STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 25, 2003
v	No. 241586 Wayne Circuit Court
KEVIN M. THOMAS, Defendant-Appellant.	LC No. 01-009787-01

Before: Cooper, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of assault with intent to commit criminal sexual conduct in the second degree, MCL 750.520g(2), entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with assault with intent to commit sexual penetration, MCL 750.520g(1). Complainant, age ten at the time of the incident, testified that defendant, her mother's cousin who was staying with her family temporarily, exposed his penis and asked her to help him. Defendant tugged slightly on the sleeve of her jacket in an effort to move her toward him. Complainant testified that she feared that defendant would attempt to have sex with her. Complainant went to school and immediately reported the incident to Carol Hartman, a teacher. After complainant returned home from school she telephoned her mother at work and reported the incident. Tracy Thomas, complainant's mother, testified that complainant telephoned her and told her that defendant had exposed himself. Complainant related the entire sequence of events. Thomas stated that later in the day she confronted defendant, and he admitted that he asked complainant for oral sex. In response to a question from defense counsel regarding where defendant lived prior to staying with her family, Thomas stated that he lived in prison. The trial court instructed the jury on two occasions to disregard the remark. Complainant's father testified that defendant admitted that he wanted complainant to give him oral sex. Hartman (the teacher) testified that complainant approached her and told her that defendant had attempted to have sex with her. Complainant was crying and her voice was shaking.

Defendant moved for a mistrial on the ground that the jury was informed that he had been in prison. The trial court denied the motion, noting both that defense counsel had been cautioned at a sidebar to exercise care in questioning the witness, and that the instruction given to the jury cured any prejudice that resulted from the question.

The jury found defendant guilty of the lesser included offense of assault with intent to commit criminal sexual conduct in the second degree. The trial court sentenced defendant as a third habitual offender to two-and-one-half to ten years in prison, with credit for 230 days. The minimum term was within the applicable statutory sentencing guidelines.

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 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).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Carbin, supra* at 600. Counsel is presumed to have afforded effective assistance, and the defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant argues that trial counsel rendered ineffective assistance by failing to object to the admission of testimony from Tracy Thomas regarding complainant's statement to her about the alleged incident.[1] We disagree. Defendant failed to object to the admission of Thomas's testimony regarding complainant's statement; therefore, absent plain error, he is not entitled to relief. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Complainant's statement related to defendant's attempt to have her give him oral sex and would qualify as a startling event, especially to a child. The lapse of time between the event and the statement is relevant in determining whether the declarant was still under the stress of the event, but it 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. See, e.g., *People v Smith*, 456 Mich 543, 553-554; 581 NW2d 654 (1998), and *People v Kowalak (On Remand)*, 215 Mich App 554, 558-559; 546 NW2d 681 (1996).

Complainant spoke with Thomas approximately four hours after the incident occurred. Thomas's statement that complainant was nervous during the conversation indicated that

[1] Defendant essentially concedes that Hartman's testimony regarding complainant's statement was properly admitted under MRE 803(2). Presumably, defendant takes this position because complainant spoke to Hartman first in time.

complainant, who was ten years old at the time, was still under the stress of the startling event when she made the statement to Thomas, notwithstanding the fact that she had spoken to Hartman earlier in the morning. Cf. *People v Fenner*, 136 Mich App 45, 48-49; 356 NW2d 1 (1984). Complainant's statement related to the circumstances of the startling event. Furthermore, independent evidence, i.e., testimony from complainant, existed to show the event took place. Thomas questioned complainant about the incident; however, nothing indicates that Thomas was required to ask numerous or leading questions to elicit the information. Thomas's testimony regarding complainant's statement was admissible under MRE 803(2).[2] *Straight*, *supra*; *Hendrickson*, *supra*. Defense counsel did not render ineffective assistance by failing to make a meritless objection. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Even if we were to conclude that admission of Thomas's statement constituted error, we would find that no prejudice resulted from that error. Complainant testified regarding the event. The testimony of a sexual assault victim need not be corroborated. MCL 750.520h. The jury was entitled to find complainant's testimony credible and to accept it. See, generally, *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002). Defendant has not shown that but for the alleged error, the result of the proceedings would have been different. *Carbin*, *supra*. No plain error occurred. *Carines*, *supra*.

Prior consistent statements of a witness are generally not admissible as substantive evidence. *People v Lewis*, 160 Mich App 20, 29; 408 NW2d 94 (1987). Some exceptions are "(1) where a statement is used to rebut a charge of influence; (2) where there is a question whether a prior inconsistent statement was made; and (3) where a witness has been impeached with a charge of recent fabrication." *People v Stricklin*, 162 Mich App 623, 627; 413 NW2d 457 (1987); see also MRE 801(d)(1)(B);

Defendant asserts that he was denied a fair trial by the introduction of Thomas's testimony regarding complainant's statement because that testimony improperly bolstered complainant's testimony. We disagree. Defendant failed to object to the admission of Thomas's testimony on this or any other ground; therefore, absent plain error, he is not entitled to relief. *Carines*, *supra*. Thomas's testimony regarding complainant's statement was not offered for any reason permitted by MRE 801(d)(1)(B); however, as stated above, the testimony was admissible under MRE 803(2). No plain error occurred. *Carines, supra.*

The trial court's denial of a motion for a mistrial is reviewed for an abuse of discretion. A mistrial should be granted only for an irregularity that results in prejudice to the defendant and impairs his ability to get a fair trial. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003).

Defendant argues that the trial court abused its discretion by denying his motion for a mistrial on the ground that he was denied a fair trial when Thomas testified that he had been in

[2] Plaintiff's argument on appeal that Thomas's testimony was admissible under MRE 803A, dealing with a child's statement about a sexual act (and formerly known as the tender-years rule), is incorrect because that rule allows the admission of only the *first* corroborative statement about the sexual act.

prison. We disagree. Thomas's testimony came in response to a question from defense counsel. Immediately prior to the exchange, the trial court held a sidebar at which defense counsel was warned to be cautious in her questioning of Thomas on this issue. Defendant cannot now predicate error on a response he elicited after fair warning. To find otherwise would allow defendant to harbor error as an appellate parachute. *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995). Moreover, the trial court instructed the jury on two occasions to disregard the reference to defendant having been in prison. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). No irregularity resulted in prejudice that prevented defendant from getting a fair trial. *Alter*, *supra*.

Affirmed.

/s/ Jessica R. Cooper
/s/ Jane E. Markey
/s/ Patrick M. Meter