STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK PATTERSON,

Defendant-Appellant.

UNPUBLISHED
June 10, 2010

No. 289561
Wayne Circuit Court
LC No. 08-007123-FC

Before: HOEKSTRA, P.J., and MARKEY and DAVIS, JJ.

PER CURIAM.

Defendant was convicted by a jury of 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. He was sentenced to 20 to 120 months' imprisonment for the assault conviction and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant was convicted of shooting his friend, John Ray, with a handgun. The evidence showed that Ray and his girlfriend Lauren Morris went to defendant's house to speak with defendant. Ray refused to testify at trial, so his preliminary examination testimony was offered under MRE 804(b)(1). At the preliminary examination, Ray denied knowing who shot him. Morris likewise testified at trial that she knew little about the incident and did not implicate defendant. The principal evidence against defendant was the responding police officers' testimony that Ray told them at the scene that defendant had shot him.

Defendant first argues that the trial court erred in allowing the officers to testify regarding Ray's hearsay statements at the scene. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Ackerman*, 257 Mich App 434, 442; 669 NW2d 818 (2003). A trial court abuses its discretion when its decision results in an outcome falling outside the range of principled outcomes. *People v Carnicom*, 272 Mich App 614, 616-617; 727 NW2d 399 (2006).

The trial court appears to have admitted Ray's statements under MRE 801(d)(1)(C) (statement of identification), MRE 803(1) (present sense impression), MRE 803(2) (excited utterance), and MRE 804(b)(2) (statement under belief of impending death). Because we conclude that Ray's statements were admissible under MRE 803(2), it is unnecessary to consider the remaining grounds in question.

"'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Under MRE 802, hearsay is inadmissible as substantive evidence unless the rules provide otherwise. *People v Poole*, 444 Mich 151, 159; 506 NW2d 505 (1993), overruled in part on other grounds by *People v Taylor*, 482 Mich 368, 370; 759 NW2d 361 (2008).

An excited utterance, i.e., "[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," is an exception to the hearsay rule. MRE 803(2). To be admissible as an excited utterance, three conditions must be met: (1) the statement arises out of a startling event, (2) the statement is made before there has been time to contrive and misrepresent, and (3) the statement relates to the circumstances of the startling event. *People v Straight*, 430 Mich 418, 424; 424 NW2d 257 (1988). The second condition considers whether the declarant "was still under the influence of an overwhelming emotional condition" at the time the statement was made. *Id.* at 425. Thus, a statement may meet the second condition even if it is not made immediately following the startling event. On the other hand, a statement will not meet the second condition if it is made "while under control, even though made contemporaneously" with the event. *Id.* at 424. The focus is on the lack of capacity to fabricate, not the lack of time to fabricate. Because there is no express time limit for excited utterances, a delay between the event and the statement is not dispositive in determining whether the declarant was still under the stress of the event. One must consider whether there was a plausible explanation for the delay, such as shock, unconsciousness, or pain produced by the event. *People v Smith*, 456 Mich 543, 551; 581 NW2d 654 (1998). The fact that a statement is made in response to questioning does not in and of itself preclude it from being an excited utterance. *People v Petrella*, 124 Mich App 745, 759-760; 336 NW2d 761 (1983), aff'd 424 Mich 221 (1985).

In this case, Ray's statements that defendant had shot him arose out of and related to a startling event. Further, the officers testified that they arrived promptly on the scene. The first officers arrived "within five minutes" of receiving the dispatch and other officers arrived "within ten minutes" of receiving the dispatch. The officers quickly approached Ray, who was lying across the threshold of the doorway, at or near to where he fell. There was evidence that when Ray made the statements, he was still in some degree of pain from having been shot in the abdomen and was bleeding. "Being shot is a traumatic event, both physically and psychologically. Its startling effect, depending on the severity of the injury, can continue for hours or longer." *Yamobi v State*, 672 NE2d 1344, 1347 (Ind, 1996). Thus, a victim's statements to officers responding to the scene are admissible as excited utterances. *Id.* at 1345-1347. Accord *United States v Baptiste*, 264 F3d 578, 590-591 (CA 5, 2001), withdrawn in part on rehearing 309 F3d 274 (CA 5, 2002); *Webb v Lane*, 922 F2d 390, 394 (CA 7, 1991). Under the circumstances, the trial court's ruling admitting the testimony under MRE 803(2) was not an abuse of discretion.

In a separate pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, defendant challenges the verdict as not being sustained by the evidence or as being against the great weight of the evidence.

