STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 9, 2002
v	No. 228080 Ottawa Circuit Court
JESSE DANIEL PALMER, Defendant-Appellant.	LC No. 00-023580-FC

Before: K. F. Kelly, P.J., and Doctoroff and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of criminal sexual conduct in the second degree (CSC II), MCL 750.520c, entered after a bench trial, and his sentences for that conviction and his plea-based conviction of armed robbery, MCL 750.529. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with armed robbery and CSC II in connection with a robbery at a video store. He pleaded guilty to the charge of armed robbery, and proceeded to trial on the charge of CSC II. Complainant, an employee, testified that defendant and another man entered the store, and that defendant ordered her into a back room. He bound her with duct tape, touched her breasts and her vaginal area over her clothing, and asked her if she liked it. Complainant waited until she heard defendant and the other man leave, and then attracted the attention of a customer, who called the police. Deputy James testified that he arrived at the store within ten minutes of receiving the call. He spoke with complainant, whom he described as very upset and shaken. Over defense objections, James testified complainant told him defendant touched her in a sexual manner during the incident. Defendant denied that he touched complainant in a sexual manner, but acknowledged he told the police he might have done so accidentally.

The trial court found defendant guilty of CSC II. The court found complainant's testimony more credible than that given by defendant, and observed complainant's testimony regarding the touching was corroborated by James' testimony.

The applicable statutory sentencing guidelines recommended a minimum term range of 81 to 135 months for the conviction of armed robbery, and 36 to 71 months for the conviction of CSC II. At sentencing, defendant objected to the scoring of offense variable (OV) 8, MCL 777.38, victim asportation or captivity, at 15 points on the ground that complainant was taken to a place of greater danger or to a situation of greater danger. The trial court rejected defendant's

argument and found that OV 8 was correctly scored at 15 points. The trial court imposed concurrent sentences within the guidelines.

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 as an excited 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).

Defendant argues the trial court abused its discretion by admitting complainant's statement to James as an excited utterance. We disagree. The statement concerned a touching of complainant's person by a stranger during a robbery, which would qualify as a startling event. The lapse of time between the event and the 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); *People v Kowalak (On Remand)*, 215 Mich App 554, 558-559; 546 NW2d 681 (1996).

Approximately ten minutes passed between the time the event ended and complainant made the statement. James' testimony that complainant was extremely upset indicated complainant was still under the stress of the startling event when she made the statement. See *Smith*, *supra*. Complainant's statement related to the circumstances of the startling event. Furthermore, independent evidence, i.e., complainant's direct testimony, existed to show the event took place. Complainant made the statement during a conversation in which James asked questions; however, the fact that a statement may have been 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 did not constitute an abuse of discretion. See MRE 803(2); *Hendrickson*, *supra*; *Straight*, *supra*.

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

The offenses of which defendant pleaded guilty and was convicted occurred after January 1, 1999; therefore, the statutory sentencing guidelines apply to this case. MCL 769.34(1). This Court must affirm sentences within the guidelines absent an error in the scoring of the guidelines or reliance on inaccurate information in determining sentence. MCL 769.34(10); *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000).

Defendant argues the trial court erred by scoring OV 8 at fifteen points when calculating the guidelines for both armed robbery and CSC II for the reason that no evidence showed that by taking complainant to the back room he took her to a place or situation of greater danger. We disagree. This Court has held that the moving of a victim to a different room away from other persons supports a finding the victim was moved to a place of greater danger. See, e.g., *People v Hack*, 219 Mich App 299, 313; 556 NW2d 187 (1996).[1] Here, the evidence showed that defendant moved complainant away from the sales counter and into a back room. By doing so, defendant eliminated complainant's ability to quickly attract attention to her plight. Offense variable 8 was properly scored. Defendant is not entitled to resentencing.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Martin M. Doctoroff
/s/ Mark J. Cavanagh

[1] *Hack*, *supra*, interpreted OV 5 [victim was carried away or held captive] of the offense variables for criminal sexual conduct offenses under the judicial sentencing guidelines. Offense variable 5 of the judicial sentencing guidelines and OV 8 of the statutory sentencing guidelines have the same standards for the scoring of points.