STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 18, 2001
V	No. 220544 Wayne Circuit Court
COREY COLLINS, Defendant-Appellant.	LC No. 98-006159

Before: Markey, P.J., and Jansen and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, armed robbery, MCL 750.529; MSA 28.797, and first-degree home invasion, MCL 750.110a; MSA 28.305(a). Defendant was sentenced to sixty to ninety years for the second-degree murder conviction, fifty to ninety years for the armed robbery conviction, and fourteen to twenty years for the first-degree home invasion conviction. The sentences are to be served concurrently to each other and consecutively to a prior parole sentence. Defendant appeals by right. We affirm defendant's convictions, but remand for resentencing and correction of the judgment of sentence.

Defendant first contends that the trial court erred in allowing Shantaina Herron's statement to the police into evidence under the excited utterance exception to the hearsay rule. We disagree. Officer Vaughan Watts of the Detroit Police Department testified that on April 28, 1998, approximately six weeks after Kemp Traylor was killed, he and his partner responded to Herron's residence pursuant to a 911 call. Herron was upset and crying and appeared to have been assaulted. She was physically shaking and was extremely nervous and excited when she explained what had happened. Herron stated that defendant punched her in the face, pointed a gun at her, and stated that he was going to kill her. Herron stated that defendant's gun was a nine millimeter blue steel automatic. Herron told Watts that she called 911, but had to leave the line open.

Herron stated that her boyfriend was Benny Wright, but that his real name was Corey Collins. She said that defendant was not afraid of the police and that she was concerned that he would kill her as he had killed before. While Watts was at Herron's house, the phone kept ringing. Herron would shake and beg the caller to stop calling. Herron stated that defendant was the person calling. Watts estimated that the phone rang at least ten times. When Watts asked

Herron what she meant about defendant killing before, Herron said that defendant killed the man on Kilbourne Street. Herron stated that defendant had been bragging about the killing. She further stated that defendant and his friends had sorted property taken from the house and that on the morning of the homicide, defendant came into the house and told her to turn on the news. The report stated that Traylor's fiancée had been raped. Defendant said the "b----h wasn't raped." Herron asked defendant how he knew, and he said because he and his boys did it, and they did not rape her.

Defendant now contends that the trial court erred in determining that Herron's statements to the police were excited utterances, and thus, an exception to the hearsay rule. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Excited utterances are not excluded by the hearsay rule even if the declarant is available as a witness. MRE 803(2). 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). "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." *People v Straight*, 430 Mich 418, 423; 424 NW2d 257 (1988), quoting McCormick, Evidence (3d ed), § 297, p 855.

Proper admission of a hearsay statement as an excited utterance has three requirements: "(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." *Straight, supra* at 424, quoting *People v Gee*, 406 Mich 279, 282; 278 NW2d 304 (1979). Addressing the first condition, independent proof, either direct or circumstantial, must exist that the startling event occurred. *People v Kowalak (On Remand)*, 215 Mich App 554, 559; 546 NW2d 681 (1996), quoting *People v Burton*, 433 Mich 268, 294; 445 NW2d 133 (1989).

Defendant contends that the alleged startling event was the domestic assault. The prosecutor, on the other hand, argues that the assault and the pointing of the gun at Herron were only components of the startling event. The prosecutor asserts that defendant's threat to kill Herron, knowing that Herron knew he had killed before, was also a necessary component of the startling event. This Court agrees with the prosecutor. In *Kowalak*, supra at 555-556, the defendant made a death threat against his mother, the victim, after she testified against him in a child custody hearing. Approximately thirty to forty-five minutes later, after receiving a distressing telephone call from the victim, Nancy Moore visited the victim. The victim told Moore that the defendant had threatened to kill her. *Id*. at 556. This Court stated that "[i]t is hard to conceive of a more startling (or terrifying) event with which one might be confronted than a serious death threat." *Id*. at 558.

In the instant case, the death threat was immediately preceded by a physical assault. Defendant held a gun to Herron's head and threatened to kill her. Herron's knowledge that defendant had killed Traylor was a component of her fear that defendant would kill her. Accordingly, defendant's statement concerning his killing of Traylor was part and parcel of the startling event.

The next condition predicate for a statement to be an excited utterance is whether the statement was made before there was time to contrive and misrepresent. *Straight, supra*. This Court has held that "[w]hile the time that passes between the event and the statement is important in determining whether the declarant was still under the stress of the excitement when the statement was made, the focus of the exception is on the declarant's 'lack of capacity to fabricate, not the lack of time to fabricate.'" *People v Layher,* 238 Mich App 573, 583; 607 NW2d 91 (1999), lv gtd on other grds 463 Mich 906; 618 NW2d 772 (2000), quoting *People v Smith,* 456 Mich 543, 551; 581 NW2d 654 (1998).

