STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 16, 1999
v	No. 203503 Kent Circuit Court
ANTHONY PEREZ VANCE, Defendant-Appellant.	LC No. 96-008883 FC

Before: Markey, P.J., and Saad and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial judge sentenced defendant to two years' imprisonment for the felony-firearm conviction, and 6 ½ to 10 years' imprisonment for each assault conviction, the latter to be served concurrently but only after the completion of the felony firearm sentence. We affirm.

Defendant, along with his codefendant in the trial below, was accused of shooting at Jamal Overstreet and Anthony McConer as they walked down the street toward defendant and a group of people with him. Once defendant and his codefendant started shooting, Overstreet and McConer ran in separate directions. Defendants chased McConer. When they caught him, they shot him in the legs and beat him. Police arrived at the scene to find McConer limping down the street. While they were treating him, Overstreet ran back to the scene. Although not allowed to talk to his wounded friend, Overstreet told police that defendants were their assailants, identifying them by name. According to the record, McConer overheard this conversation. About twenty minutes later, after being transported to the hospital, a wounded McConer told police that "Anthony" shot him. The trial court allowed the police officer to testify that McConer made this statement. Defendants objected that the testimony was hearsay, but the trial court concluded that the statement fell under the "excited utterance" exception to the hearsay rule. MRE 803(2). This defendant argues that the trial judge abused his discretion. We disagree.

We review for an abuse of discretion trial court's determination regarding the admission of evidence. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). Close questions on discretionary issues "should not be reversed simply because the reviewing court would have ruled differently." *Id.* "The trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion." *Id.* An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

Generally speaking, hearsay is not admissible evidence unless it falls under one of the exceptions to this general rule. MRE 802. "'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. Certain statements are not excluded by the hearsay rule, however, including excited utterances. MRE 803(2) defines an excited utterance a "[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." The question before us is whether McConer's statement to the police officer at the hospital was an excited utterance.

Our Supreme Court's recent decision in *People v Smith*, *supra*, disposes of this case. In *Smith*, the Court held that 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. While it is important to consider the time that passes between the startling event and the utterance, time is not dispositive. *Id*. "It is necessary to consider whether there was a plausible explanation for the delay." *Id.* Indeed, there is no express time limit. In *Smith*, the complainant waited ten hours before telling his mother that he had been sexually assaulted. "'Physical facts, such as shock, unconsciousness, or pain, may prolong the period in which the risk of fabrication is reduced to an acceptable minimum.'" *Id.* at 551-552, quoting 5 Weinstein, Evidence (2d ed), § 803.04[4], p 803-24. In *Smith*, the trial court's determination whether the declarant was still under the stress of the event was given wide discretion. *Smith, supra* at 552.

In this case, at the time it ruled on defendant's hearsay objection to the admission of McConer's testimony, the trial court had to decide whether McConer had the capacity to fabricate. The court therefore relied on Officer Bailey's testimony that Overstreet could not have spoken with McConer when the police were treating McConer at the crime scene. The trial court also concluded that McConer was still under the influence of an overwhelming emotional condition when he was interviewed at the hospital approximately twenty minutes later. *People v Straight*, 430 Mich 418, 425; 424 NW2d 257 (1988).

Unfortunately, the trial court did not have, as we do, the benefit of a complete record. Instead, it had to determine whether Overstreet *told* McConer his shooters' names before police interviewed him at the hospital. While additional testimony from both the police and McConer would later make it clear that McConer *overheard* Overstreet at the scene, the trial court did not have the benefit of this later testimony when it made its ruling, and defense counsel never renewed its hearsay objection once this evidence was presented. Given the information the court had at the time of the ruling, the trial court's finding that the out-of-court statement was an excited utterance fell well within its discretion.

Moreover, even if the trial court abused its discretion in admitting the testimony, we are hard-pressed to find that it could be anything more than harmless error. MCR 2.613(A); MCL 769.26; MSA 28.1096. A nonconstitutional error is harmless if it is highly probable that, in light of the strength and weight of untainted evidence, the tainted evidence did not contribute to the verdict. See *People v Harris*, 458 Mich 310, 320; 583 NW2d 680 (1998).[1] Plaintiff's counsel conceded in his closing argument that the wounded complainant had no personal knowledge of defendant's name when he gave his statement in the hospital, and that he had indeed, overhead Overstreet's conversation with the police at the scene. Despite this concession, there was sufficient, additional evidence that McConer and Overstreet could identify their shooters, which they did through a photo array, allowing the jury to find defendant guilty.

We affirm.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Jeffrey G. Collins

[1] Because the excited utterance exception to the general prohibition against hearsay is a firmly rooted exception, the statement's admission does not raise any constitutional concerns. See *Idaho v Wright*, 497 US 805, 817; 110 S Ct 3139; 111 L Ed 2d 638 (1990) ("Admission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded long standing judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements").