STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 23, 2001
v LEONARD RAYMOND HANSEN, Defendant-Appellant.	No. 220786 Iron Circuit Court LC No. 98-008055-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v STEVEN DALE SAYLOR, Defendant-Appellant.	No. 222708 Iron Circuit Court LC No. 98-008057-FH

Before: Sawyer, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

The prosecutor tried defendants Leonard Hansen and Steven Saylor jointly on charges of first-degree home invasion, MCL 750.110a(2), assault with intent to commit unarmed robbery, MCL 750.88, and conspiracy to commit each of those two offenses, MCL 750.157a. The jury convicted both defendants as charged. The trial court sentenced defendant Hansen as a third habitual offender, MCL 769.11, to concurrent prison terms of six to twenty years each for the home invasion and assault convictions, along with terms of two to twenty years each for the conspiracy convictions. The trial court sentenced defendant Saylor as a third habitual offender, MCL 769.11, to concurrent prison terms of ten to twenty years for the home invasion conviction, seven to twenty years for the assault conviction, and two to twenty years each for the conspiracy convictions. Both defendants appeal as of right, and this Court has consolidated their appeals for decision. We affirm.

In Docket No. 220786, defendant Hansen raises two challenges to the admission of evidence at trial. Hansen argues that the trial court erroneously admitted hearsay evidence and erroneously allowed the victims to testify that they met defendant Hansen while in jail. Because we find no error requiring reversal, we affirm defendant Hansen's convictions.

First, Hansen argues that the trial court abused its discretion when it admitted evidence that he was unable to purchase alcohol with a credit card shortly before the charged offense. Defendant essentially argues that the readout from the financial transaction device denying defendant credit qualifies as inadmissible nonverbal hearsay. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 288-289; 531 NW2d 659 (1995).

Robert Loia, a clerk at the Mobil gas station in Iron River, testified that Hansen entered the store on April 23, 1998, a few days before the assault. During that visit, Hansen purchased approximately $70 worth of goods, comprised mainly of alcohol. Loia testified that Hansen paid for those purchases with a credit card. However, Hansen experienced some difficulty with the transaction and he telephoned the credit card company before the transaction was approved. Loia testified that Hansen returned to the store a few days later and attempted to purchase more alcohol. Although he was not certain regarding the date of Hansen's second visit, Loia testified that it probably occurred on April 27, 1998, the night of the assault. When Loia attempted to process the purchase, the financial transaction device displayed a "sales denied" readout and Hansen's credit card was rejected. Hansen again telephoned the credit card company, but was unable to obtain authorization to complete the transaction. Loia admitted that he had no idea why Hansen's credit card was rejected, and that a rejection can be caused by a variety of reasons. However, Loia testified that he would have completed the sale if Hansen had cash or a different credit card.

The prosecutor argued that the above evidence tended to prove Hansen's motive for committing the assault and robbery. According to the prosecutor, Hansen and his co-defendants embarked on a week-long drinking binge. Hansen's first purchase from Loia tended to show that Hansen was financing that drinking binge with his credit card. When unable to use that credit card to purchase more alcohol, Hansen needed to find other funds in order to continue drinking. According to the prosecutor's theory, the fact that Hansen left the store without the alcohol gave rise to the inference that he lacked other funds with which to complete the purchase. Thus, Hansen had developed a motive to assault and rob the victims, who had received a substantial sum of money earlier that day.

Hansen's counsel moved to suppress Loia's testimony, arguing that the "sales denied" readout on the financial transaction device qualified as nonverbal hearsay. The trial court denied defendant's motion, concluding that the evidence was not offered to prove any particular reason why Hansen was denied credit. That is, the evidence was not offered to prove that defendant had reached his credit limit. Rather, the evidence was offered simply to prove the effect of that statement on Hansen, given his inability to purchase more alcohol.

"Hearsay is defined as an out-of-court statement offered in evidence to prove the truth of the matter asserted". *People v Tanner*, 222 Mich App 626, 629; 564 NW2d 197 (1997), citing MRE 801(c). When an out-of-court statement is introduced to show the effect of the statement

on the listener, the statement does not constitute hearsay. *People v Eggleston*, 148 Mich App 494, 502; 384 NW2d 811 (1986).