Defendant's argument with respect to this factor is twofold. First, defendant contends that because Herron's statement stemmed from the questioning of Officers Watts and Quinn, it was the product of reflective thought. Second, defendant's statement to Herron occurred some six weeks before the domestic assault and corresponding death threat.

With regard to the officers' questioning of Herron, the Michigan Supreme Court has held that whether 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. Here, in response to Herron's statement that she believed defendant would kill her because he had killed before, Officer Watts asked her what she meant. Herron stated that defendant had been involved in the homicide on Kilbourne Street.

In *Smith, supra* at 549, the minor criminal sexual conduct victim told his mother what had happened to him after his mother asked him what was wrong. The *Smith* Court distinguished the *Straight* decision where the stress caused by the parents' repeated and suggestive questioning immediately after the four-year-old victim had been examined for signs of molestation, was held to have supplanted the residual stress from the alleged assault. *Id* at 553. The Court held that the mother's questioning in *Smith* was neither repetitive nor suggestive and did not undermine the Court's confidence that the victim's statement resulted from the stress of the assault rather than the stress of his mother's questions. *Id.* at 553-554. This Court finds that the facts of the instant case are analogous to *Smith*. Here, Herron told the police that she was afraid of defendant because he had killed before. Officer Watts' question merely sought for clarification of Herron's volunteered statement. There was no evidence that the questioning was suggestive or persistent. Accordingly, Herron's statement was not the result of stress from Officer Watts' questions.

Addressing the time question, defendant argues that defendant's statement to Herron regarding his participation in Traylor's murder occurred six weeks before the domestic assault and did not relate to the domestic assault. As noted above, defendant's statement to Herron, the domestic assault, and defendant's death threat were all components of the "startling event." Herron had just been beaten and had a gun pointed at her head. Defendant threatened Herron's life, and she knew he was capable of killing her. While the police were at her house, defendant called over ten times causing Herron's terror to continue. Herron did not have any reason to fabricate her statement before the assault and death threat. Accordingly, the timing of the prolonged physical and verbal assault should be dispositive. Thus, we conclude that Herron did not have the capacity to fabricate her statement to the police.

Addressing the third factor, we agree that defendant's death threat was certainly a serious event. When combined with the unstated inference that defendant had killed before and was capable of killing again, the threat was even more serious. Defendant's statement related to the startling event in that it gave credence to his death threat. In sum, this Court finds that the trial court did not abuse its discretion in ruling that Herron's statement to the police was admissible under the excited utterance exception to the hearsay rule.

Defendant next contends that the trial judge erred in allowing a police investigator to read the prior inconsistent statement of witness Herron into evidence for purposes of impeachment. During the prosecutor's direct examination of Officer Barbara Simon, defense counsel objected when the prosecutor asked Simon to read Herron's statement into evidence. The prosecutor argued that the statement was only for impeachment. Defense counsel stated, "so that the record is clear, your Honor, she is doing it only for purposes of impeachment and not as substantive evidence." Defense counsel did not object to the statement being read into evidence, but rather, objected to the use of the statement as substantive evidence. Accordingly, the issue was not properly preserved for appeal. An unpreserved issue is reviewed for plain error. In *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), quoting *United States v Olano*, 507 US 725, 731-734, 736-737, 113 S Ct 1770; 123 L Ed 2d 508 (1993), the Michigan Supreme Court held:

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. . . . Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." [Citations omitted.]

At trial, Herron testified that she gave a statement to the police, but that the contents of that statement were a lie. The prosecution called Officer Simon who testified that she interviewed Herron on May 1, 1998. The purpose of obtaining a statement from Herron was to determine if she had any information regarding Traylor's murder. The prosecution handed Simon a written statement. Simon identified the statement as the one she took from Herron. Simon stated that she had a conversation with Herron before memorializing Herron's statement in written form. Simon indicated that Herron reviewed the statement and then signed it. The prosecution requested that Simon read the statement in question and answer form. Defense counsel objected to the statement being used for substantive purposes. The trial court sustained the objection. Defendant now contends that it was error for the statement to be read to the jury.

