STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 18, 2012
v	No. 304309 St. Clair Circuit Court
ANTOINE JERMAINE CONLEY, Defendant-Appellant.	LC No. 11-000092-FH

Before: METER, P.J., and FITZGERALD and WILDER, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of unlawful imprisonment, MCL 750.349b, felonious assault, MCL 750.82, domestic violence, third offense, MCL 750.81(4), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant as a habitual offender, fourth offense, MCL 769.12, to serve concurrent prison terms of 15 to 25 years for unlawful imprisonment, 3 to 15 years for felonious assault, 3 to 15 years for domestic violence, and 6 to 10 years for felon in possession of a firearm, along with a consecutive sentence of 2 years for felony-firearm. We affirm.

This 2011 prosecution stems from events occurring on or about 2011 New Year's Day. Early in the morning of January 1, 2011, the victim, defendant's girlfriend, was spotted on the side of road by a passing motorist. She told the motorist that defendant had beaten her, and she asked to be taken to her mother's home. The victim's mother testified that her daughter said defendant beat her with a gun, tore off her clothes, and forced her into a closet at her residence. The police were called and arrived thereafter. A police officer testified that the victim told him how defendant had beaten her with his fists and a gun, how he had torn off her clothing, and how he had forced her into a closet and would not allow her to leave. At the hospital, the same officer asked her to write out her prior statement, which she did. The emergency room physician who attended to the victim testified that her injuries were consistent with blunt-force trauma. Defendant was subsequently apprehended as he slept at the victim's residence. A loaded semiautomatic pistol was found under his bed. Bullets were found in a crawlspace, and one was found in a child's car seat.

At trial, the victim testified to a lack of memory of the events of New Year's. She believed she had been intoxicated at the time. She recognized her handwritten police statement

but testified to a lack of memory with respect to writing it. She did remember, however, that a police officer told her that he would not leave the hospital until she wrote out a statement. She denied that the officer told her what to write.

Defendant first argues that the trial court erred in admitting testimony by the motorist and the victim's mother regarding what the victim told them on January 1. We disagree, and conclude that the trial court properly admitted these statements under the "excited utterance" exception to the hearsay rule, MRE 803(2). A trial court's decision on an evidentiary issue is reviewed for an abuse of discretion. *People v Holtzman*, 234 Mich App 166, 190; 593 NW2d 617 (1999). The trial court does not abuse its discretion when its decision in within the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Hearsay is an unsworn, out-of-court statement that is offered to establish the truth of the matter asserted. MRE 801(c); *People v Stamper*, 480 Mich 1, 3; 742 NW2d 607 (2007). Hearsay is generally not admissible, but it may be admitted if it meets the requirements of one of the hearsay exceptions set forth in the Michigan Rules of Evidence. MRE 802; *Stamper*, 480 Mich at 3.

Even though still hearsay, MRE 803(2) lists "excited utterances" as an exception to being inadmissible by the hearsay rule. An "excited utterance" is defined as "[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). The rationale for admitting such statements is that "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." *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998) (internal quotation marks omitted). There are two primary requirements for a statement to be admissible under this exception: "1) that there be a startling event, and 2) that the resulting statement be made while under the excitement caused by the event." *Id.* "It is the lack of capacity to fabricate, not the lack of time to fabricate, that is the focus of the excited utterance rule." *Id.* at 551. In other words, the key inquiry is whether the declarant "was still under the influence of an overwhelming emotional condition" at the time the statement was made. *People v Straight*, 430 Mich 418, 425; 424 NW2d 257 (1988). Therefore, "[t]he question is not strictly one of time, but of the possibility for conscious reflection." *Smith*, 456 Mich at 551.

