

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK THOMAS HAMILTON,

Defendant-Appellant.

UNPUBLISHED

September 21, 2004

No. 249232

Oakland Circuit Court

LC No. 2003-188610-FH

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

PER CURIAM.

Defendant appeals as of right his jury trial convictions of felon in possession of a firearm, MCL 750.224f, possession of a firearm in the commission of a felony, MCL 750.227b, and careless discharge of a firearm resulting in property damage over \$50, MCL 752.862. The trial court sentenced defendant, as a fourth habitual offender, MCL 769.12, to two years' imprisonment for the felony-firearm conviction, eighteen months' to ten years' imprisonment for the felon in possession of a firearm conviction, and one year in jail for the careless discharge of a firearm conviction. We affirm.

Defendant was accused of discharging a gun in an occupied apartment that belonged to his girlfriend. Defendant's girlfriend told the responding police officer that defendant was attempting to unload a gun in her apartment, when he accidentally discharged it into the floor. On appeal, defendant argues that the trial court committed error requiring reversal by initially admitting his girlfriend's statement as an excited utterance. We disagree.

Generally, we review a trial court's determination regarding the admission of evidence for an abuse of discretion. But where the decision involves a preliminary question of law our review is de novo. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *Id.* at 413 n 3. Generally, hearsay is not admissible unless it falls under an exception to the rule. MRE 802; *McDaniel*, *supra* at 412. MRE 803(2) allows evidence to be admitted as an exception to the hearsay rule if it satisfies two primary requirements for excited utterances: "(1) that there be a startling event, and (2) that the resulting statement be made while under the excitement caused by the event." *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998), citing *People v Straight*, 430 Mich 418, 424; 424 NW2d 257 (1988).

The parties do not dispute that the discharge of a gun in an occupied apartment home is a startling event. Accordingly, we address only whether the declarant, defendant's girlfriend, made the statement while under the stress caused by the discharge of the gun. The critical question is whether the declarant was capable of conscious reflection. *Smith, supra* at 551. The absence of reflection renders the declaration spontaneous and trustworthy. *Straight, supra* at 424 n 3. The time interval between the event and utterance is an important factor in determining whether the declarant was capable of reflective thought, but it is not dispositive. *Smith, supra* at 551. Other factors that indicate reflective thought are whether the statement was made in response to an inquiry or was self-serving. *Straight, supra* at 426 n 6, quoting McCormick, Evidence (3d ed), § 297, p 857.

In the present case, when the trial court admitted the declarant's, defendant's girlfriend's, statements under the excited utterance exception, testimony had been presented that the statement was made shortly after the incident and that defendant's girlfriend was agitated and excited. Therefore, at the time the court made its ruling, we find no abuse of discretion.

However, further testimony revealed that defendant's girlfriend made her statement implicating defendant after thirty minutes of police questioning and originally told the responding officer that she did not see who discharged the gun. Moreover, the responding officer testified that defendant's girlfriend was agitated because she did not want to get defendant in trouble. After learning of the circumstances surrounding defendant's girlfriend's conflicting statements and lack of cooperation, the trial court sua sponte re-raised the issue of defendant's objection to the hearsay evidence. The trial court decided to change the basis for allowing the statements and held that defendant's girlfriend's statement was properly admitted because defendant waived his right to object because defendant's objection violated a pre-trial order that required all motions to be made no less than fourteen days before trial. But a review of the record reveals that defendant did not have prior notice that defendant's girlfriend would not testify and the prosecution provided no notice prior to trial that she could not be located. Consequently, defendant could not have been expected to file a pretrial motion fourteen days prior to trial. Thus, the trial court erred in determining that the statement was admissible on the basis of defendant's failure to file a pretrial motion.

Regardless, we find that the error was ultimately harmless. An error is harmless where it does not prejudice a defendant and harmless errors do not require reversal. *People v Grant*, 445 Mich 535, 544-545; 520 NW2d 123 (1994). Here, the declarant told two other witnesses that defendant was in her apartment. Moreover, one witness testified to seeing defendant carelessly handle a gun shortly before the gun discharged. Because defendant was placed inside the apartment and had carelessly handled a gun minutes before the incident, there was corroborative evidence to establish that defendant discharged the gun. We conclude that defendant has failed to demonstrate that the error resulted in a miscarriage of justice. MCL 769.26; *Grant, supra*.

We affirm.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Donald S. Owens