> The hearsay rule proscribes evidence of statements made by another offered to prove the facts asserted therein. But where the alleged statements. . . were offered to show, circumstantially, the effect of the [communicated] statement on the hearer, . . . then it is not offered for a hearsay purpose because its value does not depend upon the truth of the statement. McCormick, Evidence, § 228, pp 464-465. [*People v Lee*, 391 Mich 618, 642; 218 NW2d 655 (1974).]

Even if we deemed the readout on the financial transaction device as a nonverbal assertion of fact, we would conclude that it was non-hearsay. Defendant argues that the challenged evidence was presented in order to show that he had reached his credit limit, and therefore had to steal more money to keep drinking. The machine readout did not state "insufficient funds" or "over credit limit." Rather, the readout simply stated "sales denied." Loia admitted that he had no reason why the credit card was declined. However, Loia testified that he personally observed Hansen leave the store without the alcohol. That testimony, which did not involve any hearsay statements, tended to prove that Hansen lacked the money to purchase additional alcohol. After a thorough review of the record, we conclude that the trial court did not abuse its discretion in admitting the challenged testimony.

Hansen next argues that he is entitled to a new trial because both victims mentioned during their testimony that they met Hansen while they were incarcerated. Hansen objected to the first such remark and the trial court instructed the jury to disregard that testimony. However, Hansen failed to object to the second remark and failed to request a mistrial or move for a new trial based on this issue. Therefore, appellate relief is precluded absent a showing of a plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

It is apparent from the record that the challenged testimony involves unresponsive, volunteered answers that were not solicited by the prosecutor. Accordingly, there is no basis for finding that prosecutorial misconduct played a role in this matter to justify granting a new trial. *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990); *People v Taylor*, 159 Mich App 468, 489; 406 NW2d 859 (1987). Further, the testimony was just as damaging to the credibility of the complaining witnesses as it was to the defendants. By informing the jury that they had met the defendants while in jail, the victims also revealed their own criminal records. Because the jury verdict rested largely on the credibility of the victims, we cannot say that Hansen's substantial rights were affected by this testimony.

In Docket No. 222708, defendant Saylor raises three issues on appeal. First, Saylor challenges the testimony of a police officer because her original notes were not preserved for production during discovery. Second, Saylor argues that the trial court erroneously admitted one of the victim's hearsay statements to a police officer. Finally, Saylor argues that the trial court erroneously denied his motion for a new trial because the evidence was insufficient to support his convictions. Because we find no error requiring reversal, we affirm defendant Saylor's convictions.

Saylor first contends that Officer Laura Kezerle should have been barred from testifying because she failed to preserve her notes of interviews with defendants. Saylor failed to object to Kezerle's trial testimony on this basis. Further, Saylor never sought to exclude Officer Kezerle from testifying due to an alleged discovery violation. Therefore, we review this unpreserved issue for plain error. *Carines*, *supra* at 763-764. Because the record fails to disclose that the notes amounted to material evidence, that they were deliberately destroyed in bad faith, or that defendant Saylor made a specific request for the notes before they were destroyed, we conclude that defendant has not established plain error. *People v Paris*, 166 Mich App 276, 283; 420 NW2d 184 (1988).

Saylor next contends that the trial court erroneously admitted a hearsay statement made by one of the victims to a police officer on the morning after the assault. According to the victims, the assault occurred around midnight on April 27, 1998. At 6:00 a.m. the next morning, victim Gary Moore appeared at the police station to report the assault. When asked what Moore said when he appeared at the police station, Officer Tom Hadley responded that Moore "said he was scared from the people that did this to him." Officer Hadley also testified that Moore had severe facial injuries and that Moore appeared to be excited, nervous, shaky and scared. Hadley was so concerned about Moore's condition that he transported Moore to the hospital, despite Moore's reluctance to seek official help for his injuries. Further medical treatment revealed that Moore had suffered a minor fracture to one of his ribs, a skull fracture near his left eye, and significant bruising around his right eye.

Counsel for one of Saylor's co-defendants objected to the above testimony on hearsay grounds. The prosecutor argued that the statement was admissible as an excited utterance. The trial court allowed the testimony, concluding that the statement qualified as a present sense impression. We review a trial court's decision to admit evidence for an abuse of discretion. *Bahoda*, *supra* at 288-289. We agree with defendant Saylor that the trial court erroneously admitted the statements under the present sense exception to the hearsay rule. However, because we conclude that the statement qualifies as an excited utterance, we find no error requiring reversal.

