STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 5, 2000
v	No. 213541 Muskegon Circuit Court
WILLIAM HARRIS, Defendant-Appellant.	LC No. 98-041614-FC

Before: Jansen, P.J., and Hoekstra and Collins, JJ.

PER CURIAM.

Defendant was convicted by jury of first-degree murder, MCL 750.316; MSA 28.548, and of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to life imprisonment on the murder conviction and to two years' imprisonment on the felony-firearm conviction to be served consecutively with and preceding the term of life imprisonment. Defendant appeals as of right. We affirm.

Defendant's convictions originated from the events of January 7, 1998. On that date, defendant and another man entered the apartment of Milton Davis and demanded money from three men in the apartment. During the robbery, defendant shot one of the men in the back and that victim died shortly thereafter.

Defendant argues that the trial court abused its discretion by allowing a police officer to testify about the statements made by a four-year-old child who was at the apartment during the incident, but who the court found incompetent to testify at trial. The statements at issue were given shortly after the commission of the crime, and confirmed that two men had visited the victim's home twice during that evening, the latter time carrying guns. Considering the statements excited utterances of the child witness, the trial court permitted the police officer to testify regarding what the child said. See MRE 803(2); *People v Smith*, 456 Mich 543, 550-551; 581 NW2d 654 (1998).

On appeal, defendant does not argue that the child's statements should not have been considered excited utterances. Instead, defendant argues that the child's statements should not have been admitted because the child was found incompetent to testify at trial. In essence, defendant argues

that, similar to the child's testimony, the child's statements also should have been excluded as evidence at trial.

This Court reviews a trial court's determination of evidentiary issues for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999); *People v Layher*, 238 Mich App 573, 582; __ NW2d __ (1999). We find that the trial court did not abuse its discretion in allowing testimony on the child's statements. An excited utterance, which is "[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), is not excluded by the hearsay rule. See generally MRE 802 and 803. MRE 803(2) is devoid of a requirement that the declarant be competent to testify at trial before testimony may be given concerning the declarant's excited utterances. Further, this Court has consistently allowed such testimony without considering the competency of the declarant. See *Layher*, *supra* at 582-584 (statements by five-year-old girl admissible as excited utterances without consideration of declarant's competency); *People v Houghteling*, 183 Mich App 805, 806-808; 455 NW2d 440 (1990) (statements by five-year-old girl admissible as excited utterances without consideration of declarant's competency); *People v Edgar*, 113 Mich App 528, 530-534; 317 NW2d 675 (1982) (statements by four-year-old girl admissible as excited utterances without consideration of declarant's competency). Thus, competency of the declarant is not a consideration when dealing with excited utterances, and as a result, the trial court did not abuse its discretion in allowing testimony concerning the child's excited utterance in the present case.

Defendant next argues that the trial court abused its discretion by allowing police officers to testify about statements that defendant made to his mother in a telephone conversation in an effort to have her retain an attorney for him. At the time of the telephone call, defendant had been placed under arrest and had been informed of his *Miranda*[1] rights. Three police officers testified that they overheard defendant's statements to his mother, which included statements to the effect that he had made a mistake and had gotten caught. Defendant argues that admission of the statements violated his right to due process of law, and that the trial court abused its discretion by allowing the statements.

We conclude, however, that the trial court did not abuse its discretion in allowing this testimony. These communications were not privileged because defendant's mother was not acting as an agent for defendant in communicating with an attorney. In such instances, the attorney-client privilege attaches when the client's agent communicates directly with the client's attorney, not when the client talks with his own agent. See *Grubbs v K Mart Corp*, 161 Mich App 584, 589; 411 NW2d 477 (1987); *People v Cramer*, 97 Mich App 148, 165; 293 NW2d 744 (1980). Thus, defendant's due process rights were not implicated because he was not entitled to privacy when talking with his mother. See *People v Bell*, 131 Mich App 586; 345 NW2d 652 (1983).

Therefore, the trial court did not abuse its discretion when it admitted statements resulting from this conversation.

Affirmed.

/s/ Kathleen Jansen
/s/ Joel P. Hoekstra
/s/ Jeffrey G. Collins

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).