STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 17, 2004
v	No. 248200 Macomb Circuit Court
ROBERT JOHN MAZAK, Defendant-Appellant.	LC No. 2002-002860-FH

Before: Griffin, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction for assault with intent to do great bodily harm less than murder, MCL 750.84. We affirm.

On appeal, defendant first argues that inadmissible, harmful hearsay was improperly admitted into evidence and reversal is required. We disagree. We review a trial court's evidentiary decisions for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 288; 531 NW2d 659 (1995).

Defendant claims that the victim's statement to police that defendant was the perpetrator of his assault was not an excited utterance under MRE 803(2) because "the statement was not made before there was time to contrive and misrepresent and the statement was not spontaneous." Officer Jason Hansen testified that he responded to a 911 call and, upon his arrival to the scene of the incident, he found the victim covered in blood from head to toe, his t-shirt was ripped off, and he was moaning. Officer Hansen testified that the victim seemed to be going into shock, his face was completely pale, and he was gurgling and spitting up blood. The victim spoke and said, "It was Mazak. Mazak did this to me. You have to find him." Then the victim went in and out of consciousness but every time he woke up he said, "It was Mazak. You have to find him. He's still here. Mazak beat me. You have to find him." Officer Hansen testified that the victim's statements regarding Mazak were not in response to any questions about who caused his injuries but were spontaneous. Officer Hansen's primary concern was treating the victim's injuries and stabilizing him while he waited for the ambulance to arrive.

Three criteria must be met before a hearsay statement may be admitted into evidence as an excited utterance: (1) the statement must have resulted from a startling event, (2) been made before the declarant had time to engage in contrivance or misrepresentation, and (3) must relate to the circumstances of the startling event. *People v Straight*, 430 Mich 418, 424; 424 NW2d

257 (1988). Defendant claims that the victim's statement may have been made as long as two hours after the assault, thus, the victim had time to contrive this statement that was made to police in response to questioning. However, the pertinent inquiry is not whether there was time for the declarant to fabricate a statement, but whether the declarant was so overwhelmed that he lacked the capacity to fabricate. *People v Smith*, 456 Mich 543, 551; 581 NW2d 654 (1998). Here, the police responded to a 911 call at approximately 5:00 a.m. and there was testimony that the assault could have occurred less than an hour before. The victim was found moaning in pain, covered in blood, going into shock, and going in and out of consciousness. Physicians testified that the victim had very significant injuries, including a dislocated shoulder, severely fractured lower jaw, eighty to ninety percent of his teeth were fractured, and some teeth were dangling. Officer Hansen testified that he never asked the victim who caused his injuries but may have asked what happened to him. In light of all of these circumstances, we are confident that the risk of fabrication was reduced to an acceptable minimum and, thus, the victim's identification statement constituted a reliable and admissible excited utterance. See *id*. at 551-552.

Next, defendant argues that the trial court abused its discretion when it admitted testimony related to defendant's prior incarceration because its potential to prejudice exceeded its probative value. We disagree. As the trial court held, the victim's testimony that defendant was angry at him for not accepting his collect calls made while he was in jail was relevant to establish a reason for the crime. The jury must be given "an intelligible presentation of the full context in which the disputed events took place." *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996). Further, even if this brief testimony was inadmissible, in light of the weight of the other evidence, it did not constitute a miscarriage of justice warranting relief. See MCL 769.26; *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001).

Finally, defendant argues that his conviction was against the great weight of the evidence and the trial court abused its discretion when it denied defendant's motion for a new trial. See *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). We disagree. Defendant claims that the victim's testimony and another witness, Charles Cangelosi's, testimony was unreliable, incompetent, inconsistent, or impeached and, thus, could not support the verdict. But, the victim never wavered as to who perpetrated the assault against him—he consistently identified defendant, his acquaintance, as the attacker. And, Cangelosi, defendant's friend, clearly testified that he saw defendant strike the victim. It was within the province of the jury to accept or reject their testimony. See *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002). The evidence did not preponderate heavily against the verdict thus this issue is without merit. See *Gadomski, supra*.

Affirmed.

/s/ Richard Allen Griffin
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood