

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

MARTIN T. SOLOMON,

Defendant-Appellant.

UNPUBLISHED
September 4, 2001

No. 225971
Wayne Circuit Court
LC No. 99-005006

Before: Fitzgerald, P.J., and Gage and C.H. Miel*, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction of criminal sexual conduct in the third degree, MCL 750.520d(1)(a), entered after a bench trial. We affirm.

Complainant testified that defendant invited her to go shopping. After they finished shopping, defendant drove to a parking lot. Complainant, who was fifteen years old at the time, stated that she resisted when defendant attempted to kiss her. Defendant moved the car, forced her into the back seat, removed her pants, and penetrated her vagina with his penis. Defendant drove complainant home, and she managed to note the license plate number of his car. Two and one-half hours later, complainant agreed to report the incident to the police. Officer Lewis testified that when she arrived at complainant's home complainant was crying and hyperventilating, and could not speak for several minutes. Over defense objections, Lewis testified that complainant reported that defendant assaulted her. Defendant testified that the car he drove on the day of the incident belonged to a friend, and that complainant and the friend engaged in sexual intercourse in the car after the three of them drank alcohol and smoked marijuana. The trial court found defendant guilty.

Defendant argues that the trial court erred by admitting complainant's statement. We disagree and affirm defendant's conviction. We review a trial court's determination of an evidentiary issue for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995).

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). Three criteria must be met before a hearsay statement can be admitted into evidence as an excited

* Circuit judge, sitting on the Court of Appeals by assignment.

utterance: (1) the statement must have resulted from a startling event; (2) the statement must have been made before the declarant had time to engage in contrivance or misrepresentation; and (3) the statement must relate to the circumstances of the startling event. *People v Straight*, 430 Mich 418, 424; 424 NW2d 257 (1988). An excited utterance is inadmissible absent independent proof, direct or circumstantial, that the underlying event took place. *People v Hendrickson*, 459 Mich 229, 238; 586 NW2d 906 (1998).

The statement, in the case at bar, concerned a physical attack by an acquaintance, which would qualify as a startling event. The amount of time lapse between the event and the resulting statement is relevant in determining whether the declarant was still under the stress of the event, but is not dispositive. Physical factors such as shock, unconsciousness, or pain may prolong the period in which the risk of fabrication is minimal and acceptable. *People v Smith*, 456 Mich 543, 553-554; 581 NW2d 654 (1998) (ten-hour delay did not render statement regarding sexual assault inadmissible); *People v Kowalak (On Remand)*, 215 Mich App 554, 558-559; 546 NW2d 681 (1996) (forty-five minute delay did not render statement regarding death threat inadmissible). Complainant's statement was related to the circumstances of the startling event. Lewis's testimony that complainant was crying and hyperventilating and could not speak for several minutes indicated that complainant was still under the stress of the startling event when she made the statement. *Smith, supra*. Furthermore, independent, direct evidence in the form of articles of complainant's clothing found in defendant's car, existed to show that the event took place. Complainant made the statement during a conversation in which Lewis asked questions; however, the fact that a statement was made in response to an inquiry is a factor to be considered by the trial court in determining whether to admit the statement. See *People v Creith*, 151 Mich App 217, 224-225; 390 NW2d 234 (1986). Admission of complainant's statement was not an abuse of discretion. MRE 803(2); *Straight, supra*; *Hendrickson, supra*.

Even if we concluded that admission of the statement constituted error, we would find the error to be harmless. Complainant gave direct testimony regarding the incident, and identified defendant as the perpetrator. Other evidence supported her testimony. From this evidence the court could find beyond a reasonable doubt that defendant committed the charged offense. Admission of the statement as an excited utterance did not result in a miscarriage of justice. MCL 769.26; *People v Lukity*, 460 Mich 484, 493; 596 NW2d 607 (1999).

Before accepting a jury waiver, the trial court must address the defendant in open court and ascertain that he understands that he has the constitutional right to a jury trial, and that he is voluntarily waiving that right. A verbatim record must be made of the proceeding. MCR 6.402(B). Defendant asserts that the trial court record does not reveal that he waived his right to a jury trial in open court. Defendant's failure to provide the transcript necessary to verify the factual basis of his argument has resulted in his waiver of this issue on appeal. *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Hilda R. Gage
/s/ Charles H. Miel