STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED May 16, 2000
v	No. 212999 Berrien Circuit Court
SANTIAGO LOPEZ MORENO, Defendant-Appellant.	LC No. 98-400340-FC

Before: Jansen, P.J., and Hoekstra and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(c); MSA 28.788(2)(1)(c), two counts of kidnapping, MCL 750.349; MSA 28.581, and one count of aggravated stalking, MCL 750.411i; MSA 28.643(9). He was sentenced to concurrent prison terms of thirty to fifty years for each conviction of first-degree criminal sexual conduct, twenty-five to forty years for each conviction of kidnapping, and forty to sixty months for the conviction of aggravated stalking. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court improperly allowed the admission of hearsay evidence, pursuant to the excited utterance exception, MRE 803(2), regarding statements made by the complainant to a police officer and her father. We disagree. The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). An abuse of discretion occurs where an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *Id.*

MRE 803(2) defines an excited utterance as 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." *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). The rule allows the admission of hearsay testimony 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.'" *Id.*, quoting 5 Weinstein, Evidence (2d ed), § 803.04[1], p 803-19. In order for statement to qualify as an excited utterance,

two requirements must be satisfied: (1) there must be a startling event; and (2) the resulting statement must be made while under the excitement caused by that event. *Id.*, citing *People v Straight*, 430 Mich 418, 424; 424 NW2d 257 (1988).

The complainant testified that she spent most of January 20, 1998, being held against her will in a motel room and sexually assaulted repeatedly by defendant. This testimony was supported by the testimony of Officer Siebenmark and nurse Patricia Cronk, who stated that the complainant had bruises indicating that she had been bound at the wrists. The complainant's testimony that defendant abducted her while wearing a black ski mask and covered her with a blanket in the back seat of her car after she was bound and gagged was supported by Detective John Vaningen's testimony that a black ski mask and blanket were found in the complainant's car. Officer Siebenmark and the complainant's father both testified that the complainant was extremely upset when she made the statements in question. Given this evidence, we find that the trial court properly found that the complainant experienced a startling event before she made the statements in question.

Furthermore, the evidence supports the trial court's finding that the complainant was under the excitement of the startling event when she told her father that defendant had taken her to the motel against her will and raped her. The complainant testified that the kidnapping did not end until her father arrived and she ran from the car to call 911. The complainant's father testified that the complainant made the statement in question while they were at the motel, sometime after the police arrived. Officer Siebenmark testified that he arrived at the motel "one to two minutes" after being dispatched. The complainant's father also testified that when the complainant made the statement she was "so nervous, you know, panic, she couldn't really talk." Accordingly, we find that the trial court did not abuse its discretion in admitting, under the excited utterance exception to the hearsay rule, the complainant's father's testimony regarding the complainant's statement to him.

Nor did the trial court abuse its discretion in admitting Officer Siebenmark's testimony regarding the complainant's statement to him when he arrived in response to the 911 call. Again, Siebenmark testified that he arrived at the motel "one or two minutes" after being dispatched. He also stated that he spoke with the complainant "within one or two minutes" after arriving at the motel, and that she was "crying, real – real upset." Moreover, the fact that at least part of the complainant's statement to Siebenmark was made in response to questioning does not render its admission by the trial court an abuse of discretion. "[W]hether a statement made in response to questioning should be excluded under MRE 803(2) depends on the circumstances of the questioning and whether it appears that the statement was the result of reflective thought." *Smith*, *supra* at 553. The evidence supports the finding that the complainant's responses to Siebenmark's questions were not the result of reflective thought. Furthermore, there is no evidence that Siebenmark's questions were suggestive, or "persistent and insistent." *Id.* Therefore, the trial court did not abuse its discretion in admitting Siebenmark's testimony under the excited utterance exception.

Defendant next argues that the trial court erred in allowing Detective Vaningen to testify as an expert about the demeanor of sexual assault victims. Defendant contends that because Vaningen was not properly qualified as an expert witness, the trial court improperly allowed him to testify regarding the complainant's lack of eye contact during her interview with him. The qualification of a witness as an

expert, and the admissibility of his testimony, are within the trial court's discretion. *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). Under MRE 702, there are three prerequisites to the admission of expert testimony: (1) the witness must be an expert; (2) there must be facts in evidence that require or are subject to examination and analysis by a competent expert; and (3) there must be knowledge in a particular area that belongs more to an expert than to an ordinary person. *People v Ray*, 191 Mich App 706, 707; 479 NW2d 1 (1991).

Vaningen's testimony that he had been a police detective for twenty-six years and had investigated "between 30 and 50" sexual assault cases supports the trial court's finding that Vaningen had the necessary knowledge, skill and experience to give an expert opinion of the meaning of the complainant's demeanor during questioning. Vaningen testified during cross-examination that, as a general rule, people who avoid eye contact during interviews are being deceitful. In Vaningen's opinion, however, sexual assault victims represent an exception to this general rule and their lack of eye contact may be attributed to shame rather than deceit. This opinion was based on Vaningen's years of experience as a detective and his involvement in many sexual assault cases and represents knowledge that belongs more to an expert than to an ordinary person. Accordingly, the trial court did not abuse its discretion in qualifying Vaningen as an expert.

Defendant also argues that the trial court erred in admitting Vaningen's testimony because he improperly vouched for the complainant's credibility. However, defendant's objection at trial related only to an alleged lack of foundation for Vaningen's expert testimony on the demeanor of sexual assault victims; defendant did not object to the content of his testimony. To preserve an evidentiary issue for appeal, the party opposing the admission of evidence must object at trial "on the same ground that the party asserts on appeal." *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). Because this issue is unpreserved, appellate review is precluded absent manifest injustice. *Id.*

Defendant acknowledges that under *People v Peterson*, 450 Mich 349, 352-353; 537 NW2d 857 (1995), an expert may testify regarding "syndrome evidence" to rebut a defendant's attack on a complainant's credibility and to explain behavior that could be incorrectly construed as inconsistent with that of a sexual abuse victim. Vaningen's very limited testimony was admissible to rebut defendant's attacks on the complainant's credibility and for the purpose of explaining the complainant's failure to make eye contact, which might otherwise have been construed by the jury as inconsistent with that of a sexual assault victim. Because Vaningen did not testify that the sexual abuse occurred, vouch for the credibility of the complainant, or indicate whether he thought defendant was guilty, *Peterson, supra* at 352, admission of his testimony did not result in manifest injustice.

Affirmed.

/s/ Kathleen Jansen
/s/ Joel P. Hoekstra
/s/ Jeffrey G. Collins