Extrinsic evidence may be used to prove that a witness made a prior inconsistent statement, but may not be used to prove the contents of the statement. *People v Jenkins*, 450 Mich 249, 256; 537 NW2d 828 (1995). In *Jenkins*, *supra* at 251, 253-254, our Supreme Court held that it was error requiring reversal for the trial court to allow a police officer to read

verbatim the witness' signed statement into the record. The Court noted that the statement was hearsay, and the prosecution did not lay a sufficient foundation for the statement to qualify as an exception to the hearsay rule. The Court suggested that the proper way to use the statement included: (1) the officer could have testified from memory about the statement; (2) if the officer could not recall the conversation, he could have been shown the statement to refresh his memory; and (3) if he could not testify without the aid of the statement, the statement could have been introduced into evidence as a past recollection recorded under MRE 803(5). *Jenkins, supra* at 257-258, quoting *People v Rodgers*, 388 Mich 513, 519; 201 NW2d 621 (1972).

In the instant case, the prosecution did not lay a proper foundation for the statement to be read into evidence. However, as noted above, the issue was not properly preserved for appellate review. Thus, defendant must demonstrate plain error. The evidence contained in the statement is essentially the same as Herron's statement to the police that was admitted for substantive purposes under the excited utterance exception to the hearsay rule. Moreover, the prosecutor impeached Herron's statement line by line during direct examination. Assuming arguendo that it was error for Herron's statement to be read into evidence, defendant did not object to the reading of the statement, and its probative value for impeachment was cumulative to Herron's excited utterance, and the prosecution's impeachment of Herron on the stand. Accordingly, the error did not affect the outcome of the lower court proceedings. *Carines, supra*.

Defendant next contends that the prosecutor improperly used the witness' statement as substantive evidence during her closing argument. During her closing argument, the prosecutor stated:

> Her [Herron's] statement to Homicide is not going to be an exhibit for you, but you may consider any evidence that she said in this courtroom and what she said to Investigator Simon when Investigator Simon read that statement to you. Investigator Simon said to you—

Defense counsel objected and stated that Simon's statement could not be used as substantive evidence. The trial court agreed and sustained the objection. The prosecution concedes that later in the prosecutor's closing argument, she may have used part of Herron's statement to Simon as substantive evidence when she stated:

> There's another point, ladies and gentlemen, and again on the statement you decide whether you believe it or not, Shantaina Herron said that Corey Collins told her, "I got bold on that thing; I was bold on that thing. I think I left prints."

However, defendant did not object to this argument. Accordingly, defendant objected to the prosecution's *attempted* use of Herron's statement for an improper purpose and was sustained by the trial court. There was no error. Defendant did not object to the prosecution's later use of the statement. In Herron's preliminary examination testimony, she admitted having a conversation with the police concerning defendant telling her about fingerprints. However, Herron never confirmed the statement about defendant potentially leaving fingerprints at the scene. Because defendant did not object to the prosecution's substantive use of Herron's statement, this argument is unpreserved. *Carines, supra*. Our review of this matter indicates that any error did not affect the outcome of the proceedings.

Defendant next contends that the trial court erred in not giving a timely and adequate instruction to the jury on the use of Herron's statement only for purposes of impeachment. Although during Herron's testimony defendant requested that an instruction be given to the jury regarding the use of an out-of-court statement, the trial judge declined to give the appropriate instruction until the conclusion of the case. Before the trial began on the following day, the trial judge indicated that he received a note from the jury asking for the definition of the term impeach. Defense counsel noted his earlier request, but indicated a preference to have the appropriate instruction read at the end of trial. The trial judge agreed. In accordance with CJI2d 4.5, the trial judge gave the following instructions to the jury at the end of trial:

> There has been some evidence that Shantaina Herron made an earlier statement that does not agree with her testimony at trial. You must be very careful how you consider this evidence. The statement was not made during the trial, so you must not consider it when you decide whether the elements of the crime have been proven.
>
> On the other hand, you may use it to help you decide whether you think the witness is truthful. Consider the statement carefully. Ask yourself if the witness made the statement and whether the statement was true and whether it differs from the witness' testimony here in court. Then remember that you may only use it to help you decide whether you believe the witness' testimony here in court.
>
> However, if the witness testified that the earlier statement was true, or if the earlier inconsistent statement was given under oath subject to penalty of perjury at a hearing or at a preliminary examination, then it may be considered as proof of the facts in the statement.

