STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD H. MOZHAM,

Defendant-Appellant.

UNPUBLISHED
May 22, 1998

No. 198661
Recorder's Court
LC No. 96-090005

Before: Whitbeck, P.J., and MacKenzie and Murphy, JJ.

PER CURIAM.

Defendant appeals by leave his district court conviction of aggravated assault, MCL 750.81a; MSA 28.276(1), and the order of the Detroit Recorder's Court denying defendant's motion for reversal and remand for a new trial. We reverse and remand for a new trial.

At defendant's bench trial, a Detroit police officer testified that on April 26, 1994 he responded to a report of a crime and discovered a female who had "been obviously beaten up by someone, severely bruised, almost unconscious." The police officer testified that the victim stated that defendant had beaten her with his fists and his feet and threatened her with a fork. Defendant denied inflicting the victim's injuries. Defendant represented himself at trial after the trial court found that defendant was not entitled to appointed counsel.

Defendant appealed to Detroit Recorder's Court on the grounds that the trial court failed to make an adequate inquiry into defendant's financial ability to hire an attorney, failed to make adequate assurances that defendant knowingly and voluntarily waived his right to counsel, and that defendant's conviction was based on improper hearsay testimony from the police officer. The Recorder's Court denied defendant's request for reversal and a new trial.

I. Adequate Inquiry as to Indigency

Defendant contends that the trial court erred in failing to conduct an adequate inquiry into defendant's alleged indigency pursuant to MCR 6.005(B). An indigent defendant has a right to appointed counsel whenever the offense charged is punishable by more than ninety-two days in jail.

MCR 6.610(D)(2)(a). Defendant was charged with, and convicted of, aggravated assault,

that is punishable by up to one year imprisonment. MCL 750.81a(1); MSA 28.276(1)(a). Therefore, defendant was entitled to appointed counsel if he were determined to be indigent. MCR 6.005(B) states that "[i]f the defendant requests a lawyer and claims financial inability to retain one, the court must determine whether the defendant is indigent." The determination of whether a defendant is indigent is guided by the following factors:

> (1) present employment, earning capacity and living expenses;
>
> (2) outstanding debts and liabilities, secured and unsecured;
>
> (3) whether the defendant has qualified for and is receiving any form of public assistance;
>
> (4) availability and convertibility, without undue financial hardship to the defendant and the defendant's dependents, of any personal or real property owned; and
>
> (5) any other circumstances that would impair the ability to pay a lawyer's fee as would ordinarily be required to retain competent counsel. [MCR 6.005(B).]

Trial courts determine a defendant's indigency case by case, by consideration of the defendant's financial ability in accordance with MCR 6.005(B). *People v Arquette*, 202 Mich App 227, 230; 507 NW2d 824 (1993).

The trial court abused its discretion by failing adequately to determine whether defendant was indigent. The trial court failed to consider the required factors, but rather summarily concluded that because defendant owned a bar, the trial court could not appoint counsel for him. The trial court then asked defendant if he wanted a jury or a nonjury trial. The trial court asked defendant no further questions regarding defendant's earning capacity, outstanding debts and liabilities, any additional assets, or whether defendant was receiving any public assistance. There is no support for the trial court's conclusion that because defendant owned a business he was able to afford an attorney. Such a conclusion would require an inquiry into the factors enumerated in MCR 6.005(B) to determine how much money, if any, defendant was earning from his business. The mere fact that defendant owned a bar does not *in itself* show that defendant had adequate funds to retain competent counsel.

Because the trial court failed to make an adequate inquiry into defendant's financial ability to hire an attorney in the course of denying him appointed counsel, we reverse defendant's conviction and remand for a new trial. *People v Gillsepie*, 42 Mich App 679, 681-682; 202 NW2d 552 (1972); *People v Rocha*, 13 Mich App 596, 597; 164 NW2d 680 (1968). Before defendant's new trial, a proper hearing should be held pursuant to MCR 6.005(B) regarding defendant's alleged indigency.

II. Knowing and Voluntary Waiver of Right to Counsel

Defendant argues that the trial court erred by failing to determine adequately whether defendant knowingly and voluntarily intended to proceed to trial without an attorney. Before a defendant's waiver of counsel is justified, trial courts must substantially comply with the substantive requirements set forth in

People v Anderson, 398 Mich 361; 247 NW2d 857 (1976), and MCR 6.005(D). *People v Adkins (After Remand)*, 452 Mich 702, 726; 551 NW2d 108 (1996). "Substantial compliance requires that the court discuss the substance of both *Anderson* and MCR 6.005(D) in a short colloquy with the defendant, and make an express finding that the defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures." *Id*. at 726-727. *Anderson* requires that before a defendant's request to proceed in pro per is granted, the following requirements must be met:

> First, the defendant's request must be unequivocal. [*Anderson, supra*] at 367. Second, the defendant must assert his right to self-representation knowingly, intelligently, and voluntarily. In assuring a knowing and voluntary waiver, the trial court must make the defendant aware of "the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." *Id*. at 368. Third, the court must establish that the defendant will not unduly disrupt the court while acting as his own counsel. *Id*. [*Adkins, supra* at 722.]