Testimony introduced at trial indicated that defendant assaulted the victim sometime between 2 a.m. and 4 a.m. and that until she fled, she was in a closet and threatened with further violence if she left the closet. Defendant had also been brandishing a loaded gun. Around 7 a.m., a motorist saw the victim on the side of the road trying to flag someone down. He described her as disheveled, disoriented, and "[s]omewhat hysterical." He then drove her to the home of her mother, who described her daughter as crying and half-dressed, with her "hair falling out" and her eyes swollen nearly shut. The victim's mother believed that the victim was panicked and scared, not knowing what to do. Subsequently, the victim was interviewed by a police officer, who described her as shaking and crying with marks, bruises, and cuts on her. There was no evidence that the victim engaged in ordinary activities, consulted others, or contemplated her story between the assault and her disclosures. See *People v Hackney*, 183

Mich App 516, 525-526; 455 NW2d 358 (1990); *People v Petrella*, 124 Mich App 745, 759-761; 336 NW2d 761 (1983).

Defendant first claims that the excited utterance exception does not apply because of the elapse of time between the alleged incident and the making of the statements. However, contrary to defendant's claim, the evidence demonstrated that the victim was still under the influence of the stressful event at the time she made her out-of-court statements. The trial court, therefore, did not abuse its discretion in admitting the statements under the excited utterance exception.

Defendant further argues that the victim's statements to her mother were the product of conscious reflection with the capacity to fabricate because they came in response to questioning by the mother. However, statements are not rendered inadmissible under the excited utterance exception merely because they were made in response to questions. *Smith*, 456 Mich at 553. As we noted earlier, the key focus is whether the statement was made under the stress of the underlying event. *Id.* at 553-554. Here, the victim's mother did not definitively testify that she questioned the victim when she showed up at her home. Instead, when asked whether she had asked her daughter what had happened to her, the victim's mother responded that her daughter told her defendant had assaulted her. Nonetheless, even if the witness had asked "what happened," the question did not require the victim to set aside her emotional state to reflect on what transpired. In short, "there is nothing about the mother's inquiries in the present case that undermines confidence in the conclusion that the complainant's statement resulted from the stress of the assault and not from the 'stress' of [her] mother's inquiries." *Id.* at 554.

Next, defendant argues that his conviction of unlawful imprisonment is not supported by sufficient evidence. In determining whether the prosecutor has presented sufficient evidence to sustain a conviction, we must take the evidence in the light most favorable to the prosecutor to ascertain whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010). Direct and circumstantial evidence, as well as all reasonable inferences that may be drawn, when viewed in a light most favorable to the prosecution, are considered to determine whether the evidence was sufficient to support defendant's conviction. *People v Hardiman*, 466 Mich 417, 429; 646 NW2d 158 (2002).

Defendant was convicted of unlawful imprisonment under MCL 750.349b(1)(a), which provides that "[a] person commits the crime of unlawful imprisonment if he or she knowingly restrains another person . . . by means of a weapon or dangerous instrument." (Paragraph structure omitted.) "Restrain" means "to forcibly restrict a person's movements or to forcibly confine the person so as to interfere with that person's liberty without that person's consent or without lawful authority." MCL 750.349b(3)(a).

Defendant argues that there was insufficient evidence to establish that any unlawful imprisonment was accomplished "by means of a weapon or dangerous instrument," because no fingerprints, blood, or tissue were found on the gun. However, a fingerprint expert explained how it was possible to not have fingerprints on a gun that had been touched. Further, the pistol was found by police under the bed, a foot from the edge, on which defendant was sleeping when he was detained. Additionally, three witnesses, the victim's mother, a police officer, and an emergency room nurse, testified that the victim told them that defendant beat her with a gun and

forced her to stay in a closet by threatening to further use the gun on her. The victim also told the emergency room physician that her face was beaten with a pistol, and the physician found facial wounds consistent with blunt-force trauma. Therefore, viewing the evidence in a light most favorable to the prosecution, we conclude that the evidence presented was sufficient a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *Tennyson*, 487 Mich at 735.

Next, defendant argues in his Standard 4 brief that the written statement that the victim provided to the police should not have been admitted because it was not voluntarily given. We disagree.

In order to preserve an evidentiary issue for review, the party opposing the admission of the evidence at issue must object at trial and specify the same ground for objection that it asserts on appeal. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Here, although defendant objected to the admission of the statement, the objection was not based on the grounds that it was involuntary. Thus, this argument was not preserved for appeal. Unpreserved issues are reviewed for plain error affecting substantial rights. *People v Bauder*, 269 Mich App 174, 180; 712 NW2d 506 (2005).

