STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 23, 2007
v	No. 271163 Oakland Circuit Court
JAMAL KYREE KING, Defendant-Appellant.	LC No. 2005-204894-FH

Before: Kelly, P.J., and Meter and Gleicher, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2); willful prevention of communication by telephone, MCL 750.540; and domestic violence, MCL 750.81(2). He was sentenced to seven to 20 years' imprisonment for the first-degree home invasion conviction, one to two years' imprisonment for the willful prevention of a telephone communication conviction, and two days in jail for the domestic violence conviction. We affirm.

In the early morning hours of September 7, 2005, defendant forced his way into the victim's[1] residence, damaging the back doorjamb while leaving the door and the deadbolt in a locked position. Defendant awakened the victim by turning on the light in her bedroom, throwing a plate of yogurt in her direction, and knocking a television into a nearby wall, leaving a hole. Defendant then hit the victim several times, with an open hand and a closed fist. Defendant went on a rampage through the residence, damaging furniture and other items of personal property. When the victim attempted to call 911, defendant grabbed the telephone from her hand and pulled the telephone jack from the wall. Defendant fled from the residence seconds later when the telephone rang. The incoming call was from the 911 dispatcher. The victim told the 911 dispatcher that her ex-boyfriend was "tearing up" her home and that he hit her. The police were dispatched to the residence. When the police arrived, the victim explained that defendant did not have permission to be in the residence and assaulted her. Defendant was subsequently apprehended and arrested. At trial, defendant advanced a theory that he either resided with the victim or had permission to be in her residence and that the offense of first-

[1] The victim was defendant's former girlfriend.

degree home invasion therefore could not be established. The victim's testimony at trial largely supported defendant's version of events.

On appeal, defendant claims that the prosecutor's closing argument challenged the veracity of defense counsel and improperly shifted the burden of proof to defendant. We disagree.

In general, we review claims of prosecutorial misconduct de novo, *People v Wilson*, 265 Mich App 386, 393; 695 NW2d 351 (2005), and on a case-by-case basis, *People v Walker*, 265 Mich App 530, 542; 697 NW2d 159 (2005), vacated in part and remanded 477 Mich 856 (2006). However, defendant did not object below to the prosecutor's argument, and therefore he must demonstrate the existence of a plain error that affected his substantial rights, i.e., that was outcome-determinative. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). We will not find error requiring reversal if a curative instruction could have prevented any prejudicial effect. *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

This Court reviews the prosecutor's comments "as a whole and evaluate[s them] in light of defense arguments and the relationship they bear to the evidence admitted at trial." *Ackerman, supra* at 452. "A prosecutor is generally given great latitude to argue the evidence and all inferences relating to the prosecutor's theory of the case." *Walker*, *supra* at 542. However, a prosecutor must not denigrate the defendant "with intemperate and prejudicial remarks." *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995). Yet the prosecutor need not limit his arguments to the blandest of terms. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001). "Moreover, attacking the credibility of a theory advanced by a defendant does not shift the burden of proof." *People v McGhee*, 268 Mich App 600, 635; 709 NW2d 595 (2005).

The record reflects that the prosecutor presented his theory of its case, presented the evidence, and argued reasonable inferences from the evidence in his closing argument. The prosecutor argued that it was not reasonable for defendant to break down the back door to enter the victim's residence if he had permission to be there. In arguing that defendant did not have permission to be in the victim's residence, the prosecutor posed a hypothetical to the jury:

> Do you really think the Defendant was permitted to be in the house that night? The last contact between the victim and the Defendant, she hung up on him. He busted down the back door.
>
> If you have permission to come to a house, do you use a back door? If you show up at 2:15[2] in the morning, don't you ring a door bell if the door is locked?
>
> No, the Defendant would have you believe that a person who has permission to come in the house would naturally kick down or bust down a locked

[2] The trial transcript indicates 2:15, but the prosecutor later stated that the incident occurred at 2:50 a.m. There was evidence that the incident occurred at approximately 2:50 a.m.

> and dead bolted door and rampage the house and destroy property. I mean, that's reasonable; right?
>
> The Defendant would have you believe that he lived there. No, he lived at 32 East Martin Luther King Boulevard in Pontiac.