Defendant argues that the instructions explicitly asked the jury to determine if the written statement was true. It then asked the jury to compare the written statement to the trial testimony to determine which statement they believed. Defendant contends that once the jury was instructed to determine which statement they believed was true, they were essentially allowed to use the statement as substantive evidence. The prosecutor contends, and this Court agrees, that the instructions, when viewed in their entirety and in context, clearly state that the jury was only to consider Herron's statement for purposes of impeachment. See *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992).

Defendant also argues that the trial court erred by failing to give the instruction on the use of Herron's statement only for purposes of impeachment at the time defendant initially requested the instruction. Given the fact that defendant later indicated that he agreed the instruction should be given at the end of the trial when the jury indicated its request for the definition of impeachment, the trial court did not err in giving the appropriate instruction at the end of the trial.

Defendant next contends that the trial court improperly allowed Officer Watts to testify regarding the origin of the 911 call. We disagree. This Court reviews a trial court's decision

whether to admit evidence under the abuse of discretion standard. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

On April 28, 1998, Officer Watts responded to a family disturbance call at 10871 Lakepointe at approximately 10:00 p.m. Herron was at the residence and told Officer Watts that she had called 911, but had to leave the line open because defendant had still been in the apartment, and she was unable to talk. Herron testified for the prosecution, but was immediately classified as a hostile witness. Herron denied that she called 911 on April 28, 1998. Officer Watts was recalled and testified that the 911 call originated from Herron's residence. He testified that when a 911 call is made, the address appears on a screen in his police car. On cross-examination, Watts admitted that he did not see the address on his computer screen, but that the dispatcher told him that the 911 call originated from Herron's residence.

Defendant is correct that the statement of the dispatcher is hearsay. Furthermore, there is no exception to the hearsay rule for statements transmitted over a police radio. *People v Eady*, 409 Mich 356, 361; 294 NW2d 202 (1980). However, statements transmitted over the radio may be admissible for purposes other than to prove the truth of the matter asserted. *Id.* Here, the prosecution offered the evidence to impeach Herron's credibility. Under MRE 607, the prosecution may impeach its own witness. *People v Kilbourn*, 454 Mich 677, 682; 563 NW2d 669 (1997). "The general rule is that evidence of a prior inconsistent statement of the witness may be admitted to impeach a witness even though the statement tends directly to inculpate the defendant." *Id.* The *Kilbourn* Court noted that, in *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994), an exception was noted to the general rule. "A prosecutor cannot use a statement that directly tends to inculpate the defendant under the guise of impeachment when there is no other testimony from the witness for which his credibility is relevant to the case." *Kilbourn, supra*. The rule set forth in *Stanaway* is that impeachment should not be allowed when "(1) the substance of the statement purportedly used to impeach the credibility of the witness is relevant to the central issue of the case, and (2) there is no other testimony from the witness for which his credibility was relevant to the case." *Id.* at 683.

In *Kilbourn, supra* at 682, the defendant's father made an out-of-court statement to a detective that implicated the defendant as the person who fired a shot into the victim's home. The trial court allowed the detective to testify regarding the statement after the defendant's father denied making the statement at trial. The trial court instructed the jury that the evidence could only be used for impeachment. This Court overruled the decision of the trial court and remanded the case for a new trial, and the Michigan Supreme Court granted leave to appeal, limited to the issue of admissibility of the prior inconsistent statement. *Id.* at 680-682.

The *Kilbourn* Court held that the *Stanaway* holding was very narrow and did not apply to the case at bar. The Court conceded that the substance of the statements used to impeach the credibility of the defendant's father was relevant to a central issue of the case. However, the Court held that the second prong of the test was not met because there was other relevant testimony from the witness for which his credibility was relevant. The defendant's father testified that before the shooting, he called the victims' house and requested that before calling the police (there was a fight at the defendant's house), he would appreciate it if the victims would first contact him. One of the victims, on the other hand, testified that the defendant's father made

a threatening phone call. Thus, the Court found that the detective's testimony was admissible because it could properly be used to impeach the credibility of the defendant's father. *Kilbourn, supra* at 683-684.

In the instant case, Herron made statements to the police regarding defendant's involvement in Traylor's murder. She denied making some of these statements at trial and testified that the statements she did make were untrue. Under the holding of *Kilbourn, supra,* Herron's denial with regard to making the 911 call was subject to impeachment as an issue that was not the central issue of the case and only relevant for purposes of impeachment. Moreover, defense counsel was able to impeach Officer Watts' testimony by getting Watts to admit that he never saw Herron's address on his vehicle's computer screen. Any error in the admission of this testimony was limited by defense counsel's successful impeachment of Watts.

