

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY TROY DAVIS,

Defendant-Appellant.

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UNPUBLISHED

April 21, 2000

No. 204177

Macomb Circuit Court

LC No. 97-000180 FC

Before: Zahra, P.J., and Saad and Gage, JJ.

PER CURIAM.

Defendant was charged with 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). After a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, and the felony-firearm charge. The trial court sentenced defendant to an enhanced term of forty-five to seventy years' imprisonment for the second-degree murder conviction and a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

We first address defendant's contention that the trial court abused its discretion in admitting the victim's statement to her mother attributing certain injuries to a physical assault by defendant. We review the trial court's decision to admit this evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

The prosecutor conceded that the statement was hearsay, but sought to admit it under the excited utterance exception to the hearsay rule. MRE 803(2). To qualify as an excited utterance, two general requirements must be shown: (1) a startling event, and (2) that the statement resulted from the startling event while the declarant was still under the excitement caused by the event. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). The statement must have been made before the declarant had an opportunity for conscious reflection and fabrication, thereby establishing that the statement was spontaneous and trustworthy. *Id.* at 550-551. The amount of time that elapses between the statement and the startling event is a relevant factor, but not the sole consideration. *Id.* at 551.

In the instant case, while it is not clear whether the victim made the statement at issue on the same day or the day after the assault occurred, the victim's mother's testimony established that the victim remained still upset about the assault when she made the statement. Because there was evidence that the victim was still under the emotional impact of the startling event when she made the statement to her mother, we cannot conclude that the trial court abused its discretion in admitting the statement as an excited utterance. *Smith, supra* at 550 ("The trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion.").

Defendant also argues that the trial court erred in allowing a police officer to offer his opinion that dried blood observed on defendant shortly after the police arrived at the crime scene appeared to have been on defendant for at least an hour. Even if an inadequate foundation existed for admitting this statement as expert testimony under MRE 702, *Phillips v Deihm*, 213 Mich App 389, 401; 541 NW2d 566 (1995), we find that the officer's testimony was admissible as lay opinion testimony. MRE 701. The officer's opinion testimony concerned his perception of the blood on defendant, was based on the officer's prior experiences with and observations of blood stains, and was helpful to the jury's resolution of relevant factual issues. *Co-Jo, Inc v Strand*, 226 Mich App 108, 116-117; 572 NW2d 251 (1997); *People v Daniel*, 207 Mich App 47, 57; 523 NW2d 830 (1994).

Defendant further asserts that the trial court improperly admitted testimony regarding defendant's failure to alert the police or prosecutor before trial that the killing allegedly occurred accidentally. The prohibition against the use of a defendant's post-*Miranda*<sup>1</sup> silence does not apply where a defendant waives his right to remain silent after being advised of his rights, subsequently makes a statement to the police, and does not later reassert his right to remain silent. *People v Davis*, 191 Mich App 29, 34-36; 477 NW2d 438 (1991). In this case, defendant, after being advised of his right to remain silent, chose to make a statement to the police denying his involvement in the victim's shooting. The record does not establish that defendant later reasserted his right to remain silent.<sup>2</sup> Therefore, we conclude that the trial court properly admitted evidence of defendant's failure to inform the police or prosecutor of his accident defense before the commencement of trial. *People v Avant*, 235 Mich App 499, 508-509; 597 NW2d 864 (1999).<sup>3</sup>

With respect to the allegations of instructional error defendant raises on appeal, we conclude that the trial court did not err in failing to instruct the jury on self-defense or diminished capacity. Defendant presented at trial only an accident defense. He did not request instructions on either self-defense or diminished capacity. Therefore, the trial court did not err in failing to give those instructions. *People v Lemons*, 454 Mich 234, 250; 562 NW2d 447 (1997); *People v Mills*, 450 Mich 61, 80-81; 537 NW2d 909, modified on other grounds 450 Mich 1212; 539 NW2d 504 (1995).

Next, we reject defendant's contention that his conviction must be disturbed on the basis that the trial court's instructions on first- and second-degree murder failed to include language clearly indicating that the burden was on the prosecution to prove that the killing was not justified or excused. Even assuming that defendant has presented valid and preserved claims of instructional error or inaccuracy concerning first- and second-degree murder, our review of the trial court's instructions as a whole convinces us that reversal is not required. *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992). The trial court's accurate instructions regarding defendant's claim of accident were

sufficient to inform the jury that the prosecutor had the burden to prove that defendant intended to kill or injure the victim. Viewed in their entirety, the instructions did not impermissibly shift to defendant the burden of proving that the victim's death was accidental.

Next, defendant argues that his sentence for second-degree murder is disproportionate. The record indicates that the trial court sentenced defendant as a second habitual offender. MCL 769.10; MSA 28.1082.<sup>4</sup> Accordingly, the sentencing guidelines do not apply. *People v McFall*, 224 Mich App 403, 415; 569 NW2d 828 (1997). Considering the very serious nature of this offense, defendant's prior criminal background, his poor military service record and his lengthy substance abuse history, we cannot conclude that the trial court abused its discretion in imposing a disproportionate sentence. *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997) (A trial court does not abuse its discretion in sentencing an habitual offender when the sentence imposed falls within the statutory limits set by the Legislature and when the offense, in the context of the defendant's prior record, evidences the defendant's inability to conform his conduct to the requirements of the law.).

Lastly, defendant contends that the trial court failed to award the correct amount of sentence credit for time served. Although the sentencing transcript reflects that defendant was awarded only fifteen days of sentence credit, the judgments of sentence properly reflect that defendant received credit for 145 days served. See *People v Vincent*, 455 Mich 110, 123-125; 565 NW2d 629 (1997) (A trial court speaks through its judgments and orders.). Because the judgment of sentence reflects the allegedly appropriate amount of sentence credit, we conclude that defendant's argument is without merit.

Affirmed.

/s/ Brian K. Zahra

/s/ Henry William Saad

/s/ Hilda R. Gage

<sup>1</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

<sup>2</sup> Defendant testified on his own behalf that during his interrogation by police he responded to the officers' inquiries by repeatedly invoking his right to counsel, which invocations the police ignored. The interviewing officers indicated that during the interview defendant became evasive, but denied that defendant ever invoked his *Miranda* rights. Thus, to the extent that the trial court's ruling (that the prosecutor could elicit testimony that defendant failed to raise the defense of accident before trial) rested on an implicit finding that defendant had not reasserted his right to remain silent, we cannot find that the trial court abused its discretion when the officers' testimony supported the court's determination. *Smith, supra*.

<sup>3</sup> Because we have found no instances of evidentiary error, we need not consider defendant's argument concerning the cumulative effect of alleged evidentiary errors. *People v Anderson*, 166 Mich App 455, 472-473; 421 NW2d 200 (1988).

<sup>4</sup> Defendant's habitual offender status is reflected in the trial court's amended judgment of sentence.