A challenge to the sufficiency of the evidence is reviewed de novo on appeal. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). This Court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find

that the essential elements of the crimes charged were proven beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997); *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995). Circumstantial evidence and reasonable inferences drawn therefrom are sufficient to prove the elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). It is for the trier of fact to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). All conflicts in the evidence are to be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

On a defendant's motion, the court may also order a new trial where the verdict was manifestly against the clear weight of the evidence, i.e., the evidence so clearly weighed in the defendant's favor that it would be a miscarriage of justice to allow the verdict to stand. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998); *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993). In reviewing a motion for a new trial on the ground that the verdict was against the great weight of the evidence, the judge must review the whole body of proofs. *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993), overruled in part on other grounds by *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). Generally, a verdict may be vacated only when it is not reasonably supported by the evidence and was more likely the result of causes outside the record, such as passion, prejudice, sympathy, or some other extraneous influence. *DeLisle*, 202 Mich App at 661; *People v Plummer*, 229 Mich App 293, 306; 581 NW2d 753 (1998). The resolution of credibility questions is generally within the exclusive province of the jury, *DeLisle*, 202 Mich App at 662, and this Court may not resolve them anew. *Gadomski*, 232 Mich App at 28. "[u]nless it can be said that directly contradictory testimony was so far impeached that it was deprived of all probative value or that the jury could not believe it, or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination." *Lemmon*, 456 Mich at 645-646 (internal quotation marks and citation omitted).

The elements of assault with intent to do great bodily harm are "(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder." *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). The crime is a specific intent crime. *Id.*; *People v Mack*, 112 Mich App 605, 611; 317 NW2d 190 (1981). It requires proof that the defendant intended to do great bodily harm, *Parcha* 227 Mich App at 239, which has been defined as "serious injury of an aggravated nature," *People v Mitchell*, 149 Mich App 36, 39; 385 NW2d 717 (1986), and as "any physical injury that could seriously harm the health or function of the body." CJI2d 17.7(4). The defendant's intent may be inferred from all the facts and circumstances, *People v Lugo*, 214 Mich App 699, 709-710; 542 NW2d 921 (1995), including the defendant's acts, the means employed to commit the assault itself, and the extent of the victim's injuries, although actual physical injury is not a necessary element of the crime. *People v Harrington*, 194 Mich App 424, 430; 487 NW2d 479 (1992); *People v Cunningham*, 21 Mich App 381, 384; 175 NW2d 781 (1970).

The elements of felony-firearm are that the defendant possessed a firearm during the commission or attempted commission of a felony. MCL 750.227b(1); *People v Mitchell*, 456 Mich 693, 698; 575 NW2d 283 (1998); *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

Morris's trial testimony and Ray's preliminary examination testimony was insufficient to prove that defendant did anything other than talk to Ray inside his house and then leave. However, Morris was an admittedly reluctant witness and her testimony was seriously impeached, and the officers' testimony regarding Ray's statements at the scene showed that defendant brandished a gun and then fired several shots, striking Ray twice. The officers' testimony was sufficient to prove beyond a reasonable doubt that defendant shot Ray with an intent to do great bodily harm. *Parcha*, 227 Mich App at 239. Because the evidence showed that defendant possessed and fired a gun, it was also sufficient to prove beyond a reasonable doubt that defendant committed felony-firearm. *Avant*, 235 Mich App at 505-506; *People v Espinosa*, 142 Mich App 99, 102-103, 106; 369 NW2d 265 (1985). Although the verdicts were contrary to Morris's and Ray's testimony, their credibility was seriously impeached and there were no exceptional circumstances warranting rejection of the officers' testimony that Ray had identified defendant as the shooter. Therefore, the verdicts were not contrary to the great weight of the evidence.

In his Standard 4 brief, defendant also asserts that he is entitled to a new trial due to ineffective assistance of counsel. Because defendant did not raise this issue in a post-conviction motion, our review is limited to errors apparent from the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002); *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). To establish ineffective assistance of counsel, a defendant must "show that (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. Counsel is presumed to have provided effective assistance, and the defendant must overcome a strong presumption that counsel's assistance was sound trial strategy." *People v Horn*, 279 Mich App 31, 37-38 n 2; 755 NW2d 212 (2008).

Having reviewed defendant's allegations, we find no grounds for relief. The allegations are either not supported by the record or fail to establish that counsel made a serious error that affected the outcome of the proceedings.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Alton T. Davis