STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 26, 2000
v	No. 221451 Kent Circuit Court
ISAAC KIMBALL, Defendant-Appellant.	LC No. 98-010071-FC

Before: Neff, P.J., and Murphy and Griffin, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of armed robbery, MCL 750.529; MSA 28.797, one count of carrying a concealed weapon, MCL 750.227; MSA 28.424, and one count of possession of a firearm during the commission of a felony ("felony-firearm"), MCL 750.227b; MSA 28.424(2). Defendant was sentenced to a two-year prison term for his felony-firearm conviction, a two- to five-year prison term for his conviction for carrying a concealed weapon, and a six- to thirty-year term for each armed robbery conviction. Defendant appeals as of right. We affirm.

I

This case arises out of a robbery that occurred in Grand Rapids on September 5, 1998. Defendant first argues that the trial court erred by excluding evidence that one of the victims of the robbery, Robert Beck, had previously been convicted of maintaining a drug house. 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 a court's action is so violative of fact and logic as to constitute perversity of will or defiance of judgment. *People v Laws*, 218 Mich App 447, 456; 554 NW2d 586 (1996).

Defendant sought admission of Beck's drug conviction on the basis that it supported the defense claim that there was no robbery, and that defendant was in Beck's apartment on September 5, 1998, concerning a drug deal. Defendant argued that the evidence was admissible under MRE 404(b), for the purpose of showing motive and bias on the part of Beck to contrive the robbery story to counter any drug dealing accusations made by defendant. The trial court allowed evidence concerning Beck's probation status, but excluded evidence of the conviction.

The court reasoned that the circumstances underlying the conviction were ambiguous regarding whether Beck was dealing drugs or merely in possession and, therefore, it was questionable whether there was a sufficient basis for admitting the evidence, which would potentially confuse the jury, MRE 403, and unnecessarily prolong the proceedings, MRE 611. We find no abuse of discretion with regard to the court's ruling.

With regard to MRE 404(b), the connection between Beck's prior conviction for maintaining a drug house and the defense theory that he had a motive to testify dishonestly was tenuous. More importantly, the term "motive" as used in MRE 404(b) generally relates to a defendant's motive to commit the charged offense. See *People v VanderVliet*, 444 Mich 52, 62-63; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994); *People v Hoffman*, 225 Mich App 103, 105-107; 570 NW2d 146 (1997). The term "motive" in rule 404(b) cannot properly be related to a witness' motive to testify dishonestly. In the present case, defendant was clearly attempting to impeach Beck's credibility, and at the same time bolster his own credibility, by introducing the evidence of Beck's prior conviction. In essence, defendant intended to use the prior conviction to show that on September 5, 1998, Beck was acting in conformity with his past crime of maintaining a drug house. Use of a prior conviction for such purpose is prohibited by MRE 404(b).

With regard to impeachment of a witness's credibility, MRE 609 provides:

> (a) General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross examination, and
>
> (1) the crime contained an element of dishonesty or false statement, or
>
> (2) the crime contained an element of theft, and
>
> (A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and
>
> (B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.

The evidence of Beck's prior conviction for maintaining a drug house was inadmissible under MRE 609 because the crime does not contain an element of dishonesty or false statement, or theft. See MCL 333.7405(1)(d); MSA 14.15(7405)(1)(d). Thus, defendant's argument that he should have been able to impeach Beck's credibility by evidence of Beck's prior conviction is without merit. Because there was no basis for admission of Beck's prior conviction for maintaining a drug house under MRE 404(b) and MRE 609, the court did not abuse its discretion by excluding the evidence for the reasons cited.

II

Defendant next argues that the trial court committed error requiring reversal by admitting improper hearsay testimony. We disagree.

A

Defendant objected to the testimony of Officer Rekucki of the Grand Rapids Police Department regarding the statement Beck made to him about the robbery. The trial court overruled defendant's objection, stating, "[t]his is both a present sense impression and excited utterance." We agree.

