STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JACK STANLEY SCHUBACH,

Defendant-Appellant.

UNPUBLISHED
January 11, 2000

No. 210554
Huron Circuit Court
LC No. 97-003937 FH

Before: Bandstra, C.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

Following a bench trial, defendant was found guilty of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), and sentenced to 120 days in jail, to commence on completion of this appeal or violation of bond provisions. Defendant appeals as of right. We reverse and remand for a new trial.

Defendant argues that the trial court abused its discretion by admitting hearsay testimony under the excited utterance exception for the stated reason that the declarant was more comfortable when she made the statements at issue. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion, *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998), and a decision on a close evidentiary question ordinarily cannot be an abuse of discretion, *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995), quoting *People v Golochowicz*, 413 Mich 298, 322; 319 NW2d 518 (1982). We conclude that the trial court abused its discretion in that it applied the wrong legal test and that, applying the correct legal analysis, the contested hearsay testimony should not have been admitted.

In this case, the complainant's grandmother gave the following account of her conversation with the complainant several hours after the complainant arrived home:

> After [the complainant] told me she needed to see the – she thought she needed to talk to the school nurse . . . .

* * *

> I told her that we needed to talk. And we sat down in the kitchen and I asked – I said did something happen today? She nodded yes. I said did someone touch you? She said –

* * *

> Because she said about the school nurse, I asked her did someone touch you, she nodded yes. I said – The only man she had been near to the best of my knowledge was [defendant], I said was it [defendant]? And she started to cry and she said yes, and then she told me what he did.

The grandmother stated that the complainant told her that defendant had touched "her private area." She further testified:

> And I said did he touch your bare skin in your private area? And she said no, through my shorts. And then she said he put his hands down the back of her pants. She said he put her on . . . his lap and rocked her, rocked back and forth with her. I don't think I can remember any more.

Hearsay, defined as "a statement, other than one made by the declarant while testifying at the trial, . . . offered in evidence to prove the truth of the matter asserted," MRE 801(c), is generally not admissible, MRE 802. In this case, it is not contested that the grandmother was called to testify about what the complainant told her to prove the truth of what the complainant said, namely, that defendant sexually molested her. Thus, the grandmother's testimony should have been excluded unless it came under a recognized exception to the hearsay rule. *Id*.

MRE 803(2), the so-called "excited utterance" exception to the hearsay rule, provides that "[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" will not be excluded as hearsay evidence. This rule has been most recently analyzed by our Supreme Court in *People v Smith*, 456 Mich 543; 581 NW2d 654 (1998), and *People v Straight*, 430 Mich 418; 424 NW2d 257 (1988).[1]

In the more recent of these precedents, the *Smith* Court summarized the excited utterance rule as one that "allows hearsay testimony that would otherwise be excluded because it is perceived that a person who is *still* under the 'sway of excitement precipitated by an external startling event will not have the reflective capacity essential for fabrication so that any utterance will be spontaneous and trustworthy.'" *Smith, supra* at 550, quoting Weinstein, Evidence (2d ed), §803.04[1], p 803-19 (emphasis supplied). Again, quoting *Straight, supra at* 425, the *Smith* Court stated the relevant inquiry as being "whether the statement was made when the witness was *still* under the influence of an overwhelming emotional condition." *Id*. at 551 (emphasis supplied). Yet again, discussing the impact of the passage of time, the *Smith* Court reasoned that "[t]hough the time that passes between the event and the statement is an important factor to be considered in determining whether the declarant was *still*

under the stress of the event when the statement was made, it is not dispositive." *Id.* (emphasis supplied). Finally, summarizing the facts in *Straight*, the *Smith* Court stated: "[T]he Court found that the stress caused by the parents' suggestive questioning of their four year old immediately after the child's pelvic area had been examined for evidence of molestation may well have supplanted any residual stress from an alleged assault. . . . [T]he Court could not be sure that the stress of the alleged assault was *continuing*." *Id.* at 553 (emphasis supplied). Consistent with all of these statements, the *Smith* Court summarized the events between the alleged assault upon the complainant and the excited utterance (arriving home at 1:45 a.m., taking a long bath with the water running, pacing and punching his fist, uncharacteristically sleeping on the couch while apparently crying), and concluded: "We agree with the trial court that these circumstances describe a *continuing* level of stress arising from the assault that precluded any possibility of fabrication." *Id.* at 552-553 (emphasis supplied).

