STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TORON JOHNSON,

Defendant-Appellant.

UNPUBLISHED
January 26, 1999

No. 202036
Kalamazoo Circuit Court
LC No. 96 001357 FC

Before: Hood, P.J., and Neff and Markey, JJ.

PER CURIAM.

Defendant appeals by right his conviction and sentence for second-degree criminal sexual conduct, MCL 750.520c; MSA 28.788(3). We affirm.

Defendant was charged with one count of first-degree criminal sexual conduct, MCL 750.520b(1)(f); MSA 28.788(2)(1)(f), and one count of extortion, MCL 750.213; MSA 28.410. Following a five-day jury trial, defendant was convicted of second-degree criminal sexual conduct, MCL 750.520c; MSA 28.788(3), on count one, and acquitted on count two. Defendant was sentenced as an habitual offender, MCL 769.11; MSA 28.1083, to twenty to thirty years' imprisonment. Defendant argues that his conviction and sentence should be vacated, making three claims of error. We deny all claims.

The victim of the charged sexual assault was a developmentally impaired seventeen-year-old girl who was attacked while delivering newspapers in the early morning hours of Sunday, September 15, 1996. She testified that defendant followed her along her route and eventually grabbed her around the neck and choked her. She stated that he then picked her up, carried her to the unlit end of a dead-end street, and threw her to the ground, knocking off her glasses and dazing her. She recalled having her pants pulled down to her knees and testified that defendant then raped her. The victim was either unable or unwilling to detail the moments during the attack.

Notwithstanding the absence of information about the moments of the assault, the victim testified in great detail about the preceding and subsequent minutes. She stated that at the sound of her father's loud truck returning to the area, defendant jumped off her and ran away. She was able to give a

detailed description of his appearance and clothing, and she also gave police the address where defendant said he lived. Although unable to describe the sexual nature of the attack, she did recall telling both her family and a doctor that she had been raped.

Kalamazoo police officers testified that on the basis of information that the victim provided at the scene, they were able to locate defendant at an address a few blocks away from the location of the attack. Specifically, a canine unit followed a scent track from the scene of the crime to an apartment building; the building address matched the one defendant gave the victim. Police also seized from defendant's residence items of clothing matching those that the victim described.

The only testimony supporting defendant was that of his mother, at whose apartment he resided. She claimed defendant was sleeping when she returned home on the night in question, and had not left the apartment all night. This testimony conflicted, however, with defendant's statement to the investigating detective that when defendant returned from a friend's house that night, his mother was already home.

The examining physician testified that while he could not conclusively prove so, evidence supported the allegation that penetration may have occurred. On the sum of this evidence, the trial court denied a motion for a directed verdict. When the case went to the jury, the court instructed the jury on the lesser included offense of second-degree criminal sexual conduct. The jury found defendant guilty of criminal sexual conduct in the second degree.

I

Defendant first claims that it was error mandating reversal for the trial court to admit into evidence the victim's parents' and brother's testimony and the investigating police officer's testimony that the victim said she had been raped and "he stuck his dick in me," and to base its denial of a motion for directed verdict in part on these statements. Finding that they fell within the excited utterance exception, the trial court admitted these statements into evidence. We review the admission of evidence for an abuse of discretion. *People v Kowalak (On Remand)*, 215 Mich App 554, 558; 546 NW2d 681 (1996). We also review the denial of a motion for directed verdict by considering the evidence up to the time the motion is made in the light most favorable to the prosecution and determining whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1992).

In *People v Gee*, 406 Mich 279, 282; 278 NW2d 304 (1979), our Supreme Court observed:

> Otherwise objectionable hearsay testimony may be admissible if it amounts to an excited utterance. An excited utterance is defined as:
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> "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).
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> To come within the excited utterance exception to the hearsay rule, a statement must meet three criteria: (1) it must arise out of a startling occasion; (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 occasion.