An excited utterance is 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); *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). The fact that the statement is made in response to a question does not render it inadmissible as an excited utterance. *Id*. at 553. Rather, the "circumstances of the questioning and whether it appears that the statement was the result of reflective thought" are the determinative factors. *Id.* There is no fixed limit of time within which the statement must occur. *Id.*; *People v Kowalak (On Remand)*, 215 Mich App 554, 559-560; 546 NW2d 681 (1996).

Rekucki testified that when he arrived at the crime scene, "two to four minutes" after being dispatched, Beck was "very excited," and "upset," and very hurried in speaking. This testimony supports the conclusion that Beck was still under the stress of the robbery, and that he did not have the reflective capacity for fabrication when he made the statement to Rekucki. Defendant's argument, that his drug deal theory negates a finding of an excited utterance because there was ample time for fabrication, is unconvincing. Beck's statement to Rekucki was admissible as an excited utterance.

To be admissible as a present sense impression, a statement must satisfy three conditions: (1) it must have provided an explanation or description of the perceived event; (2) the declarant must have personally perceived the event; and (3) the explanation or description must have been made substantially contemporaneously with the event. MRE 803(1); *People v Hendrickson*, 459 Mich 229, 235-236; 586 NW2d 906 (1998). Defendant contends that the statements to Rekucki were not substantially contemporaneous with the alleged robbery and, furthermore, are inadmissible under *Hendrickson, supra,* because there was no "independent, extrinsic evidence corroborating the underlying event." Defendant's argument is without merit.

Although in *Hendrickson, id.* at 238-239, our Supreme Court opined that there must be independent evidence that the underlying event occurred before a statement may be admitted as a present sense impression, the Court also noted:

> Generally, a perceived event is presumed to have occurred because a witness was present, observed, and can verify the statement's accuracy. [Citations omitted.] Therefore, we recognize that independent evidence of the perceived event normally will be established by another witness who can testify about the accuracy of the declarant's statement. [*Id.* at 239 n 7.]

Beck's statement was corroborated by Nathan Gebremarian. Gebremarian was Beck's roommate at the time of the robbery, and he was a victim of, and a witness to the events of September 5, 1998. Thus, independent evidence of the robbery was established by the testimony of Gebremarian.

As discussed above, the statement was substantially contemporaneous with the event. "[T]he phrase 'immediately thereafter' is not synonymous with 'instantly thereafter.'" *Duke v American Olean Tile Co*, 155 Mich App 555, 570; 400 NW2d 677 (1986); see also *People v Burns*, 118 Mich App 242, 248-249; 324 NW2d 589 (1982) (statement made to police officer immediately after witness perceived robbery was admissible as present sense impression). Beck's statement to Rekucki was properly admitted as a present sense impression.

B

Defendant did not object to the admission of Gebremarian's statement to Rekucki. Thus, this unpreserved issue is reviewed for plain error. *People v Carines*, 460 Mich 750, 761-764; 597 NW2d 130 (1999). We find no error in the admission of Gebremarian's statement to Rekucki as an excited utterance. Rekucki described Gebremarian as "a little excited" during his statement, although "a lot less excited than [] Beck." Whether a statement is reliable and admissible as an excited utterance depends on the circumstances preceding and surrounding the statement. *Smith, supra* at 552-554. Given the sequence of their statements, it is understandable that Gebremarian would be somewhat less excited than Beck, who was the first to recount the circumstances of the robbery for Rekucki. This difference is insufficient to convince us that Gebremarian was not under the stress of the robbery when he made the statement.

Further, Gebremarian's statement was admissible as a present sense impression, in accordance with the above analysis of Beck's statement. It was "substantially contemporaneous" with the event. MRE 803(1). The record indicates that Gebremarian made the statement to Rekucki within approximately fifteen minutes of the robbery. Our Supreme Court has found that a four-minute interval between the event and the statement may satisfy the "substantially contemporaneous" requirement of MRE 803(1). *Johnson v White*, 430 Mich 47, 56-57; 420 NW2d 87 (1988). We find that a fifteen-minute interval between the event and the statement in this case is not too long to be considered "substantially contemporaneous" for the purposes of MRE 803(1).