Defendant argues that the prosecutor's closing argument "was a blatant attempt to confuse and improperly sway the jury; the defense . . . had no burden of proof, and no evidence was presented and [defendant] did not testify." Defendant asserts that the prosecutor's argument was not in response "to any defense argument," shifted the burden of proof to defendant, and challenged defense counsel's veracity and defendant's failure to present any evidence. We conclude that the prosecutor's closing argument was based on his theory of the case as supported by the evidence and reasonable inferences derived therefrom. See *Walker*, *supra* at 453. It did not include an improper attack on defense counsel's veracity, did not shift the burden of proof to defendant, did not deny defendant a fair trial, and did not meet the threshold for reversal based on unpreserved error. See *McGhee*, *supra* at 635, and *Ackerman*, *supra* at 454.

Next, defendant asserts that the trial court abused its discretion and denied defendant a fair trial by admitting, over objection, statements from the victim through a police officer who was at the scene. Defendant claims that the challenged statements were not reliable and should not have been admitted as excited utterances because the victim had an opportunity to fabricate the statements. We review a trial court's ruling to admit evidence under a hearsay exception for an abuse of discretion. *People v Geno*, 261 Mich App 624, 631-632; 683 NW2d 687 (2004). "[A]n abuse of discretion can be found only where an unprejudiced person, considering the facts on which the trial court (relied), would find no justification or excuse for the ruling made." *People v McSwain*, 259 Mich App 654; 676 NW2d 236 (2003) (internal citation and quotation marks omitted). Moreover, for reversal to be warranted, this Court must conclude that, absent the evidentiary error, it is more probable than not that the outcome of the case would have been different. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Hearsay is defined as a statement, other than the one made by the declarant while testifying, offered to prove the truth of the matter asserted. MRE 801(c). Generally, a trial court will not admit hearsay evidence unless it meets an exception under the rules of evidence. MRE 802; *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). MRE 803(2) provides that a purported hearsay statement is admissible at trial if it 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." There are "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). This Court has noted that "[t]here is no express time limit for excited utterances." *Walker*, *supra* at 534. MRE 803(2) "focuses on the lack of capacity to fabricate, not the lack of time to fabricate." *Walker*, supra at 534.

> 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. The question is not strictly one of time, but of the possibility of conscious reflection. [*Id*.]

In *People v McLaughlin*, 258 Mich App 635, 659; 672 NW2d 860 (2003), the defendant argued that the trial court erred in admitting "a police officer's testimony regarding what the victim told him at the scene of the crime." This Court concluded that "[t]he statement was . . . properly admitted under MRE 803(2)." *Id*. at 660. In reaching that conclusion, this Court determined that the prosecution laid a proper foundation for the statement. *Id*. The responding police officer "testified that the victim appeared extremely upset or 'frantic,' and was having trouble breathing and speaking." *Id*. Additionally, the responding police officer testified "that he arrived within a minute or two of the victim's call." *Id*. That testimony was consistent with testimony of the victim's daughter, who "testified that the victim was extremely upset and shaking at the time she called the police." *Id*. Thus, this Court found that "it can reasonably be inferred that the rape was the cause of the victim's stress, and that she was still under the influence of the stress when she made the statement." *Id*. "[T]he lapse of time between the alleged assault and the victim's statement was brief and there was no evidence that [the responding officer] questioned the victim." *Id*.

The instant case is very close factually to *McLaughlin*. We conclude that a startling event occurred when defendant arrived at the residence, awakened the victim from sleep, assaulted her, and went on a rampage through her residence. *Smith*, *supra* at 550. The police officer was dispatched to the victim's residence to respond to "a possible domestic situation" at approximately 2:52 a.m. He arrived approximately five to six minutes after receiving the dispatch, finding an upset and distraught victim at the residence. The victim appeared to be crying and her nightgown appeared to be "stretched out, maybe a little bit torn." The trial court concluded that "a foundation has been laid for an excited utterance exception to the hearsay rule."

