STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNIE BERNARD WILLIAMS,

Defendant-Appellant.

UNPUBLISHED
November 17, 2005

No. 256442
Oakland Circuit Court
LC No. 03-193461-FH

Before: Jansen, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to thirty-three months to ten years in prison for the assault with intent to do great bodily harm conviction and two years in prison for the felony-firearm conviction. We affirm.

Defendant's first issue on appeal is that the trial court erred in admitting the victim's hearsay statements under the excited utterance hearsay exception. We disagree.

This Court reviews for a clear abuse of discretion the trial court's decision to admit or exclude evidence. An abuse of discretion exists only if an unprejudiced person considering the facts on which the trial court acted would say that there is no justification or excuse for the trial court's decision. A trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Houston*, 261 Mich App 463, 465-466; 683 NW2d 192 (2004).

Testimony regarding a statement made by another and offered to prove the truth of the matter asserted is hearsay, but an excited utterance is an admissible hearsay statement. MRE 803(2); *People v Kowalak (On Remand)*, 215 Mich App 554; 546 NW2d 681 (1996). 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); *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). The rule allows 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. *Smith, supra* at 550. There are two primary requirements for an excited utterance: (1) a startling event, and (2) the resulting statement must have been made while the declarant was under the excitement

caused by that event. *Id.* There is no express time limit for excited utterance statements. *Id.* at 551. The rule focuses on the lack of capacity to fabricate, not the lack of time to fabricate. *Id.* Although the amount of time that passes between the event and the statement is an important factor in determining whether the declarant was still under the stress of the event when the statement was made, it is not dispositive. *Id.* The question is not strictly one of time, but of the possibility of conscious reflection. *Id.* 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. The trial court's decision regarding whether the declarant was still under the stress of the event is given wide discretion. *Id.* at 552.

Defendant contends that the hearsay statements admitted were not made while the victim, Rubshona, was under the stress of excitement caused by the shooting. Specifically, defendant contends that three hours passed after the shooting before the victim made the statements to the police. However, as noted, there is no express time limit for excited utterance statements. *Smith*, *supra* at 551. Here, the circumstances presented a continuing level of stress arising from the shooting, which reduced the possibility of fabrication. *Id.* at 553. As the victim and defendant traveled home, defendant pointed a handgun at her stomach and hit her in the head with the handgun. Defendant then threatened to kill her and shot her in the right leg. The victim was afraid that defendant would kill her and tried to remain as calm as possible. When they arrived at the victim's home, defendant noticed that she was shot and offered to take her to the hospital. Because the victim feared defendant, she asked her brother to ride to the hospital with her and defendant. Defendant took the victim to the hospital. The victim indicated that she was in pain at the time the police arrived at the hospital, approximately three hours after the shooting. She also indicated that she was dazed, confused, and in shock because of the shooting.

Officer Mullins also indicated that the victim appeared upset, scared, and reluctant to speak. The victim told Mullins she was scared and cried when Mullins asked her about the shooting. It is well settled that several physical factors, including shock or pain, may prolong the period in which the risk of fabrication is reduced to an acceptable minimum. *Smith*, *supra* at 551-552. The statements to Mullins were also made while Rubshona was at the hospital because of the incident. Therefore, the record indicates that the statement was made while Rubshona was under excitement caused by the shooting. *Id.* at 550. Therefore, defendant's contention that the passage of time between the shooting and the victim's statements to the police gave her time to fabricate is without merit.

Defendant further contends, in his supplemental brief, that the prosecution withheld statements obtained from medical personnel who spoke with the victim. Defendant contends that these witnesses could testify that the victim did not realize that she was injured. MCR 6.201(B)(1) requires the prosecution to provide the defendant, upon the defendant's request, "any exculpatory information or evidence known to the prosecuting attorney." A trial court should grant a motion for discovery of information that is "necessary to a fair trial and a proper preparation of a defense." *People v Laws*, 218 Mich App 447, 452; 554 NW2d 586 (1996). Provided the information will aid the defendant in the preparation of trial, inadmissible evidence is subject to discovery. *Id.* If the evidence is favorable to the defendant and material to guilt or innocence, the defendant has a due process right to obtain such evidence in the possession of the prosecution. *Id.* Defendant has failed to demonstrate that any statements obtained from members of the hospital staff regarding the victim's recognition that she was shot was material to

his guilt or innocence. In fact, the victim testified that she informed hospital staff that she did not know who shot her. She also testified that she did not realize she was injured until she reached her home. Therefore, the victim's statement to medical personnel was already placed on the record. Additional testimony from members of the hospital staff regarding the victim's knowledge of the shooter would not have been material to defendant's guilt or innocence.