The dissent in *Smith* did not quarrel with the majority regarding the relevant inquiry, agreeing that the definitive question was whether "the complainant's statement was made while *still* under the *continuing* stress of the alleged sexual assault." *Id.* at 559 (Brickley, J., concurring in part and dissenting in part) (emphasis supplied). Using that same test, however, the dissent disagreed with the conclusion that the victim's actions between the alleged event and the utterance were "extraordinary" and thus "demonstrate[d] a level of *continuing* stress sufficient to satisfy the threshold for admission of the complainant's statement as an excited utterance." *Id.* at 560 (emphasis supplied).

The *Smith* justices were thus unanimous on the appropriate test to be applied - whether, even though time had passed since the alleged event, the facts showed that the victim was still under a continuing level of stress that would preclude any possibility of fabrication. The majority and dissent in *Smith* disagreed as to whether the facts showed a continuing level of stress. Most importantly for our purposes, the majority explicitly stated:

> We acknowledge that this statement is nearing the outer limits of admissibility under the excited utterance exception, and trial courts should be so cautioned. [*Id.* at 554 n 4]

We read this to mean that the events between the alleged incident and an utterance must be at least as convincing as those in *Smith* at showing a continuing level of stress to justify use of the excited utterance exception in a case, like that before us, where significant time has passed before the utterance was made. Conversely, if the facts do not as compellingly demonstrate a continuing level of stress, use of the excited utterance exception is error.

The trial court did not employ this analysis but, instead, considered whether there was some reason for the delay in the complainant's account of what occurred:

> I am – I am going to allow the testimony of the grandmother as to what the child told her occurred. I'm going to rule that that is admissible evidence as an excited utterance because I think that based on the time frame of what occurred here, the alleged incident happened and after that the child really wasn't according to the child's own testimony in an environment or with a person that she would feel free to speak with until she had this opportunity to speak with her grandmother.

> And I think under those circumstances and the limited time period between the alleged incident and the statement to the grandmother, that that would be – fall within the confines of an excited utterance and I will for that reason allow it to be considered as part of the evidence in this case.

Thus, the trial court erred by failing to consider the relevant question under *Smith* and *Straight* regarding whether the complainant was still under a continuing level of stress that would preclude any possibility of her fabricating an account regarding what had occurred with defendant.[2]

Applying the correct analysis to this case, we find the facts to be far less compelling than those in *Smith* in support of applying the "excited utterance" exception to the hearsay rule. In *Smith*, the victim was in a constant state of consternation from the time of the assault until he made the utterance. The evidence here directly contradicts such a conclusion. There was testimony from a witness that, shortly after the alleged assault, the complainant had a "nice, bright smile on her face and she had a nice - said hi to me when I said hello to her, and stuff, and I couldn't see [anything] abnormal with her." The complainant herself testified that, after the alleged abuse occurred, she finished mowing a portion of the lawn that her mother had been mowing. Her mother stated that the complainant behaved normally at this point. Apparently, several hours later, another witness saw the complainant and her mother shortly before they left defendant's farm. He testified that the complainant was playing, jumping around like a normal child, and appeared to be "having fun." The mother testified that, during the car ride home, the complainant did not appear to be upset about anything. According to the mother, the complainant only became upset after she arrived at her grandmother's home.

Thus, there is *no* support in the record for a conclusion that the complainant was *continually* upset from the time of the alleged criminal sexual conduct until the time that the challenged statement was made. The hearsay evidence here should not have been admitted under *Smith* and its "caution" that the excited utterance exception should not be stretched beyond the "outer limits" of the facts of that case.

