

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY ALAN MAXON, SR.,

Defendant-Appellant.

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UNPUBLISHED

November 12, 2002

No. 235542

Lapeer Circuit Court

LC No. 00-007103-FC

Before: Murray, P.J., and Cavanagh and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(b)(ii) [victim between the ages of thirteen and sixteen and related to defendant], and one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) [victim under thirteen years of age]. We affirm.

On appeal, defendant first argues that the trial court reversibly erred when it admitted, as excited utterances, hearsay statements made by the victim to her sister which included a first-time disclosure of the sexual molestation. We review the trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

Hearsay, a statement offered to prove the truth of the matter asserted, is inadmissible at trial unless there is a specific exception allowing for its introduction. See MRE 801; MRE 802; *People v Ivers*, 459 Mich 320, 331; 587 NW2d 10 (1998). One exception to the hearsay rule is the excited utterance exception, which permits the admission of statements "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). Therefore, to qualify as an excited utterance the statement must (1) arise out of a startling event, and (2) be made while the declarant was under the excitement caused by that event. See *People v Layher*, 238 Mich App 573, 582; 607 NW2d 91 (1999), citing *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998).

Here, the victim's sister, Amy, testified at trial about the events of a particular September night that culminated in her younger sister disclosing that defendant had been molesting her for some time. In particular, Amy testified that she heard defendant come home from work at about 3:00 a.m. or 3:30 a.m., proceed upstairs to the victim's bedroom where he opened the door presumably to get the dog so that it could go outside, and then return downstairs. About five or

six minutes later, Amy heard defendant go back upstairs and open the victim's bedroom door, and then return downstairs again. About five minutes later Amy heard and saw the victim walk down the stairs and go into the living room. Amy continued to listen to defendant and the victim speaking for several minutes and then walked into the room where they were sitting with their backs toward Amy. Amy noted that defendant and the victim were sitting about a half of a foot apart and that the victim had her head down and was whimpering. Amy testified that she asked what was going on and the victim ran upstairs.

Amy further testified that within approximately five minutes, she followed the victim upstairs to the victim's bedroom and noticed that she was crying, shaking terribly, trembling, and breathing very heavy. Amy was scared and asked the victim what was wrong to which the victim responded, "[h]e told me if I told anybody I'd end up like the Ramsey girl." Amy testified that she inquired as to what the victim meant and asked, "[i]s he hurting you?" The victim, who was crying, "shook her head yes and she said, '[f]or a long time.'" Amy then asked, "[h]as he touched you?" and the victim answered in the affirmative. Amy testified that the victim "was scared to death. Her fingers were clawing into me." After Amy heard defendant go to bed, she and the victim spoke a little more, including "she told me again what he said, you know, that she'd end up like the Ramsey girl and my mom would hate her because we'd be poor and she was scared."

Prior to Amy's trial testimony, the victim testified about the events that transpired on the night that she told her older sister about the molestation. The victim testified that she had been sleeping in her bedroom when defendant came and woke her up and told her to go downstairs. She refused and he told her that she had five minutes to get downstairs. The victim did not go and he came back about five or ten minutes later and told her to get downstairs. The victim then ran to her sister's bedroom, thinking she was in there, and laid on the floor. Defendant found her in her sister's bedroom and told her to get downstairs. The victim, noting that her sister was not there, got up and went downstairs where, she testified, she was asking and begging defendant to "[p]lease don't make me do anything." She was crying with her head in her hands and defendant told her that they were not going to do anything. She told him that she hated him and wanted "what was going on" to stop. At that point her sister walked in and the victim ran upstairs. The victim also testified that previous to this September incident, in June on her thirteenth birthday, defendant had awakened her when he came home from work, told her to go downstairs, at which point he pushed her onto the kitchen floor, and forced her to have sex with him. The victim further testified that, because defendant woke her up when he came home from work on several occasions, she would often sleep on her older sister's bedroom floor.

Defendant argues that the victim's sister, Amy, should not have been permitted to testify that the victim told her that defendant "had been hurting her for a long time and that he touched her" because the last alleged sexual assault occurred twenty-two days prior to this disclosure; therefore, the hearsay testimony was not admissible under the excited utterance exception. We disagree.

The focus of the analysis, as the trial court noted, is on the event that directly preceded and precipitated the contested statements. Here, the statements disclosing the molestation occurred in response to and as a consequence of a startling event—defendant's actions which mirrored prior behavior that led to the victim being forced to have sex with defendant, in the middle of the night, in an isolated part of the house, under threats of violence and abandonment.

Further, the statements were made while the victim was under the excitement and stress of the startling event. The victim was whimpering, crying, shaking, trembling, breathing heavily, and was clawing into her sister's skin with her fingers. It is clear that the victim was responding, physically and emotionally, to the perceived threat of another sexual assault consistent with defendant's past conduct. Considering the circumstances, including the victim's age, her relationship to defendant, the duration and intensity of the abuse, and that the disclosure occurred within minutes of the startling event, we conclude that the trial court did not abuse its discretion when it admitted the contested statements.

Next, defendant argues that his Fifth Amendment right to remain silent was violated when the prosecution introduced evidence, and referred to that evidence in closing argument, that defendant did not appear at a scheduled appointment that he had made with the investigating police officer to discuss the allegations. We disagree.

In a criminal trial, the use of a defendant's silence as evidence is limited by the constitutional privilege against self-incrimination and the right to due process. See *People v Dennis*, 464 Mich 567, 573-574; 628 NW2d 502 (2001). However, silence that does not occur during a custodial interrogation or in reliance on *Miranda*<sup>1</sup> warnings is not constitutionally protected and evidence of the same may be admitted as substantive evidence. See *People v Schollaert*, 194 Mich App 158, 164, 166-167; 486 NW2d 312 (1992). Accordingly, here, the brief reference to defendant's failure to keep a scheduled appointment with the police investigator, for the purpose of rebutting the inference that the investigation was not thorough, did not violate defendant's constitutional rights. Defendant's reliance on *People v Bobo*, 390 Mich 355; 212 NW2d 190 (1973), a case involving a defendant's silence *at the time of arrest*, is misplaced. Therefore, the trial court properly admitted the contested testimony.

Affirmed.

/s/ Christopher M. Murray  
/s/ Mark J. Cavanagh  
/s/ Richard A. Bandstra

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<sup>1</sup> *Miranda v Arizona*, 384 US 436, 467; 86 S Ct 1602; 16 L Ed 2d 694 (1966).