Defendant contends that "[t]he time period is not the crucial factor; rather, the issue is whether or not [the victim] had the capacity to contrive or fabricate," and defendant concludes that "[s]he certainly did." The record does not support defendant's position. First, a startling event occurred: defendant broke down the victim's back door, assaulted her, and rampaged through her residence. *Smith*, *supra* at 530. Second, the victim's statements to the police officer were made while under the excitement of the event. *Id*. Further, her level of excitement was corroborated by the 911 call that had occurred five or six minutes earlier. Given the wide discretion afforded to a trial court in determining whether a declarant was still under the stress of the event, *Walker*, *supra* at 534, we conclude that the trial court did not abuse its discretion in admitting the victim's statements under MRE 803(2).

Next, defendant challenges the sufficiency of the evidence presented at trial for his first-degree home invasion conviction, arguing that the prosecutor did not prove the element of "without permission" beyond a reasonable doubt. We disagree.

This Court reviews sufficiency of the evidence claims de novo, viewing the evidence in the light most favorable to the prosecution to determine if the evidence was sufficient for a rational jury to find the defendant guilty beyond a reasonable doubt. *McGhee*, *supra* at 622. A prosecutor may offer circumstantial evidence and reasonable inferences as proof of the elements of a crime. *Carines*, *supra* at 757. This Court resolves conflicts regarding the evidence in favor of the prosecution, *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997), and conflicts regarding the credibility of witnesses in support of the jury's verdict, *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). "This Court will not interfere with the trier of fact's role

of determining the weight of the evidence or the credibility of witnesses." *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005).

MCL 750.110a(2) provides:

> A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:
>
> (a) The person is armed with a dangerous weapon.
>
> (b) Another person is lawfully present in the dwelling.

MCL 750.110a(1)(c) defines "without permission" as "without having obtained permission to enter from the owner or lessee of the dwelling or from any other person lawfully in possession or control of the dwelling." It is implicit that an individual cannot commit a breaking and entering into one's own home. *People v D'Angelo*, 208 Mich App 417, 420-421; 528 NW2d 771 (1994).

Defendant argues that the only evidence offered by the prosecutor regarding the "without permission" element was improperly admitted hearsay. Defendant claimed that he either lived at the victim's residence or had her permission "to come and go as he pleased." The victim's trial testimony supported such a position. However, we note that, after being arrested, defendant admitted that he lived in Pontiac. The victim also told the 911 dispatcher that defendant resided in Pontiac. At any rate, on the record before us, we find that the prosecution offered sufficient substantive evidence to support that defendant did not have permission to enter the victim's house. The doorjamb of the house was broken; the door and deadbolt were still locked; officers responded to a 911 call at that residence; and the victim, who made the call, was in an excited state and indicated that the door was not broken when she went to sleep. Further, as discussed previously, the victim's hearsay statements were properly admitted under MRE 803(2). The police officer testified that the victim told him the following: that she dated defendant for approximately four years; that they recently ended the relationship; that defendant had a key to the residence, but he refused to give it back; and that defendant was no longer allowed in the residence. Additionally, the evidence demonstrated that after speaking to defendant on the telephone, the victim told defendant that she did not want to speak to him any longer and she hung up on him. Later, after she had gone to sleep, the victim was awakened after the lights were turned on and defendant was in her bedroom. Defendant was upset that the victim ended their earlier conversation. This evidence as a whole was sufficient to enable a rational trier of fact to conclude that defendant did not reside there or that he did not have permission to be in the residence, thereby satisfying any prong of the first element of first-degree home invasion. MCL 750.110a(2).

While the victim offered testimony to support that defendant was not in the house without permission, the jury determined the credibility of the witnesses. This Court will not interfere

with that determination. *Williams, supra* at 419. Moreover, in reviewing the case, we resolve conflicts regarding the credibility of witnesses in support of the jury's verdict. *Nowack, supra* at 400. Viewing the evidence in the light most favorable to the prosecutor, we conclude that a rational trier of fact could, and did, find that the prosecutor proved the element of "without permission" beyond a reasonable doubt.

Finally, defendant contends that his conviction amounts to cruel and unusual punishment, because he is actually innocent of first-degree home invasion. Defendant's claim is without merit, because a rational trier of fact concluded otherwise. Defendant was afforded a trial and convicted of the offense for which he was charged; thus, the presumption of innocence disappeared. *Herrera v Collins*, 506 US 390, 399; 113 S Ct 853; 122 L Ed 2d 203 (1993).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Patrick M. Meter
/s/ Elizabeth Gleicher