Additionally, MCR 6.005(D) states that the trial court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first:

> (1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and
>
> (2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

The trial court did not substantially meet the requirements of either *Anderson* or MCR 6.005(D). First, defendant's request to proceed without counsel was not unequivocal. Defendant stated that he had not hired a lawyer because he could not afford one. As discussed above, the trial court did not adequately determine whether defendant was, in fact, entitled to appointed counsel. When asked if he planned to represent himself, defendant replied "I guess I have to." Such a statement is far from the required unequivocal request. Indeed, it appears that defendant did *not* want to represent himself.

Next, there is no evidence that the trial court made defendant aware of the "dangers and disadvantages of self-representation" as required by *Anderson* and MCR 6.005(D)(1). The trial court informed defendant that an attorney would not be appointed to represent him and then asked defendant if he wished to proceed with a jury or a nonjury trial. The trial court did not give defendant an opportunity to attempt to retain counsel. MCR 6.005(D)(2) specifically requires the trial court to offer a defendant the opportunity to consult with a lawyer, whether retained or appointed, before waiving his right to counsel. Because the trial court failed to address the requirements of *Anderson* or MCR 6.005(D) and failed to make adequate assurances that defendant was asserting his right to self-representation knowingly, intelligently, and voluntarily, defendant did not effectively relinquish his right to counsel. *People v Blunt*, 189 Mich App 643, 650; 473 NW2d 792 (1991). This reinforces our

decision in Part I to reverse defendant's conviction and remand for a new trial. *Id*. at 651; *Rocha, supra* at 597.

III. Hearsay Testimony

Defendant contends that the trial court erred in admitting the hearsay testimony of a police officer regarding statements made by the victim. We address this issue because it may arise again at retrial. The police officer, the only witness presented by the prosecution, testified that the victim had identified defendant as her assailant. The police officer also testified that the assault had occurred at 12:30 p.m. and that he had spoken with the victim at 12:50 p.m. The Recorder's Court found that such statements were admissible under the excited utterance exception to the hearsay rule, MRE 803(2).

MRE 803(2) provides that the following is not excluded by the hearsay rule, even though the declarant is available as a witness:

> (2) *Excited Utterance*. 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.

Defendant argues that the twenty minutes that passed between the 12:30 p.m. assault and the 12:50 p.m. conversation between the victim and the police officer provided ample time for the victim to contrive and fabricate her statements. "While the actual lapse of time between the event and the statement is a significant factor, its significance depends largely on the character of the event." *People v Zysk*, 149 Mich App 452, 457; 386 NW2d 213 (1986). Indeed, in *People v Smith*, 456 Mich 543, 545; ___ NW2d ___ (1998), the Michigan Supreme Court concluded that a statement made about ten hours after an alleged startling event was properly admitted as an excited utterance. Much case law has repeated the principle that, to constitute an excited utterance, a statement must (1) arise out of a startling event; (2) be made before there was time to contrive and misrepresent; and (3) relate to the circumstances of the startling event. See, e.g. *People v Straight*, 430 Mich 418, 424; 424 NW2d 257 (1988); *People v Jensen*, 222 Mich App 575, 581-582; 564 NW2d 192 (1997). However, the Michigan Supreme Court, even prior to *Smith*, made clear that the second prong of this test cannot be taken literally as there is always some time in which fabrication may conceivably have occurred:

> 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*[1] 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* at 424-425.]

With regard to the possibility of fabrication, "it is the lack of capacity to fabricate, not the lack of time to fabricate, that is the focus of the excited utterance rule. The question is not strictly one of time, but of the possibility for conscious reflection." *Smith, supra* at 551. As made clear in *Smith* and *Straight*, statements that for hearsay evidence to properly be admitted under the excited utterance exception

there must be *no* possibility of fabrication are hyperbole. Rather, the risk of fabrication must be at "'an acceptable minimum.'" See *Smith, supra* at 551-552, quoting 5 Weinstein, Evidence (2d ed), § 803.04[4], p 803-24.

Although twenty minutes had passed between the time of the attack on the victim and the victim's statements to the police, the evidence shows that the victim remained in an excited state when her statements were made. The police officer testified that the victim was "extremely upset," "crying," and "almost to the point of being knocked out." The victim's statements clearly related to the assault she had endured and were made while she was still under the stress of the assault and while she was nearly unconscious. Such evidence is sufficient to establish that the victim was still under the stress of the attack when her statements were made and while she would have been unlikely to have the capacity to fabricate. Thus, the trial court did not abuse its discretion, *Smith, supra,* by admitting this testimony under the excited utterance exception.

We reverse and remand to the district court for a new trial. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Barbara B. MacKenzie
/s/ William B. Murphy

[1] *People v Gee,* 406 Mich 279; 278 NW2d 304 (1979).