MRE 803(1) defines the hearsay exception for present sense impressions to include a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Moore spoke to Officer Hadley approximately six or seven hours after the assault. Because his statement was not "substantially contemporaneous" to the underlying event, we conclude that the statement cannot qualify as a present sense impression. *People v Hendrickson*, 459 Mich 229, 235-236; 586 NW2d 906 (1998).

MRE 803(2) defines the hearsay exception for excited utterances to include 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." Officer Hadley's testimony clearly indicates that Moore was still under the stress of excitement caused by the assault when he stated that he was "scared from the people that did this to him." Unlike the exception for a present sense impression, there is no express time limit for excited utterances. *People v Smith*, 456 Mich 543, 551; 581 NW2d 654 (1998). The focus of the excited utterance rule is the lack of capacity to

fabricate, not the lack of time to fabricate. *Id*. "'Physical factors, such as shock, unconsciousness, or pain, may prolong the period in which the risk of fabrication is reduced to an acceptable minimum.'" *Id*., quoting 5 Weinstein, Evidence (2d ed), § 803.04[4], p 803-24.

Given Moore's behavior when making the statement, as well as his injuries and need for medical attention, we conclude that he was still under the stress of excitement caused by the assault. Therefore, the statement qualified as an excited utterance under MRE 803(2). Because the trial court reached the correct result, albeit for the wrong reason, reversal is not required. *People v Lyon*, 227 Mich App 599, 612-613; 577 NW2d 124 (1998). Furthermore, even if the evidence was erroneously received, reversal would not be required because the victim offered the same information when he testified at trial. Viewed in the light of the untainted evidence, we cannot say that it is more probable than not that a different outcome would have resulted without the challenged testimony. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

Finally, Saylor argues that the trial court erroneously denied his motion for a new trial because the evidence was insufficient to support his convictions. When reviewing a sufficiency claim, we view "the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Oliver*, 242 Mich App 92, 94-95; 617 NW2d 721 (2000). "The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Saylor argues that the evidence was insufficient to support his conviction of home invasion because he was a frequent visitor in Sleeman's home. Saylor argues in his appeal brief that he and the victims formed "a close group of chronic alcoholic middle aged men in a very small town who spent a great deal of time together." While we do not doubt that assertion, the record contains evidence sufficient to convince a rational jury that Saylor knew he lacked permission to enter Sleeman's home on the night in question. The victims testified that they locked the door in order to keep Saylor out. Further, they testified that Saylor pounded on the door for some time that night, but eventually left when they would not allow him inside.

Saylor also argues that the evidence was insufficient to support his conviction of home invasion because he did not intend to commit an assault when the breaking and entering occurred. Saylor testified that he and his co-defendants only decided to assault the victims after they had laid in wait inside Sleeman's home for some period of time. However, Sleeman testified that Saylor was present when he and Moore discussed the substantial sum of money that Sleeman received on the day of the assault. Combined with the victim's descriptions of the assault and the statements made during that assault, the above evidence was sufficient to support Saylor's conviction of first-degree home invasion.

Finally, Saylor argues that he assaulted and robbed the victims based on a subjective, bona fide belief that the victims owed him money. Citing *People v McCann*, 42 Mich App 47, 48-49; 201 NW2d 345 (1972) and *People v Karasek*, 63 Mich App 706, 710-712; 234 NW2d 761 (1975), defendant argues that this motivation precludes his conviction of unarmed robbery. However, our review of the record convinces us that there was no evidence presented to support this theory. According to the testimony, it was defendant Hansen who had purchased much of

the alcohol for the group's drinking binge, financing those purchases on his credit card. Therefore, while the victims might have conceivably owed Hansen money, they did not owe Saylor money. Furthermore, the ferocity and brutality of the attack on the victims negates any inference that Saylor acted in good faith. The issues in this case involved the credibility of the witnesses, which is a matter for the jury, not the trial court, to decide. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). Viewed in a light most favorable to the prosecution, the evidence was sufficient to support each of defendant Saylor's convictions by proof beyond a reasonable doubt.

Affirmed.

/s/ David H. Sawyer
/s/ Michael R. Smolenski
/s/ William C. Whitbeck