

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENT AARON TINGSTAD,

Defendant-Appellant.

UNPUBLISHED

April 22, 2004

No. 245111

Wayne Circuit Court

LC No. 02-004205

Before: Cavanagh, P.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of criminal sexual conduct in the third degree, MCL 750.520d, and criminal sexual conduct in the fourth degree, MCL 750.520e, entered after a bench trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Complainant testified that defendant fondled her breast and penetrated her vagina with his finger. The trial court denied defendant's request that complainant be sequestered following her testimony. Defendant claims this was error. He argues that the trial court abused its discretion by denying his request to sequester complainant. We disagree.

The decision to sequester witnesses is within the discretion of the trial court. *In re Jackson*, 199 Mich App 22, 29; 501 NW2d 182 (1993). A trial court may sequester witnesses so that they do not hear the testimony of other witnesses. MCL 600.1420. But the victim of a crime has "[t]he right to attend trial and all other court proceedings that the defendant has the right to attend. Const 1963, art 1, § 24. Complainant testified prior to defendant moving to sequester her. And defendant has not shown that the trial court's decision resulted in prejudice. *People v King*, 215 Mich App 301, 309; 544 NW2d 765 (1996). We find that no abuse of discretion occurred. *Jackson, supra*.

Defendant also argues that the trial court abused its discretion by admitting complainant's statement to her mother as an excited utterance. Over defendant's objection, complainant's mother was allowed to testify that complainant told her that defendant fondled her breast and penetrated her vagina with his finger. We review a trial court's decision on 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).

Complainant’s statement related to a touching of her person by defendant, which qualifies 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. *People v Smith*, 456 Mich 543, 551; 581 NW2d 654 (1998). “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.* at 551-552 (citation omitted).

Complainant’s mother’s testimony that complainant was crying and breathing heavily when she arrived home indicated complainant was still under the stress of the startling event when she made the statement to her mother. And the statement related to the circumstances of the startling event. Further, there was independent evidence to prove that the startling event took place in the form of complainant’s direct testimony and the testimony of another witness who was present in the car at the time of the event. *Hendrickson, supra* at 237-238. The fact that complainant’s statement contradicted other evidence was irrelevant to its admissibility under MRE 803(2). Therefore, we find that the trial court did not abuse its discretion in admitting the statement.

Affirmed.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Michael R. Smolenski