In addition, defendant contends in his supplemental brief that the police coerced the victim into making a statement implicating defendant. However, defendant has merely announced his position on appeal and gave the issue cursory treatment. A party may not announce a position on appeal and leave it to this Court to unravel or elaborate his claims. *People v Johnigan*, 265 Mich App 463, 467; 696 NW2d 724 (2005). Therefore, this issue has been abandoned on appeal.

Defendant's second issue on appeal is that the trial court erred in admitting improperly obtained physical evidence. We disagree.

The determination whether a violation of the federal constitutional prohibition against unreasonable searches and seizures requires exclusion of the evidence is a question of law which is reviewed de novo on appeal. *People v Lombardo*, 216 Mich App 500, 505; 549 NW2d 596 (1996).

Both the United States and Michigan Constitutions protect a person against unreasonable searches and seizures, and no warrants may issue except based on probable cause supported by oath or affirmation particularly describing the place to be searched and the persons or things to be seized. US Const, Am IV; Const 1963, art 1, § 11; *People v McGhee*, 255 Mich App 623, 625; 662 NW2d 777 (2003). The right to be secure against unreasonable searches and seizures absent a warrant based upon probable cause is subject to specifically established and well-delineated exceptions. *People v Kazmierczak*, 461 Mich 411, 417-418; 605 NW2d 667 (2000). An automobile may be searched without a warrant if it is readily mobile and probable cause exists which would support the issuance of a warrant. *Id.* at 419. The automobile exception does not rise or fall depending on the peculiarities of the automobile to be searched. Instead, the exception was established because of the mobility of automobiles in general. *People v Carter*, 250 Mich App 510, 515; 655 NW2d 236 (2002).

Several months after the shooting, Mullins went to the victim's home to deliver subpoenas to the victim and her mother. He noticed defendant's blue Chevy Tahoe backed in the driveway of the victim's home. Mullins confirmed defendant's ownership through a VIN number search. Mullins looked through the driver's side window and noticed the passenger's side door panel missing. He walked around the vehicle and looked through the passenger's side window. He noticed a speaker cover on the floorboard with what appeared to be a bullet hole in it. Mullins impounded defendant's vehicle and later obtained a search warrant to search the inside of the vehicle. Defendant contends that the seizure of his vehicle without a search warrant violated his constitutional rights.

An automobile may be searched without a warrant if it is readily mobile and probable cause exists which would support the issuance of a warrant. *Id.* at 419. The seizure of defendant's vehicle did not violate his constitutional rights. Although defendant's vehicle was parked and locked, it appeared readily movable. Mullins verified defendant's ownership of the

vehicle by conducting a VIN number search. While walking around the outside of the vehicle, Mullins noticed a speaker cover on the floorboard with what appeared to be a bullet hole in it. He spoke with the victim several months before this date and she informed him that defendant shot her as she sat in the passenger's side of the vehicle. Therefore, there was probable cause which would support the issuance of a search warrant. In fact, Mullins secured a search warrant after impounding the vehicle (i.e., before he conducted a search of the vehicle). Therefore, defendant's contention is without merit. Defendant further contends that the information upon which the warrant was based was stale. However, defendant cites no authority for his position and it is thereby abandoned on appeal. *Johnigan, supra* at 467.

Defendant's final issue on appeal is that he was denied effective assistance of counsel. We disagree.

Because defendant did not move for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Westman*, 262 Mich App 184, 192; 685 NW2d 423 (2004). Whether a defendant has been denied the effective assistance of counsel is a mixed question of law and fact. A judge must first find the facts and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003). Question of constitutional law are reviewed by this Court de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, a defendant must show: (1) that his trial counsel's performance fell below an objective standard of reasonableness; (2) that defendant was so prejudiced thereby that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and 3) that the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). When considering a claim of ineffective assistance of counsel, counsel's performance must be considered without the benefit of hindsight. Moreover, a defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defendant first contends that defense counsel's failure to call medical personnel as witnesses deprived him of effective assistance of counsel. However, decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Even so, the information defendant purported medical personnel would provide was provided by the victim at trial. Therefore, the statement the victim made to medical personnel was already admitted at trial. Defendant has failed to overcome the presumption that defense counsel's failure to call medical personnel as witnesses was sound trial strategy.

Defendant also contends that defense counsel's failure to file a motion for a 180-day ruling constituted ineffective assistance of counsel. However, defendant has failed to cite supporting authority and has given this issue cursory treatment. It is therefore abandoned on appeal. *Johnigan, supra* at 467. Defendant has also cited little or no supporting authority regarding his contention that defense counsel's failure to file a motion for a new trial, failure to

file a motion for a directed verdict based on insufficient evidence, and failure to secure defendant's presence at a circuit court hearing constituted ineffective assistance of counsel. *Id.* These issues are likewise abandoned on appeal. *Id.*

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood