STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 1, 2000
v	No. 222407 Menominee Circuit Court
KEITH HANNON, Defendant-Appellant.	LC No. 99-002427-FH

Before: Gribbs, P.J., and Kelly and Hoekstra, JJ.

PER CURIAM.

Defendant was convicted by a jury of attempted second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a); MCL 750.92; MSA 28.287. He was sentenced to thirty to ninety months' imprisonment as a second habitual offender, MCL 769.10; MSA 28.1082. He appeals as of right. We affirm.

Defendant argues that the trial court committed error requiring reversal in admitting, under the excited utterances exception to the hearsay rule, the hearsay testimony of the police officer who interviewed the complainant. MRE 803(2). This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998); *People v Adair*, 452 Mich 473, 482; 550 NW2d 505 (1996). This Court will find an abuse of discretion when it is clear, considering the facts on which the trial court acted, no unbiased person would find justification or excuse for the ruling made. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

Defendant first contends that the statements should not have been admitted as excited utterances because they did not arise out of a startling occasion. We disagree. There was evidence to indicate that defendant had sexually assaulted the victim, and that it constituted a startling event. *People v Layher*, 238 Mich App 573, 583; 607 NW2d 91 (1999); *People v Kowalak (On Remand)*, 215 Mich App 554, 559-560; 546 NW2d 681 (1996).

Defendant further contends that the statements should not have been admitted under the excited utterance exception because the complainant had the time to contrive and misrepresent what had occurred. Again, we disagree. Correctly stated, the question is whether the complainant was still under the influence of an overwhelming emotional condition, not whether she had time to contrive and misrepresent the situation. *People v Smith*, 456 Mich 543, 551; 581 NW2d 654 (1998). In *Smith*, *supra* at 543, our Supreme Court clarified previous rulings and determined that the key element in determining if a statement was made while under the excitement of the startling event is whether the victim had the capacity to fabricate. *Id*. at 551. The Court further noted that "the question is not strictly one of time, but of the possibility for conscious reflection." *Id*., citing 5 Weinstein, Evidence (2d ed), § 803.04[4], p 803-823. See also *People v Verburg*, 170 Mich App 490, 495; 430 NW2d 775 (1988). Here, the complainant's mother during voir dire examination testified that during the ride from defendant's house, her daughter was very upset, almost hysterical, and that her daughter remained very upset while waiting for the police to arrive. This testimony was used by the trial court in determining that the complainant's statements to the police officer were excited utterances. In so doing, the judge specifically stated that the complainant was still under the stress of an exciting event when talking to the police officer. In addition, the police officer himself testified that the complainant seemed to be stressed while discussing the situation. Based on the testimony of the complainant's mother, as well as the testimony of the police officer, this Court cannot say that the trial court abused its discretion in analyzing the

complainant's emotional state and ruling that the statements were made while under the stress of the event, and that under the circumstances in this case, the complainant did not have time to misrepresent or contrive the events that occurred. See *In the Matter of Meeboer*, 134 Mich App 294, 302; 350 NW2d 868 (1984); *People v Houghteling*, 183 Mich App 805; 455 NW2d 440 (1990).

Defendant's next contention is that the statements were not properly admitted as excited utterances because they were made as a result of questioning. We disagree. Statements made in response to questioning can still be admitted as excited utterances provided it is evident that the statements are made as a result of the stress of the event and not from the stress of being questioned. *Smith*, *supra* at 553-554. It is evident from the record that the police officer's questions were not suggestive and were designed to clarify statements made by the complainant. Therefore, it cannot be said that the complainant's responses were influenced by being questioned. The trial court did not abuse its discretion in admitting the statements of the complainant to the police officer under the excited utterance exception to the hearsay rule.

Defendant next claims that the trial court committed error requiring reversal by admitting prior consistent statements of the complainant because it led to improper bolstering. Defendant did not object to the prior consistent statements on this basis below. Therefore this issue has not been preserved for appellate review. See *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 21 (1996). Nonetheless, since the consistent statements were properly admitted under the excited utterance exception to the hearsay rule, there was no error in their admission.

Affirmed.

/s/ Roman S. Gribbs
/s/ Michael J. Kelly
/s/ Joel P. Hoekstra