An excited utterance is inadmissible without independent proof, direct or circumstantial, of the underlying event. *People v Burton*, 433 Mich 268, 294; 445 NW2d 133 (1989). The justification for the excited utterance exception to the hearsay rule is that it allows admission of statements deemed reliable because of the nature and circumstances of their making.[1] It is the province of the court to determine what testimony is admissible but the jury must to determine the weight that the testimony will receive. *People v Serra*, 301 Mich 124, 135; 3 NW2d 35 (1942).

Defendant now argues that the startling event at issue was the penetration, not the sexual assault. Cf. *Burton, supra*. This narrow construction of the excited utterance test simply does not comport with the general rule set forth in *Gee, supra*. Rather, the purpose of the rule is to admit statements related to a more general, yet sufficiently established, startling event. "[T]he question is not whether [the independent proofs] corroborate the excited utterance, but whether they independently support the startling event to which the excited utterances relate." *Burton, supra* at 298. Once admitted, the statements are to be considered by the factfinder, along with the remaining evidence, to determine whether the elements of the offense are proven beyond a reasonable doubt.

Here, defendant was convicted of second-degree criminal sexual conduct, suggesting that once the jury considered all the evidence, it found these statements and other testimony insufficient to prove the penetration element of first-degree criminal sexual conduct. Given that the victim's statements satisfied MRE 803(2)'s excited utterance exception, i.e., the statements arose out of a sexual assault on a seventeen-year-old developmentally impaired person, they were made very soon after the assault and before she had time to contrive or misrepresent the events, and they related to the circumstances of the assault, we find the trial court did not abuse its discretion in admitting into evidence her statements to testimony, *Kowalak, supra*, nor did it err in denying defendant's motion for a directed verdict, *Daniels, supra*.

As part of his first issue on appeal, defendant also claims that it was erroneous for the court to rely on these inadmissible statements in denying defendant's motion for directed verdict[2] and, as a result, the jury was permitted to return a compromise verdict when it was presented with a higher charge of first-degree criminal sexual conduct supported by inadmissible evidence. Because we have determined that the evidence was admissible under the excited utterance exception, we need not determine the impact of the court's recitation of this testimony on the jury. Nevertheless, defendant argues under the following authority:

> [W]here a jury is permitted consideration of a charge unwarranted by the proofs, there is always prejudice because a defendant's chances of acquittal on any valid charge is substantially decreased by the possibility of a compromise verdict. For this reason it is reversible error for a trial judge to refuse a directed verdict of acquittal on any charge where the prosecution has failed to present evidence from which the jury could find all elements of the crime charged. [*People v Vail*, 393 Mich 460, 464; 227 NW2d 535 (1975).]

Vail has been overruled. In *People v Graves*, 458 Mich 476, 486-487; 581 NW2d 229 (1998), the Michigan Supreme Court held:

> The presumption of prejudice in *Vail* is inconsistent with the presumption that the jury followed its instructions not to compromise.
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> * * *
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> The *Vail* rule gives the jury far less credit than is warranted.
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> Further, the *Vail* rule also overlooks the fact that the error is cured when the jury acquits the defendant of the unwarranted charge. We are persuaded by the view that a defendant has no room to complain when he is acquitted of a charge that is improperly submitted to a jury, as long as the defendant is actually convicted of a charge that was properly submitted to the jury. Such a result squares with respect for juries.

Second-degree criminal sexual conduct is a cognate lesser included offense of first-degree criminal sexual conduct, and the evidence presented at trial determines whether the trial court was obligated to instruct on the offense. See *People v Norman*, 184 Mich App 255, 259-260; 457 NW2d 136 (1990). The jury acquitted defendant of first-degree criminal sexual conduct and convicted only on the charge of second-degree. Under the reasoning of *Graves, supra*, defendant's claim must fail.

II

Defendant's second claim is that the trial court's comments before the jury when ruling on the hearsay objections improperly bolstered the prosecution's case. Defendant failed to raise this issue before the trial court. Absent objection, however, this Court may review the matter if manifest injustice results from the failure to review. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). We believe no manifest injustice will result.

