

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff- Appellee,

v

JEREMIAH LOVEBERRY,  
a/k/a JERIMIAH LOVEBERRY,

Defendant-Appellant.

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UNPUBLISHED  
February 28, 1997

No. 185902  
Recorder's Court  
LC No. 95-000615

Before: Corrigan, C.J., and Doctoroff and R.R. Lamb,\* JJ.

PER CURIAM.

Defendant appeals by right his jury trial conviction of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(c); MSA 28.788(3)(1)(c), kidnapping, MCL 750.349; MSA 28.581, assault with intent to commit criminal sexual conduct, MCL 750.520g(1); MSA 28.788(7)(1), felonious assault, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The court sentenced defendant to terms of imprisonment of two to fifteen years for the CSC II conviction, five to thirty years for the kidnapping conviction, four to ten years for the assault with the intent to commit criminal sexual conduct conviction, two to four years for the felonious assault conviction, and two years for the felony-firearm conviction. We affirm.

Defendant, the complainant's former boyfriend, abducted the complainant at gunpoint as she entered her car. While choking the complainant, defendant drove to his beauty salon, pointed the gun to her head and pushed her into a small room with a bed. Defendant took off the complainant's clothes, fondled her breast and touched the outside of her vagina.<sup>1</sup> Defendant pushed the complainant onto the bed and then masturbated until he ejaculated onto the complainant's thigh. Defendant then used a green washcloth to wipe himself and the complainant's thigh. Defendant released the complainant; the police captured him shortly thereafter.

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\* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant first contends that the trial court erred when it denied his motion for directed verdict on the charge of CSC I because the prosecution had presented insufficient evidence of penetration. We disagree.

We review a trial court's ruling on a motion for directed verdict by considering the evidence presented by the prosecution up to the time the motion was made in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Here, the record reflects that sufficient evidence existed that defendant penetrated the complainant's vagina. Although the complainant testified that no penile penetration had occurred, complainant's friend Brooks testified that shortly after the incident, the complainant told Brooks that defendant had inserted his fingers into the complainant's vagina. Therefore, because a rational trier of fact could have credited Brooks' testimony and found the sexual penetration element beyond a reasonable doubt, the trial court properly denied defendant's motion for directed verdict on the charge of CSC I. *People v Whitfield*, 425 Mich 116, 135; 388 NW2d 206 (1986).

Defendant next argues that the trial court abused its discretion when it admitted, under the excited utterance exception to the hearsay rule, statements made by the complainant to Brooks subsequent to her abduction and sexual assault. We disagree.

We review a trial court's decision whether to admit evidence for an abuse of discretion. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). An abuse of discretion occurs if, and only if, an unprejudiced person, considering the facts on which the trial court relied, would say there was no excuse or justification for the ruling. *Id.* "'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." MRE 801(c). Hearsay not falling under one of the recognized exceptions to the hearsay rule is inadmissible. MRE 802. To be admitted as an excited utterance under MRE 803(2): "[A] statement must meet three criteria: (1) it must arise out of a startling occasion; (2) it must be made before there has been time to contrive and misrepresent; and (3) it must relate to the circumstances of the startling occasion.'" *People v Straight*, 430 Mich 418, 424; 424 NW2d 257 (1988) (citation omitted).

"Properly understood, [the] requirement that the statement must 'be made before there has been time to contrive and misrepresent' is simply a reformulation of the inquiry as to whether the statement was made when the witness was still under the influence of an overwhelming condition." *Id.*, 425. Before the statement is admissible under MRE 803(2), however, some independent proof that the startling event took place must be in evidence. *People v Kowalak (On Remand)*, 215 Mich App 554, 559; 546 NW2d 681 (1996). That requirement can be satisfied with direct evidence or sufficient circumstantial evidence. *Id.* Additionally, although it is a factor to be considered, the fact that a statement was made in response to questioning does not necessarily disqualify it from being admissible under MRE 803(2). *People v Hackney*, 183 Mich App 516, 524; 455 NW2d 358 (1990).

In this case, the trial court properly admitted under MRE 803(2) the complainant's statements to Brooks. First, that a forcible abduction and sexual assault are startling events is beyond cavil, particularly, as here, where the crimes were committed while the assailant was wielding a gun. Second, given the complainant's physical and emotional state when Brooks found her, the two to three hours from the abduction until when she made the statements was not long enough to undermine their trustworthiness. *Straight, supra*, 430 Mich 425. That the complainant made the statements in response to Brooks' inquiry does not change that conclusion. *Hackney*, 183 Mich App 524. Third, the complainant's statements clearly related to her abduction and the sexual assault. The independent proof of the crimes included: (1) the complainant's boyfriend's testimony that he saw defendant abduct the complainant, (2) Brooks' testimony concerning the complainant's emotional state during their brief telephone conversation, and (3) the testimony of the complainant's neighbor about the complainant's physical and emotional state after the incident. Because sufficient evidence established a foundation for the admission of the complainant's statements under the excited utterance exception, the trial court did not abuse its discretion in admitting them.

Next, defendant contends that the trial court abused its discretion when it admitted those same statements because they were prior consistent statements made after the complainant had time to fabricate; thus, the statements improperly bolstered the complainant's credibility. We disagree. Because the complainant's statements were admissible under MRE 803(2), we need not decide whether they were admissible under MRE 801(d)(1)(B).

Defendant next argues that the trial court abused its discretion when it admitted a photograph of a green washcloth that police found in defendant's salon. Because defendant failed to object to the introduction of the green washcloth, defendant did not preserve this issue for review. *People v Dowdy*, 211 Mich App 562, 570; 536 NW2d 794 (1995).

Defendant next contends that he was denied the effective assistance of counsel when his counsel failed to object to the admission of the complainant's prior consistent statements through the testimony of Brooks. Defendant asserts that the court should have excluded the statements because the complainant made them after she had time and a motive to fabricate and they tended to bolster her testimony. We disagree. Because defendant did not move for a new trial or an evidentiary hearing, our review of this claim is limited to the facts in the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). A defendant must prove that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* A defendant can only overcome the presumption of effective assistance of counsel by showing that counsel's performance was deficient and that he was prejudiced as a result of that deficiency. *People v LaVearn*, 448 Mich 207, 217; 528 NW2d 721 (1995).

Here, defendant has failed to show that he was prejudiced by defense counsel's performance. Contrary to defendant's assertion, counsel objected to the admission of the complainant's prior

consistent statements, albeit not on the ground that they were inadmissible under MRE 801(d)(1)(B). Further, had defense counsel timely objected on that ground, the statements were admissible under MRE 803(2). Accordingly, defendant was not denied the effective assistance of counsel. *Stanaway*, *supra*, 447 Mich 687.

Finally, defendant contends that the trial court erred by not giving him credit for the time he served in jail between the time of his arrest and the day he was sentenced. Because defendant failed to object below, he has failed to preserve this issue for review. *Dowdy*, *supra*, 211 Mich App 570; *People v Connor*, 209 Mich App 419, 431; 531 NW2d 734 (1995).

Affirmed.

/s/ Maura D. Corrigan  
/s/ Martin M. Doctoroff  
/s/ Richard Ryan Lamb

<sup>1</sup> After the assault, the complainant told her friend that defendant had inserted his fingers into her vagina.