The victim admitted that she wrote out the statement because it was in her handwriting. Although the victim testified that she was told by an officer that he would not leave until she wrote out the statement, the officer unequivocally testified that he had not said anything of the kind. Regardless, they both agreed that the officer did not tell the victim what to write. As a result, we conclude that defendant failed to establish any plain error.

Defendant also argues that the statement should not have been admitted as a recorded recollection. We disagree. This issue is preserved since defendant objected on this ground at the trial court. *Aldrich*, 246 Mich App at 113.

MRE 803(5) provides the recorded recollection exception to the hearsay rule:

> A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

Documents admitted pursuant to MRE 803(5) must meet three requirements:

> (1) The document must pertain to matters about which the declarant once had knowledge; (2) the declarant must now have an insufficient recollection as to such matters; and (3) the document must be shown to have been made by the declarant or, if made by one other than the declarant, to have been examined by the declarant and shown to accurately reflect the declarant's knowledge when the matters were fresh in his memory. [*People v Dinardo*, 290 Mich App 280, 293; 801 NW2d 73 (2010) (brackets and quotation marks omitted.]

Relying on the victim's testimony that *at trial* she "didn't remember" anything about the events from New Year's Day, defendant argues that the first element of MRE 803(5) was not met. However, because the victim's lack of memory clearly addresses the second element. defendant's argument fails. Further, at the time she wrote the statement, she demonstrated that she had knowledge of the matters about which she was writing. Indeed, she was only asked to write down what she had already told the police. Additionally, she orally relayed part or all of the same recollection of events to seven witnesses that testified to her knowledge of events at the time she composed the statement. Finally, contrary to defendant's argument, the third element is also met because the victim wrote the document. Therefore, the trial court did not abuse its discretion in admitting the substance of the document under MRE 803(5).

Next, defendant argues that a police officer gave improper expert medical testimony when he testified that lines visible in a photograph of the victim's face and arms were consistent with her report of being beaten with a pistol. However, lay witnesses are permitted to give their opinion if the opinion is "rationally based on the perception of the witness." MRE 701. The officer's testimony regarding the wounds was rationally based on his perceptions because he is the one that took the photographs of the victim and he also saw the retrieved weapon. Therefore, the trial court did not abuse its discretion in admitting this testimony.

Defendant also argues that plain error occurred when the same police officer allegedly gave improper expert testimony on the nature of domestic violence when he stated that victims of domestic violence often recant their initial statements. Defendant claims that this was inadmissible expert testimony because the officer's opinion was not derived from any scientific data whatsoever. However, because the officer merely was explaining why, based on *his personal experience,* he usually obtains written statements from domestic violence victims, the officer was not required to meet any expert witness requirements under MRE 702, and defendant's argument that there was an MRE 702 violation necessarily fails.

Next, defendant argues that the prosecutor committed misconduct during closing argument by vouching for the testimony of witnesses and by misrepresenting the emergency room physician's testimony. Claims of prosecutorial misconduct are reviewed on a case-by-case basis, in the context of the issues raised at trial, to determine whether a defendant was denied a fair and impartial trial resulting in prejudice to defendant. *People v Fyda*, 288 Mich App 446, 461; 793 NW2d 712 (2010). However, because defendant never objected to the remarks he challenges on appeal, our review is again for plain error, and reversal is necessary only if a timely instruction would have been inadequate to cure any defect. *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

A prosecutor may not vouch for the credibility of a witness by implying that the prosecutor has some special knowledge that the witness is testifying truthfully. *People v Rodriguez*, 251 Mich App 10, 31; 650 NW2d 96 (2002). However, a prosecutor may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Here, the prosecutor remarked that although the victim's memory was not perfect, what the victim did remember was significant, that the victim was being honest when she wrote out her police statement, that the jury should not believe that the victim had memory loss about the incident, and that the victim's

mother had no reason to lie. The prosecutor did not imply that she had a special personal knowledge of which witnesses were credible and which were not. Rather, she was permissibly commenting on the credibility of her own witness, predicated on inferences and observations of the evidence. Therefore, these comments during closing argument were proper, and defendant's claim of improper vouching fails.

Defendant also argues that the prosecutor improperly mischaracterized the emergency room physician's testimony. Specifically, defendant claims that the prosecutor improperly stated that the physician thought the victim's wounds were not consistent with a fist fight or bumping into a chair or table. We disagree.

At trial, the emergency-room physician testified that the victim's wounds were "consistent with most likely some sort of blunt force trauma." During closing argument, the prosecutor stated,

> [The physician] testified that [the victim's] wounds were consistent with blunt force trauma, not a fist fight, not with bumping into a chair or a table, but with blunt force trauma. Blunt force trauma as inflicted with this pistol.

In reviewing the actual remarks in context, we find no grounds for reversal. The prosecutor was free to argue that the doctor's finding that the wounds were consistent with blunt force trauma confirmed the victims statement to the police as well as her written statement.

In any event, even if that it could be construed that the prosecutor was misstating the essence of the physician's testimony, the jury was properly instructed that it alone was to decide the facts of the case based on admissible evidence, where "[t]he lawyers' statements and argument are not evidence" and that the jury "should only accept things the lawyers say that are supported by the evidence or by your own common sense and general knowledge." Because "[i]t is well established that jurors are presumed to follow their instructions," *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), even if there were any inappropriate remarks, the instructions to the jury cured any error.

Next, defendant argues that the trial court erred in denying his motion to suppress the pistol and bullets that were found at the crime scene because they were obtained after an illegal search. A court's factual findings at a suppression hearing are reviewed for clear error, and the court's ultimate decision at the hearing is reviewed de novo. *Aldrich*, 246 Mich App at 116.

Both the United States and Michigan Constitutions protect individuals from unreasonable searches and seizures. US Const, Am IV; Am 14; Const 1963, art 1, § 11; see also *Slaughter*, 489 Mich at 310-311. The lawfulness of a search or seizure depends on its reasonableness, and a warrantless search is unreasonable unless there exist both probable cause and a circumstance establishing an exception to the warrant requirement. *People v Snider*, 239 Mich App 393, 406-407; 608 NW2d 502 (2000).

An established exception to the general warrant and probable cause requirements is a search conducted pursuant to consent. *People v Brown*, 279 Mich App 116, 131; 755 NW2d 664 (2008). Consent must come from the person whose property is being searched or from a third party who possesses common authority over the property. *Id*. The consent must be unequivocal,

specific, and freely and intelligently given based on the totality of the circumstances. *People v Frohriep*, 247 Mich App 692, 702; 637 NW2d 562 (2001). Here, the victim consented to the search of her apartment, and it was not disputed that the victim had such authority.

Furthermore, assuming arguendo that defendant was considered a co-tenant or a house guest, the search would still have been legal because a solitary co-inhabitant may properly consent to the search of shared premises. *Georgia v Randolph*, 547 US 103, 111; 126 S Ct 1515; 164 L Ed 2d 208 (2006), *Brown*, 279 Mich App at 131. While that consent must yield to the express refusal of another, present co-occupant, *Randolph*, 547 US at 115-116; *Brown*, 279 Mich App at 131-132, here, defendant, even though present, never expressed any refusal to the searching police. Therefore, the victim's consent was sufficient, and the trial court did not err in denying defendant's motion to suppress.

Defendant also argues that consent for the search was obtained at 8:55 a.m., which was after the search had allegedly begun at 8:30 a.m. The record established that complainant gave her consent at 8:55 a.m., but it contained no evidence of the precise time the search began. Defendant relies on police reports for his assertion, but those same reports also indicate that the search did not begin until the officers on the scene had been informed that the victim's consent had been obtained. Thus, we find this argument without merit.

Finally, defendant argues that he was denied his right of confrontation when the victim's written police statement was admitted while the victim testified that she could not remember the events that she wrote of in the statement. However, "a defendant's right of confrontation is not denied even if the witness, on cross-examination, claims a lack of memory." *People v Watson*, 245 Mich App 572, 584; 629 NW2d 411 (2001). Accordingly, we find no error.

Affirmed.

/s/ Patrick M. Meter
/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder