STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL JOEL BURRESON,

Defendant-Appellant.

UNPUBLISHED
July 25, 2000

No. 217748
Berrien Circuit Court
LC No. 98-402170-FH

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

PER CURIAM.

Defendant was convicted of arson of insured property, MCL 750.75; MSA 28.270. He was sentenced to three years' probation with the first 365 days to be served on a tether. He appeals as of right. We reverse and remand for a new trial.

Defendant argues that the trial court erred when it refused to admit evidence of a statement made by to him by his wife's grandson, Trenton, as an excited utterance. While defendant's boat was on fire, Trenton made a statement to the effect that he was sorry and that he had burned the boat. Defendant indicated that, at the time, Trenton was hysterical and crying. The trial court refused to allow defendant to testify about the statement Trenton made.

The decision whether to admit evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). "However, decisions regarding the admission of evidence frequently involve preliminary questions of law, e.g., whether a rule of evidence or statute precludes admissibility of the evidence." *Id*. We review issues of law de novo. *Id.*

Our Supreme Court has discussed the excited utterance exception to the hearsay rule as follows:

> An excited utterance is defined 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." MRE 803(2). Traditional justification for this rule lies in the belief that "special reliability" can be afforded a statement made while under sufficient stress

> or excitement because "the declarant's powers of reflection and fabrication" are removed. . . . In *People v Gee,* 406 Mich 279, 282; 278 NW2d 304 (1979), this Court summarized the criteria for the excited utterance as follows:
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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." [*People v Straight,* 430 Mich 418, 423-424; 424 NW2d 257 (1988).]

The key inquiry in determining whether the second criterion is met is whether the "statement was made when the witness was still under the influence of an overwhelming emotional condition." *Id.* at 425. With regard to the third criterion, the statements sought to be admitted must have some indicia of reliability, meaning that the declarant must have personal knowledge of the matter about which he speaks. *People v Kent,* 157 Mich App 780, 788; 404 NW2d 668 (1987).

In this case, Trenton's statement to defendant was an excited utterance. First, the statement clearly arose out of the startling event, the fire. Second, Trenton was with defendant when defendant saw smoke coming from the boat and Trenton personally observed the boat being engulfed in flames. His statement to defendant was made while he was still upset and watching the fire. Our Supreme Court has found no abuse of discretion in admission of statements made several hours after a startling event when the record shows that the declarant was under continuing stress from the event. See *People v Smith*, 456 Mich 543, 552-553; 581 NW2d 654 (1998). Third, testimony presented at trial supports that Trenton had personal knowledge about what he was saying. It was uncontroverted that Trenton was the last person to leave the boat before the fire. In addition, he personally observed the fire, the event that was the subject of his statements. *Kent, supra.*[1]

The trial court found that Trenton's statement met the test for excited utterances. However, the trial court refused to allow defendant or Hays to testify about the statement because it considered the statement conclusory and indicated that it did not believe that such a statement from a four-year-old was reliable. The trial court cited to MRE 701 to support its decision. We recognize that the hearsay exceptions deal only with whether proffered evidence is admissible over a hearsay objection. The exceptions do not address whether evidence may be excluded

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[1] Defendant also contends that similar statements made by Trenton to his mother, Stephanie Hays, qualify as excited utterances. He did not raise this issue in his statement of questions presented. Accordingly, we need not review defendant's claim. *People v Price*, 214 Mich App 538, 548; 543 NW2d 49 (1995). Nonetheless, we have examined defendant's claim and find it to be without merit. Hays testified that Trenton was crying and upset over the fire when he made the statement to her several hours after the fire. However, there was also testimony that Trenton was playing normally when the fire department was attempting to extinguish the fire. This testimony gives rise to "conflicting inferences drawn from the circumstances surrounding the making of the statement." *People v Hackney*, 183 Mich App 516, 524; 455 NW2d 358 (1990). In a case such as this, the court could have concluded that the statement qualified or did not qualify as an excited utterance. *Id*. We decline to find an abuse of discretion in ruling the evidence inadmissible. *Id*.

under another rule of evidence or other considerations. See, e.g., *Idaho v Wright*, 497 US 805, 814; 110 S Ct 3139; 111 L Ed 2d 638 (1990) (evidence otherwise admissible under hearsay exception may be barred by Confrontation Clause); *Gallaway v Chrysler Corp*, 105 Mich App 1, 9; 306 NW2d 368 (1981) (evidence found to fall within exception to hearsay rule excluded because of lack of relevance). However, the trial court's application of MRE 701 in the present case was in error. MRE 701 applies to witnesses who are rendering lay opinions in a case. Trenton was not a witness testifying as to an opinion and MRE 701 has no applicability to the case at hand. Further, there was nothing in the record to indicate that the child's statement was not reliable, other than his age. Once the evidence was found to satisfy the test for excited utterances, any further consideration of its reliability went to the weight it should be given, an issue properly left to the trier of fact. Cf. *Wright, supra* at 817 ("Admission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability"). The trial court abused its discretion in excluding defendant's testimony about Trenton's statement.[2]

We must review the trial court's error to determine whether it is more probable than not that the error was outcome determinative. *Lukity, supra* at 495. In our review, we must examine the entire cause. See MCL 769.26; MSA 28.1096. The entire case here hinged on testimony from two experts. The theory of defendant's expert rested on her assumption that Trenton was involved in mischief aboard the boat, which ultimately contributed to the start of the fire. The prosecution's expert, on the other hand, based his conclusions in large part on an assumption that accelerants were used in setting the fire and that the child's presence on the boat before the fire was discovered was irrelevant to the issue of causation. Trenton's statements were highly relevant to the defense theory and because this was a simple contest of credibility and conflicting experts, his admission became all the more critical.

Our Supreme Court recently concluded that the improper exclusion of impeachment evidence was harmful under the *Lukity* test when the absence of the evidence was emphasized by the prosecutor during closing argument and the prosecution's case was weak. See *People v Snyder*, 462 Mich 38, 45-46; 609 NW2d 831 (2000). In the present case, the prosecutor told the jury on rebuttal that he did not remember any evidence of a confession from Trenton. In addition, although there was evidence that Trenton was upset about the boat and apologized, the jury never heard that he apologized specifically for setting the boat afire. The jury deliberated over the evidence for two days before finding defendant guilty. We conclude that the error was harmful

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[2] Given our conclusion that the evidence was admissible as an excited utterance, we need not address defendant's argument that the statement was also admissible under the present sense impression exception to the hearsay rule, MRE 803(1). Further, we note that defendant does not argue that the statement to Hays constituted a present sense impression, probably because it does not meet the requirement that the statement be "substantially contemporaneous" with the subject of the statement. See *People v Hendrickson*, 459 Mich 229, 236 (Kelly, J.), 242 (Boyle, J., concurring), 249 (Brickley, J., concurring in part and dissenting in part); 586 NW2d 906 (1998).

and a new trial is required. In light of our ruling, we find it unnecessary to review the other allegations of error raised by defendant on appeal.

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

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