled by MCR 6.445(E)(1), MRE 1101(b)(3), and MCL 771.4; MSA 28.1134, all of which clearly indicate that the rules of evidence may be relaxed at a probation revocation hearing.

Although the district court's findings are terse, it is apparent that, in revoking defendant's probation, the court was aware of the issues and correctly applied the law. See *People v McEntyre*, 127 Mich App 731, 733-734; 339 NW2d 538 (1983). Viewed in the light most favorable to the prosecution, there was sufficient evidence to enable a rational trier of fact to find by a preponderance of the evidence that defendant violently pushed his wife and failed to disclose his arrest, both in violation of the terms of his probation.

For these reasons, we reverse the order of the circuit court and reinstate the district court's order revoking defendant's probation and imposing a ninety-day jail term.

Reversed.

/s/ Peter D. O'Connell
/s/ Roman S. Gribbs
/s/ Michael J. Talbot

[1] The conduct underlying the charged probation violations in Docket No. 209881 stems from the same criminal transaction underlying defendant's domestic assault conviction in Docket No. 203217.

[2] Defendant asserts, and the circuit court stated, that this prosecution was initiated by information, not complaint. No charging document appears in the circuit court file. However, the record below does contain a complaint that lists one of the arresting police officers as the complaining witness.