Defendant next contends that the trial court abused its discretion in denying defendant's motion for a mistrial. We disagree. "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *People v Griffin,* 235 Mich App 27, 36; 597 NW2d 176 (1999). This Court reviews the trial court's decision regarding a motion for a mistrial for an abuse of discretion. *Id.*

During the direct examination of Herron, there was an outburst from a man in the audience. Defense counsel asked for a recess. The trial judge determined that the examination should proceed. Shortly thereafter, during a recess, defense counsel moved for a mistrial. Defense counsel stated that five or ten minutes before the break, a man in the audience who identified himself as the decedent's cousin, yelled profanities at the witness. Defense counsel described the event as lasting several minutes, and the outburst was highly inflammatory. The man could not be immediately removed from the courtroom as he was in a wheelchair. Defense counsel opined that a cautionary instruction to the jury would not be sufficient and moved for a mistrial. The trial judge held that a cautionary instruction to the jury would be sufficient to cure any taint and denied defendant's motion for a mistrial.

When the trial resumed, the trial judge made the following statements to the jury:

> I appreciate your patience today, ladies and gentlemen.
>
> I should apologize for the outburst that you heard this afternoon during the session. Usually, these deputies of mine act a little quicker and a little faster before anything is said. But due to the fact that that particular spectator was in a wheelchair, they were a little bit slower in their reaction.
>
> But I do want to remind you that you are to base this case on the evidence, not upon what a spectator might say in the courtroom.

Defendant was not denied a fair trial. The trial court gave a cautionary instruction that stressed to the jury that it was only to consider evidence properly admitted at trial. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a mistrial. *Griffin, supra*.

Defendant next contends that the trial court erred in sentencing defendant. We agree. Defendant first notes, and the prosecutor concedes, that his fourteen-to-twenty-year sentence for first-degree home invasion was invalid pursuant to the two-thirds rule of *People v Tanner*, 387 Mich 683; 199 NW2d 202 (1972). We agree. Resentencing is required on this conviction.

Defendant next contends that the sentencing court also failed to individualize the sentences of defendant and codefendant, Bryce Bell, because it did not seem to consider their seemingly equal levels of culpability. This Court again agrees. Bell was sentenced by the same judge to eighteen to forty years' imprisonment for his conviction of second-degree murder. Bell was tried at the same time as defendant, but chose to waive his right to a jury trial. This Court has held that similar disparate treatment in sentencing requires resentencing. *People v Pfeiffer*, 177 Mich App 170, 172; 441 NW2d 65 (1989). The record is void of any factors that would explain the disparity between the two sentences. Accordingly, we remand for resentencing and that a different judge impose sentence.[1]

Defendant next contends that his conviction for two separate counts of second-degree murder violates his constitutional protection against double jeopardy. A double jeopardy issue constitutes a question of law that this Court reviews de novo on appeal. *People v Lugo*, 214 Mich App 699, 705; 542 NW2d 921 (1995).

Defendant was convicted of two counts of second-degree murder. At sentencing, the prosecution conceded that the second-degree murder convictions merged. Defendant notes that the trial judge orally pronounced one sentence for defendant of sixty to ninety years in prison. However, defendant contends that the judgment of sentence indicates that there are two convictions of second-degree murder and two sentences for sixty to ninety years. Defendant argues that although the trial court stated on the judgment of sentence that the two counts of murder are "(as one count)," the Department of Corrections (DOC) has classified defendant as being convicted of two murder counts, not one. It does appear from the DOC Basic Information Sheet provided by defendant that the DOC does consider defendant to have been convicted of two murders although only one occurred in the instant case. Because we recognize that defendant's benefit eligibility within the prison system may be affected, we remand to the trial court in order that the court may file a corrected judgment of sentence that vacates one of the second-degree murder convictions and sentences. See *People v Paintman* 139 Mich App 161, 176; 361 NW2d 755 (1984); see, also, *People v Bigelow*, 229 Mich App 218, 222; 581 NW2d 744 (1998) (this Court held that when a defendant is convicted of two counts of first-degree murder under different theories, the proper course of action is to specify that the defendant's conviction and single sentence is one count of first-degree murder supported by two theories; premeditated murder and felony murder). The other conviction and sentence for second-degree murder will remain.

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[1] Defendant also contends on appeal that his sentence for second-degree murder was disproportionate under *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Given our decision to remand for resentencing, we need not address this argument.

We affirm but remand for resentencing before a different judge. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Kathleen Jansen
/s/ Brian K. Zahra