STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JOHN RUSSELL KANERVA,

Defendant-Appellee.

UNPUBLISHED
October 26, 1999

No. 216622
Marquette Circuit Court
LC No. 97-034099 AR

Before: Griffin, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a district court jury of aggravated domestic violence, MCL 750.81a(2); MSA 28.276(1)(2), for an assault committed on his pregnant girl friend. Defendant was sentenced to probation with 122 days in jail and a fine of $760. Defendant appealed his conviction of right to the circuit court which reversed the conviction because of the admission of hearsay evidence. We granted the prosecutor's application for leave to appeal from the circuit court's decision, and we now reverse.

The prosecutor contends that the circuit court erred by concluding that insufficient evidence was presented to establish the existence of a startling event as required by *People v Burton*, 433 Mich 268; 445 NW2d 133 (1989). Five witnesses related the complainant's out-of-court statements. These statements were offered for the truth of the matter asserted therein—that the complainant had been assaulted and injured by defendant. Therefore, these statements were hearsay. MRE 801(c). However, a hearsay statement is admissible as an "excited utterance" without regard to whether the declarant is available, MRE 803, if it is

> [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).]

According to our Supreme Court in *People v Gee*, 406 Mich 279, 282; 278 NW2d 304 (1979), to come within this exception

> 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. [Citations omitted.]

Additionally, in *Burton, supra* at 294-295, our Supreme Court held that a complainant's excited utterances were inadmissible absent independent proof—by a preponderance of the evidence—of the startling event. This independent proof may be circumstantial. *People v Kowalak (On Remand),* 215 Mich App 554, 559-560; 546 NW2d 681 (1996).

Here, the complainant's statements related to a startling event or condition—defendant's alleged assault. The witnesses testified that the complainant was hysterically crying and sobbing when she made these statements; it is therefore reasonable to conclude that she was still under the stress of excitement caused by the startling event. Because defendant did not challenge the timing of the statement, the record does not precisely resolve when in relation to the alleged startling event the statement was made. Nevertheless, by defendant's own testimony, the argument between he and the complainant appears to have occurred Sunday morning while the couple was getting ready to go to church, and it further appears that the complainant went directly from defendant's apartment to the church. There is no fixed time limit for determining whether a statement is not an excited utterance. *Kowalak, supra* at 559, quoting *Browning v Spiech,* 63 Mich App 271, 277; 234 NW2d 479 (1975). In *People v Smith,* 456 Mich 543, 545, 552-554; 581 NW2d 654 (1998), our Supreme Court concluded that statements made ten hours after a sexual assault were excited utterances. Given the observable evidence of the complainant's mental condition as testified to by the witnesses, the trial court could properly conclude that she was still under the influence of the startling event.

Finally, a police officer testified without objection to his observation of a bruise on the complainant's shoulder, and a doctor's summary of his observations of bruises on the complainant during a medical examination on the day after the alleged assault, provided independent evidence that the complainant had been assaulted. In *People v Hendrickson,* 459 Mich 229, 231; 586 NW2d 906 (1998), our Supreme Court held that photographs of a domestic violence victim that depicted her injuries provided sufficient independent evidence that an assault occurred to permit witnesses to relate MRE 803(1) hearsay statements made by the victim that asserted that the defendant had just beaten her. Although the *Hendrickson* decision dealt with the present sense impression hearsay exception, the Supreme Court applied the independent evidence requirement it announced in *Burton* and observed that the present sense impression exception "is a close relative of the analytically similar 'excited utterance' exception." *Id.* at 238.

In this case, the prosecutor presented witness testimony concerning the complainant's hysterical condition, the observation that she was clutching her abdomen, the observation of at least one bruise, a photograph of that bruise, and the summary of a medical examination that supported the complainant's claim that she had been beaten. This evidence was sufficient to prove by a preponderance that an assault had occurred. Therefore, the trial court properly exercised its discretion in permitting testimony concerning the complainant's hearsay statements under MRE 803(2) and the circuit court erred on appeal by overturning the trial court's discretionary decision.

Defendant asserts that the trial court's decision to admit the complainant's statement was made before the police officer testified or the doctor's letter was admitted and thus that evidence could not be used to establish independent corroboration of the underlying event. However, because testimony and evidence must sometimes be presented in a "patchwork" fashion, evidence may be admitted conditionally subject to subsequent submission of adequate proof of the necessary preconditions. *People v Moscara*, 140 Mich App 316, 320 n 1; 364 NW2d 318 (1985) (statements of coconspirators may be admitted conditionally pending proof of the conspiracy); MRE 104(b). Furthermore, since defendant's only objection to the testimony regarding the complainant's statement was that she was not present—an objection that is irrelevant with respect to hearsay exceptions under MRE 803—the trial court was not required to determine whether a conditional admission of the evidence was appropriate. Moreover, as indicated above, the necessary independent proof of the underlying event was subsequently presented in the prosecutor's case in chief and therefore any technical deficiency regarding the order of the proofs, or the timing of the trial court's admissibility determination, is harmless. *People v Grant*, 445 Mich 535; 520 NW2d 123 (1994).

The circuit court also held, and defendant argues on appeal, that defendant's identity as the assailant must also be established independently of the excited utterance. In *Burton, supra* at 288, our Supreme Court observed, in the course of distinguishing the case of *People v Meyer*, 46 Mich App 357; 208 NW2d 230 (1973):

> Thus, the issue in *Meyer* was not whether the underlying event had occurred but rather the identity of the perpetrator. *The excited utterances, relating to the independently established event, resolved the identity issue.* [Emphasis supplied.]

Our Supreme Court held in *People v Meeboer (After Remand)*, 439 Mich 310, 328-330; 484 NW2d 621 (1992), that statements under MRE 803(4) may be admitted even where they identify a victim's assailant "if the court finds the statement sufficiently reliable to support the exception's rationale." We conclude that the same rationale applies to statements admitted under MRE 803(2).

Defendant finally claims that admission of the complainant's hearsay statements denied him his constitutional right of confrontation. This claim is raised for the first time on appeal, but since it is an assertion of a constitutional deprivation, this Court may review it despite defendant's failure to raise it below. *People v Newcomb*, 190 Mich App 424, 431; 476 NW2d 749 (1991). Defendant's argument is without merit because admission of hearsay statements will not deprive a defendant of his or her right of confrontation where the hearsay exception "bears adequate 'indicia of reliability'[;] [r]eliability can be inferred without more where the evidence falls within a firmly rooted hearsay exception." *Ohio v Roberts*, 448 US 56, 66; 100 S Ct 2531; 65 L Ed 2d 597 (1980). The excited utterance exception to the hearsay rule is "firmly rooted," *White v Illinois*, 502 US 346, 356-357; 112 S Ct 736; 116 L Ed 2d 848 (1992), and thus the fact that the complainant's statement satisfies the preconditions for an excited utterance establishes its reliability.

Defendant raised two other issues in his appeal to the circuit court. The circuit court ruled on the jury instruction issue, but declined to definitively rule on the ineffective assistance of counsel issue. Defendant did not appeal the circuit court's ruling and we therefore decline to undertake an independent

review of those issues. While the trial court's ruling on the jury instruction issue is the law of the case, since we reverse the trial court's determination regarding the hearsay issue, it is now appropriate for the trial court to rule on the ineffective assistance of counsel issue.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ David H. Sawyer
/s/ Michael R. Smolenski