# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>February 12, 2004 |
| v | No. 245100<br>Saginaw Circuit Court |
| BRANDEN ANTWON BLACKMON,<br><br>Defendant-Appellant. | LC No. 02-021050-FC |

Before: Sawyer, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of four counts of assault with intent to commit murder, MCL 750.83, and one count each of carrying a concealed weapon, MCL 750.227, possession of a firearm during the commission of a felony, MCL 750.227b, and discharge of a firearm from a motor vehicle, MCL 750.234a. Defendant appeals these convictions as of right. We affirm.

Defendant was arrested and charged with the instant offenses after being identified by two of the victims, Marquis Ashworth and Demetrious Robinson, as the individual who fired upon them from a moving vehicle. Although initially denying any involvement in the shooting, defendant ultimately acknowledged during questioning by police that he was in fact driving the vehicle from which the shots, one of which struck Ashworth in the abdomen, were fired. However, defendant denied that he was the shooter, claiming that the shots were fired by a passenger in his vehicle. Specifically, defendant claimed that Trumone Cannon, who was seated in the passenger seat of the vehicle being driven by defendant, reached across the vehicle and, after pointing a handgun out the driver's side window, unexpectedly fired several shots at a vehicle in which Ashworth was riding with Robinson and two other individuals. However, at trial, Robinson testified that he clearly saw defendant, whom he had known for years, fire the weapon with one hand while driving with the other. Ashworth, although initially identifying defendant as the shooter in a statement to Saginaw Police Officer Douglas Jordan shortly after being transported to a local hospital, testified at trial that he did not actually see the shooter, but only the gun pointing from the driver's side window of the vehicle from which the shots were fired.

On appeal, defendant first argues that the trial court erred in ruling that Ashworth's statement to Officer Jordan, identifying defendant as the shooter, was admissible at trial under the excited utterance exception to the rule against hearsay. See MRE 803(2). We disagree. A

trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

MRE 803(2) permits "hearsay testimony that would otherwise be excluded because it is perceived that a person who is still under the 'sway of excitement precipitated by an external startling event will not have the reflective capacity essential for fabrication so that any utterance will be spontaneous and trustworthy.'" *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998), quoting 5 Weinstein, Evidence (2d ed), § 803.04[1], p 803-19. There are two requirements for the admission of an excited utterance: (1) that a startling event occurs, and (2) that the resulting statement is made while under the excitement caused by the event. *Smith, supra.* Although the length of time between the startling event and the statements is an important factor to consider in determining admissibility, "it is the lack of capacity to fabricate, not the lack of time to fabricate, that is the focus of the excited utterance rule." *Id*. at 551. Moreover, '"[p]hysical factors, such as shock, unconsciousness, or pain, may prolong the period in which the risk of fabrication is reduced to an acceptable minimum.'" *Id.* at 551-552, quoting 5 Weinstein, *supra* at § 803.04[4], p 803-24.

Here, the statement at issue concerned Ashworth having been shot, an incident that unquestionably qualifies as a startling event for purposes of MRE 803(2). *Smith, supra* at 550; see also *People v Jones*, 115 Mich App 543, 550; 321 NW2d 723 (1982). Moreover, only twenty minutes had passed between the time Ashworth was shot and when he made the statement to Officer Jordan while being prepped for surgery at the hospital emergency room. Further, Jordan testified that Ashworth appeared to be "in a great deal of pain" at the time he spoke with the officer, a fact that lessens any capacity for reflective fabrication of the statement. *Smith, supra*. Although Ashworth made the statement during a conversation in which the officer asked questions, whether a statement made in response to questioning may nonetheless be admitted as an excited utterance "depends on the circumstances of the questioning and whether it appears that the statement was the result of reflective thought." *Id.* at 553. Here, there is nothing to suggest that the questioning at issue here gave rise to such reflective fabrication. Cf. *People v Straight*, 430 Mich 418, 423-424; 424 NW2d 257 (1988) (repeated and emotional inquiry regarding circumstances of sexual assault undermined confidence in victim's statement). The trial court properly admitted this testimony into evidence under MRE 803(2). The circumstances existing here militate against the possibility of fabrication and support an inference that the statement was made out of a continuing state of stress precipitated by the shooting. We find no abuse of discretion. See *Smith, supra* at 550 (a trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion).

Moreover, even were we to conclude that admission of the challenged statement was error, we would find such error to be harmless in light of Robinson's cumulative testimony definitively identifying defendant as the individual who fired upon Ashworth and his companions that night, as well as Ashworth's qualification of his statement to Officer Jordan.[1] MCR 2.613(A).

[1] Despite his earlier statement to Jordan identifying defendant as the person who shot him, Ashworth candidly testified at trial that he merely told Jordan what he "believed" had happened,
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Defendant also argues that he was denied the effective assistance of counsel as a result of defense counsel's failure to object to ballistics testimony offered by Saginaw Police Detective Scott Richmond. Defendant asserts that Richmond's testimony that bullet casings recovered from the scene of the shooting indicated that the rounds had in fact been fired from a weapon, as opposed to manually dismantled, and that it is generally quite difficult to retrieve fingerprints from spent bullet casings due to the heat generated during the firing process, constituted expert opinion testimony for which no foundation was ever laid.[2] We find no basis for reversal of defendant's convictions on this ground.

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Initially, we note that Richmond's testimony was not offered by the prosecution as that of an expert. Nonetheless, because information regarding ballistics testing is not within the common knowledge of a layman, it is a proper subject for expert testimony. See, e.g., *People v Ray*, 191 Mich App 706, 707-708; 479 NW2d 1 (1991). Under MRE 702, a witness may be qualified as an expert by knowledge, skill, experience, training, or education. In this case, before the testimony in question was received, Detective Richmond had been questioned by the prosecutor regarding his experience with firearms and ballistics testing as a detective with the Saginaw Police Department over the previous five years. His testimony on that subject sufficiently established that he was qualified by knowledge, training, and experience to offer the limited ballistics testimony at issue here. Consequently, any objection raised by defense counsel regarding Richmond's qualifications to offer testimony on that matter would have been futile and defendant was, therefore, not denied the effective assistance of counsel. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (counsel is not ineffective for failing to make a futile argument or advocate a meritless position).

In any event the challenged testimony was general in nature, limited in essence to police investigatory techniques and the fact that spent bullet casings that could not be linked to any gun or person were found at the scene. It was not disputed that Ashworth and his companions had been fired upon that evening. At issue during the trial was the identity of the shooter. The challenged testimony merely showed that ballistics evidence was not helpful in establishing that

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not what he actually knew to have happened. Ashworth's testimony in this regard certainly reduced any prejudice arising from Jordan's testimony concerning Ashworth's statement at the hospital.

[2] Defendant also asserts that Richmond inappropriately testified that review of the casings indicated that each were fired from the same weapon. However, this assertion is not supported by the record. A ballistics report prepared by the Michigan State Police Crime Laboratory, which was entered into evidence by stipulation of the parties, indicated that tests conducted on the casings were inconclusive on this point. Nothing in Richmond's testimony contradicts that finding.

point. Defendant has failed to show how the challenged testimony prejudiced his defense that it was Cannon, and not he, that fired the shots. *Pickens*, *supra*.

We affirm.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Richard A. Bandstra