Furthermore, we conclude that the trial court's decision to admit the hearsay testimony of the grandmother was error requiring reversal. Admission of this evidence was a preserved, nonconstitutional error that we presume is not a ground for reversal "unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). This standard requires defendant to prove that the error affected "the reliability of the verdict." *Id.* at 495, quoting *People v Mateo*, 453 Mich 203, 211; 551 NW2d 891 (1996).

In this case, the untainted evidence was equivocal and might well have not supported the conclusion that defendant was guilty beyond a reasonable doubt. Absent the hearsay testimony of the grandmother, there was little persuasive evidence supporting the proposition that defendant touched the complainant in a sexual manner. This was a classic credibility contest, without corroborating evidence, and even the testimony of the complainant, the only first-hand account of the alleged criminal touching, was equivocal. The complainant herself twice stated under oath that she did not remember if defendant touched her anywhere other than on her leg. Only when confronted with her preliminary examination

testimony did she agree that she answered in the affirmative when asked by her grandmother whether defendant touched her sexually. At trial, only the grandmother testified unequivocally that the complainant ever cried or expressly stated that defendant had touched her private areas. Furthermore, only the grandmother testified that the complainant had ever suggested that she needed to talk to a school nurse; the complainant herself made no such assertion.

The testimony of every witness, except the complainant and her grandmother (and some of the complainant's testimony, as well), tended to show that no sexual assault ever took place. The trial judge himself stated, "[I] agree . . . if this is inadmissible and admitted by – in error, that that probably is reversible error . . . ." The trial judge, sitting as the factfinder, apparently believed complainant's account at least partially because of the hearsay statement. Defendant has met his burden of proving that the error in considering the hearsay testimony affected the reliability of the verdict. *Lukity, supra* at 495.

Defendant raises another issue that is likely to resurface on remand, arguing that the trial court abused its discretion when it failed to admit into evidence a psychological report that tended to establish that defendant possessed no characteristics of a sexual deviant. In this case, the issue was whether defendant sexually abused the complainant. The psychological report offered by defendant stated, inter alia, that there were "no abhorrent sexual thoughts or fantasies" and that although defendant had "used poor judgment when he attempted to remove the filings from [the complainant's] leg[,] . . . [he] did not reveal any sexual deviancy."

Although the trial court found that the report was not relevant, we conclude that the report was relevant in that it had a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). In the present case, the psychological report shed light on whether it was probable that defendant had sexually fondled the complainant.

However, even though the evidence is relevant, it may still be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403. Assessing probative value against prejudicial effect requires a balancing of factors, including the time necessary to present the evidence and the potential for delay, whether the evidence is cumulative, how directly the evidence tends to prove the fact in support of which it is offered, how important the fact sought to be proved is, the potential for confusion, and whether the fact can be proved another way with fewer harmful collateral effects. *People v Oliphant*, 399 Mich 472, 490; 250 NW2d 443 (1976). Because the trial court found that the report was not relevant, it did not assess the probative value of the report against the prejudicial effect. On remand, if the issue arises again regarding admission of the psychological report, the above factors must be examined to determine if the report should be admitted.

In light of our decision to reverse defendant's conviction on the ground that the hearsay rule was misapplied, we need not consider defendant's other argument regarding ineffective assistance of counsel.

We reverse and remand for a new trial. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ William C. Whitbeck

[1] Although the *Smith* decision was not available to the trial court at the time of trial, it adopts the analysis employed in *Straight*, which was decided before the decision at issue here.

[2] We also conclude that, contrary to the trial court's remarks regarding "the limited time period" between the incident and the statement, sufficient time passed to require analysis under *Smith* and *Straight*. The evidence established that many hours passed between the alleged incident and the conversation with complainant's grandmother, during some of which complainant paced with her arms folded, apparently thinking about something.