Even were we to conclude that Gebremarian's statement was inadmissible, we find no error warranting reversal. Any error did not affect defendant's substantial rights. *Carines, supra* at 763. Rekucki's testimony of Gebremarian's statement was consistent with Gebremarian's own testimony at trial. Thus, the testimony was merely cumulative and did not, standing alone, erode defendant's credibility nor the defense theory. See *Smith, supra* at 554-555. Given the remaining evidence against defendant, no prejudice occurred.

III

Defendant next argues that the trial court gave erroneous instructions to the jury regarding the charge of carrying a concealed weapon ("CCW"). Defendant also argues that the trial court

erred by failing to instruct the jury pursuant to CJI2d 11.11. We disagree with both of defendant's contentions.

Defendant objected to the jury instruction on the charge of carrying a concealed weapon. Accordingly, that issue is preserved for appeal. This Court reviews claims of instructional error de novo. *People v Hubbard (After Rem)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). However, defendant did not request that the jury be instructed pursuant to CJI2d 11.11. Thus, that issue has not been properly preserved.

A

Defendant first argues that because the information alleged that defendant committed CCW at 837 Bridge Street, the prosecutor had to prove that defendant was carrying a concealed weapon at that address, and the jury should have been instructed accordingly. Defendant admitted that he carried a concealed weapon on the bus to Saginaw three hours after the alleged robbery, but he claims that this evidence does not support his conviction because he was not charged with carrying a concealed weapon to Saginaw. Defendant contends that the trial court's action of amending the information to conform to the proofs requires reversal of his conviction. Defendant's argument is without merit.

"A trial court may amend the information at any time before, during, or after trial in order to cure a variance between the information and the proofs as long as the accused is not prejudiced by the amendment and the amendment does not charge a new crime." *People v Stricklin*, 162 Mich App 623, 633; 413 NW2d 457 (1987). "Prejudice occurs when the defendant does not admit guilt and is not given a chance to defend against the crime." *Id.*

Defendant was not prejudiced by the amendment to the information because he was not charged with a new crime, and he admitted guilt to the crime in question. Although the information alleged the particular location of the robbery, that exact location was not a material element of the CCW charge, such that defendant was misled. See *People v Kelley*, 60 Mich App 162, 167; 230 NW2d 357 (1975). As the court noted, the CCW allegation presumes that the gun was carried to the Bridge Street address. During cross-examination, defendant testified that he carried a concealed handgun from his apartment in Grand Rapids to Saginaw on September 5, 1998, approximately three hours after the robbery. We find no error requiring reversal.

B

Defendant next argues that the trial court erred by failing to sua sponte instruct the jury pursuant to CJI2d 11.11, which defendant claims provides an exemption for carrying a firearm from one home to another in conjunction with moving goods. We disagree. The referenced instruction relates to carrying a weapon *in* a person's home and is therefore inapplicable. Further, the evidence did not support an instruction pursuant to CJI2d 11.14, which does relate to moving goods from a defendant's home to another home of his. Defendant testified that he left the gun at a friend's house in Saginaw temporarily.

IV

Defendant next argues that the trial court erred by failing to instruct the jury on the crime of reckless or wanton use of a firearm. We disagree.

A trial court generally has no duty to instruct the jury sua sponte on lesser included offenses. *People v Pouncey*, 437 Mich 382, 386; 471 NW2d 346 (1991); *People v Reese*, ___ Mich App ___; ___ NW2d ___ (Docket No. 214414, issued 9/22/00), slip op p 2, n 2. Defendant was entitled to the instruction only if he requested it. Defendant concedes that he did not request the instruction. Furthermore, we do not find the instruction applicable because it was not required as a necessarily included lesser offense, *id.* at 2; *People v Pritchett*, 62 Mich App 570, 573; 233 NW2d 655 (1975), nor was it supported by the evidence. *Pouncey, supra* at 386-387.

Affirmed.

/s/ Janet T. Neff
/s/ William B. Murphy
/s/ Richard Allen Griffin