

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RUSSELL MURPHY,

Defendant-Appellant.

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UNPUBLISHED

February 23, 2001

No. 218199

Wayne Circuit Court

LC No. 98-005453

Before: Meter, P.J., and Neff and O’Connell, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of intentional discharge of a firearm at a dwelling or occupied structure, MCL 750.234b; MSA 28.431(2), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), entered after a jury trial. We affirm.

Andre Tobar testified that at 2:10 p.m. on April 14, 1998, he was in the living room of his home when a window was shattered by a gunshot. After lying on the floor for a moment, he looked out the door and saw defendant standing across the street holding a shotgun. Defendant was alone. Tobar examined the exterior of the home after the incident, and observed buckshot holes in the siding near the broken window. Alvin Tobar, Andre’s father, testified that he received a page from Andre between 2:20 p.m. and 2:30 p.m. on April 14, 1998. He returned the page, and Andre told him that defendant had fired a shot into the house. He stated that initially, Andre was talking so fast and in such an excited tone that he could not understand him. Over defendant’s objection, the trial court admitted the testimony regarding Andre’s statement under the excited utterance exception to the hearsay rule. MRE 803(2). Defendant’s mother testified that on April 14, 1998, defendant was at home with her at the time the incident occurred. The jury found defendant guilty as charged.

We review a trial court’s determination of an evidentiary issue for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995).

An excited utterance 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). Three criteria must be met before a hearsay statement can be admitted into evidence as an excited utterance: (1) the statement must have resulted from a startling event; (2) the statement must

have been made before the declarant had time to engage in contrivance or misrepresentation; and (3) the statement must relate to the circumstances of the startling event. *People v Straight*, 430 Mich 418, 424; 424 NW2d 257 (1988). An excited utterance is inadmissible absent independent proof, direct or circumstantial, that the underlying event took place. *People v Hendrickson*, 459 Mich 229, 238; 586 NW2d 906 (1998).

Defendant argues that the trial court abused its discretion by admitting Andre Tobar's statement as an excited utterance, and that the error cannot be considered harmless. We disagree and affirm defendant's convictions. The statement concerned a shot fired through the window of his home, which undoubtedly would qualify as a startling event. The amount of time lapse between the event and the resulting statement is relevant in determining whether the declarant was still under the stress of the event, but is not dispositive. Physical factors such as shock, unconsciousness, or pain may prolong the period in which the risk of fabrication is minimal and acceptable. *People v Smith*, 456 Mich 543, 553-554; 581 NW2d 654 (1998) (ten-hour delay did not render statement regarding sexual assault inadmissible); *People v Kowalak (On Remand)*, 215 Mich App 554, 558-559; 546 NW2d 681 (1996) (forty-five minute delay did not render statement regarding death threat inadmissible). The evidence showed that Andre's statement was related to the circumstances of the startling event, and was made at most twenty minutes after the event occurred. Alvin Tobar's testimony that initially, Andre spoke so fast and in such an excited tone that he could not be understood, indicated that Andre was still under the stress of the startling event when he made the statement. Independent evidence, in the form of the broken window and the buckshot holes in the siding, existed to show that the event took place. Admission of the statement under the excited utterance exception to the hearsay rule did not constitute an abuse of discretion. MRE 803(2); *Straight, supra*; *Hendrickson, supra*.

Furthermore, even if we were to conclude that admission of the statement constituted error, we would find such error to be harmless. During his direct testimony, Andre stated that seconds after the shot occurred, he looked out the door and saw defendant standing across the street holding a shotgun. From this evidence, the jury could reasonably infer that defendant fired the shot into the house. Admission of the statement as an excited utterance did not result in a miscarriage of justice. MCL 769.26; MSA 28.1096; *People v Lukity*, 460 Mich 484, 493; 596 NW2d 607 (1999).

Affirmed.

/s/ Patrick M. Meter  
/s/ Janet T. Neff  
/s/ Peter D. O'Connell