Defendant argues that the trial court's comments demonstrated unity of purpose with the prosecutor and suggested to the jury that the victim's testimony was credible. A trial court has wide, but not unlimited, discretion and power in the matter of trial conduct. *Paquette, supra*. "When a case is tried before a jury, a judge must take care that his questions or comments do not indicate partiality." *People v Pointer*, 133 Mich App 313, 316; 349 NW2d 174 (1984). Portions of the record should not be taken out of context, however, in order to show trial court bias against defendant; rather the record should be reviewed as a whole. *Paquette, supra* at 340.

Considering the entire record, including the specific exchange detailed by defendant, it is apparent the trial court was simply reviewing what it believed to be the nonhearsay testimony presented by the witnesses and its conclusion that the existence of a startling event was proven by a preponderance of the evidence, not by hearsay itself, in order to rule on defendant's hearsay objection. See *Paquette, supra* at 341. During preliminary and final instructions to the jury, the trial court clarified for the jury that its comments, instructions and rulings on objections were not evidence. When ruling on

the objections at issue, the trial court's explanations served merely to inform the jury of the nature of both the hearsay rule and the excited utterance exception and to detail the testimony going toward the court's determination that the exception's requirements had been met. In light of the curative jury instructions, it cannot be said that the trial court's comments unduly influenced the jury and thereby deprived the defendant of a fair and impartial trial. *Id*. at 340. Therefore, there was no manifest injustice. *Id.*

III

Defendant's final claim is that his sentence is too harsh. He argues that because he was ultimately convicted of second-degree criminal sexual conduct, on a first-degree charge, a sentence of twenty to thirty years' imprisonment is disproportionate. Although sentencing guidelines do not apply to habitual offenders, the principle of proportionality does apply. *People v McFall*, 224 Mich App 403, 415; 569 NW2d 828 (1997). A sentence violates this principle and constitutes an abuse of discretion if it is not proportionate to the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).

Defendant's prior record includes various misdemeanor convictions and felony convictions for possession of a controlled substance and criminal sexual conduct in the fourth degree. The maximum sentence for criminal sexual conduct in the second degree is fifteen years. MCL 750.520c(2); MSA 28.788(3)(2). Because defendant is a third-offense habitual offender, the trial court could impose a maximum sentence twice this long, or thirty years. MCL 769.11(1)(a); MSA 28.1083(1)(a). Defendant's minimum sentence of twenty years is the highest permitted. See *People v Thomas*, 447 Mich 390, 392; 523 NW2d 215 (1994) (minimum sentence for an habitual offender may not exceed two-thirds of the maximum sentence). Defendant's sentence, therefore, is within allowable limits.

The lower court justified this term of imprisonment both during original sentencing and at the hearing on defendant's motion to resentence. The court related concern about defendant's history of aggressive behavior against women, his use of alcohol and drugs, and his lack of probationary success following his prior convictions. Discussing the circumstances of the instant offense, the court noted that defendant assaulted the developmentally challenged victim suddenly and from cover of darkness; and that the assault occurred in a relatively safe neighborhood while the victim was delivering newspapers as she did every Sunday morning. The court also detailed the severe psychological effect of the assault on the victim, both at the time of the incident (when the victim could not stop shaking and screaming), and at the time of trial (when the victim had difficulty vocalizing the events while testifying).

Having both carefully reviewed the entire record and specifically considered the lower court's justification for the sentence imposed, this Court finds no violation of the principle of

proportionality.

We affirm.

/s/ Harold Hood
/s/ Janet T. Neff
/s/ Jane E. Markey

[1] See McCormick, Evidence (3d ed), § 297, p 855.

[2] Notably, the court's rulings on defendant's motion for a directed verdict were made outside the presence of the jury. Thus, the court's statements had no direct impact on the jury. Also, the court agreed that it would not instruct the jury on penile/anal penetration because the prosecution conceded that such penetration could not be inferred from the evidence. There were, however, "objective findings of abrasive contact in the areas immediately surrounding the vaginal opening," according to the court, despite the absence of semen on the victim or in her underclothing.