STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNNIE EUGENE CHOATE,

Defendant-Appellant.

UNPUBLISHED

No. 183553
Sanilac Circuit Court
LC No. 94-004144-AR

Before: Jansen, P.J., and Young and R.I. Cooper*, JJ.

COOPER, J. (concurring).

I respectfully disagree with that portion of the majority opinion which holds that the trial court erred when it admitted into evidence testimony from the school principal and the police officer that the deceased victim had told them the morning after the incident that "his father beat him." In particular, the majority argument that Robert had time to "contrive and misrepresent" under *People v Gee*, 406 Mich 279; 278 NW2d 304 (1979), does not negate the concept stated in *People v Straight*, 430 Mich 418; 424 NW2d 257 (1988), wherein Justice Boyle stated as follows:

> Logically there is always time to contrive whether the statement begins as the event is observed or is made ten minutes later. Properly understood, *Gee*'s 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 emotional condition. [*Straight, supra*, pp 424-425.]

Our situation involves a statement made the next morning at school some fourteen hours after the eleven-year-old victim had been hit eight to ten times. The mother was only nine feet away. She was attempting to sleep on a living room couch. She did not bother to look and see what was going on while the boy was being hit. The boy had been punished a half-year earlier when defendant used a belt on him. At school the next morning, the victim was upset enough to approach the principal in the hallway and interrupt the principal who was speaking to another teacher and say he had been beaten.

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

The police were called. Photographs verify the severity of the beating. The police officer described the boy as being determined and almost defiant.

I do not agree that the trial court abused its discretion when it concluded that the victim was still under the stress of the incident when he made the statement. Obviously he could not obtain solace from his mother the evening before. He interrupted the principal in the school hallway when the victim saw the principal the next morning. Being determined and defiant does not mean he was composed. It may indicate a state of fear, anger, and/or fixed distress. As stated in *People v Verburg*, 170 Mich App 490, 495; 430 NW2d 775 (1988), in its analysis of MRE 803(2):

> Obviously, time lapse is a factor bearing on admissibility, but the standard under the latter rule's express language is that time lapse will not alone render an excited utterance inadmissible so long as the declarant is still under the stress of the excitement caused by the event.

The boy easily could have been still feeling the pain of the beating the next morning when he spotted the principal. The photographs revealed identifiable marks on his buttocks. This may well have been the first person to whom he could express his distress. If he and his sister had not died some three days later in a fire, they could have testified regarding the event. Apparently, the school principal and the officer would be capable neutral witnesses as to what they were told. Interestingly, under current MRE 804(b)(6) (other exceptions), effective April 1, 1996, where the declarant is unavailable, the matter would quite probably be presently admissible as a "material fact having circumstantial guarantees of trustworthiness." The majority opinion legitimately and understandingly applies its interpretation under *Gee*, but I do not find that the trial court abused its discretion under the conceptual developing state of law indicated in *Straight* and *Verburg*.

/s/ Richard I. Cooper