STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARTA SOLES,

Defendant-Appellant.

UNPUBLISHED
March 1, 2002

No. 227346
Wayne Circuit Court
LC No. 99-008177

Before: White, P.J., and Whitbeck, C.J., and Holbrook, Jr., J.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced, as a second habitual offender, MCL 769.10, to thirty to sixty years' imprisonment for the assault conviction, and two years' imprisonment for the felony-firearm conviction, the sentences to run concurrently. We affirm.

Defendant's only issue on appeal is that the trial court abused its discretion by admitting into evidence under MRE 803(2), the excited utterance exception, or alternatively under MRE 803(1), the present sense impression exception, the testimony of an officer as to statements made to him by a gunshot victim, identifying his assailant. We disagree.

Defendant claims that the admission of this testimony violated his Sixth Amendment right to confrontation. US Const, Am IV; see also Const 1963, art 1, § 20. When a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause usually requires a showing that he is unavailable, and that the statement bears an adequate indicia of reliability. *People v Meredith*, 459 Mich 62, 68; 586 NW2d 538 (1998). However, the Confrontation Clause is not violated if the statements fall within a "firmly rooted" exception to the hearsay rule, or if it bears an "adequate indicia of reliability." *People v Schutte*, 240 Mich App 713, 717-718; 613 NW2d 370 (2000). Both the excited utterance and the present sense impression exceptions to the hearsay rule are firmly rooted exceptions to said rule; therefore, defendant's rights under the Confrontation Clause have not been violated. *White v Illinois*, 502 US 346, 355, n 8; 112 S Ct 736; 116 L Ed 2d 848 (1992); *People v Hendrickson*, 459 Mich 229, 240; 586 NW2d 906 (1998).

Three requirements must be met in order for testimony to be introduced under the excited utterance exception: (1) the statement must arise from a startling event; (2) there must be no

time for contrivance or misrepresentation by the declarant at the time the statement is made; and (3) it must relate to the circumstances of the startling event. *People v Kowalak* (*On Remand*), 215 Mich App 554, 557-558; 546 NW2d 681 (1996). In this case, the victim was beaten and shot in the head, which was a startling event. The statements were made to the officer approximately nine minutes after he was dispatched, which eliminates the possibility of contrivance or misrepresentation. Additionally, when the statements were made, the victim remained in a panicked, upset, and angry state, and he gave sporadic answers. Finally, the statements identified the victim's assailant as defendant, which clearly relate to the circumstances of the startling event. Accordingly, the trial court properly admitted this testimony into evidence under MRE 803(2). Because we conclude the trial court properly admitted the evidence under MRE 803(2), we need not address whether admission was also proper under MRE 803(1).

Accordingly, the trial court did not abuse its discretion in admitting the officer's testimony under MRE 803(2). Further, even if the trial court did abuse its discretion, the admission of the evidence was harmless beyond a reasonable doubt because the trial court articulated other evidence supporting defendant's guilt. Defendant has failed to demonstrate that it is more probable than not that the error, if any, was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Affirmed.

/s/ Helene N. White
/s/ William C. Whitbeck
/s/ Donald E. Holbrook, Jr.