

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEVAR DARNELL SHANNON,

Defendant-Appellant.

UNPUBLISHED

August 10, 2004

No. 250164

Ingham Circuit Court

LC No. 02-000782-FC

Before: Murray, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

Defendant appeals of right his conviction following a jury trial for assault with intent to commit murder, MCL 750.83; first-degree home invasion, MCL 750.110a(2); and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to concurrent terms of 9½ to 25 years in prison for the assault conviction and 7 to 20 years in prison for the home invasion conviction, to be served consecutively to a term of 2 years in prison for the felony-firearm conviction. We affirm.

This case arose when defendant broke into the victim's house, pulled the victim out of a bathroom where he was hiding, and shot him. The victim testified that he borrowed \$1100 from defendant to buy marijuana. A friend of the victim's, James Crawford, also owed defendant money, and they tried to repay part of their debt with a gun. Crawford had also given defendant some identification and credit cards as collateral for the loan.

A week before the shooting, the victim was talking on the phone with a friend when he put her on hold because someone was at the front door. It was defendant. He entered the house, put a gun to the victim's head, and dragged him down into the basement. Defendant told the victim that if he did not produce the owed money he would kill him. The victim emptied his pockets, and defendant took the victim's keys, and left. The victim called back his friend, who had hung up by this time, and anxiously told her about defendant's actions, and asked her for money.

A week later, the victim heard noises like someone was breaking into the house, so he hid in his bathroom. Defendant found him and dragged him into the kitchen. Despite the victim's protests that he would pay the money, defendant shot the victim in the chest. The victim heard another shot, but made his way upstairs to his roommate, who called the police. The victim initially told his roommate that someone else shot him, but immediately amended his story and

accused defendant. When police arrived, they noticed the victim's keys still in the door. The victim told police that defendant shot him. Police searched defendant's home and found the identification and other collateral Crawford provided defendant. The other individual the victim initially accused had an alibi.

Defendant first argues that he was denied a fair trial when the victim attempted to assert his Fifth Amendment privilege. Defendant lacks standing to complain that the trial court improperly denied the victim's request to assert the privilege. *People v Poma*, 96 Mich App 726, 730; 294 NW2d 221 (1980). Moreover, before attempting to assert the privilege, the victim in this case repeatedly acknowledged that he simply did not wish to testify because he feared violent retribution on the street. Ordinarily, when the court is "confronted with a potential witness who is intimately connected with the criminal episode at issue, protective measures must be taken," including a determination, outside the jury's presence, of whether the witness may properly assert the privilege. *Id.* at 732. However, the witness was the victim in this case, not "a person (co-defendant, accomplice, associate, etc.) likely to be thought by the jury to be associated with the defendant in the incident or transaction out of which the criminal charges arose." *Commonwealth v DuVal*, 453 Pa 205, 217; 307 A2d 229 (1973). Therefore, defendant fails to demonstrate any risk that the jury found him guilty by association. Furthermore, the victim, who had no cognizable Fifth Amendment ground for maintaining his silence, eventually testified. Therefore, the precautions outlined in *Poma* simply do not apply, and the trial court did not err when it extracted the testimony over the witness's protests and without a special hearing.

Next, defendant claims that the victim lacked the sense of obligation to testify truthfully as MRE 601 requires, invalidating the prosecutor's strongest evidence. We disagree. Defendant failed to challenge the competence of the witness below, and, given the victim's stated fear of retaliation, there is little chance that the victim wanted to lie his way into ill favor with defendant and his associates. Therefore, defendant fails to demonstrate any plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Furthermore, because defendant's competency argument lacks any factual or legal foundation, defendant's counsel was not ineffective for failing to raise it.

Defendant also argues that the victim's testimony was unreliable and uncorroborated, so we should essentially strike it on appeal. We disagree. Not only do the facts in the record contradict defendant's premise, but we leave such questions of credibility to the trier of fact. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). The victim's reluctance to testify and his testimonial inconsistencies affected his credibility, not his competence. See *People v Edgar*, 113 Mich App 528, 535; 317 NW2d 675 (1982). Therefore, the testimony was properly offered and provided sufficient basis for the jury's verdict.

Next, defendant argues that the trial court improperly admitted hearsay testimony under MRE 803(2). We disagree. We review for abuse of discretion a trial court's determination of an evidentiary issue. *People v Smith*, 456 Mich 543, 549-550; 581 NW2d 654 (1998). Excited utterances are not excluded by the hearsay rule, even if the declarant is available as a witness. MRE 803(2). For a statement to be admitted into evidence as an excited utterance there must be a startling event, and the "resulting statement" must be made "while under the excitement caused by the event." *Smith, supra* at 550.

Here, the victim's friend testified about the occasion when the victim placed her on hold, received death threats from defendant, and then called her back moments after defendant left. The victim's friend testified that he sounded frightened and told her that defendant came into his house, put a gun to his head, stated that he wanted his money, and took his keys. Here, the victim was still under the excitement of being threatened at gunpoint by defendant. This startling event was supported by independent evidence, namely the victim's testimony at trial. *People v Kowalak (On Remand)*, 215 Mich App 554, 559; 546 NW2d 681 (1996). Therefore, the trial court did not abuse its discretion when it admitted the hearsay testimony.

Defendant next argues that the trial court's jury instruction coerced the jury into returning a verdict. We disagree. Contrary to defendant's assertions, the trial court is not required to use the standard language regarding deadlock. *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985). Coercion, not the specific language of the instruction, is the relevant inquiry. *People v Hardin*, 421 Mich 296, 313; 365 NW2d 101 (1984). Here, the trial court told the jury members to keep an open mind, but not to give up their own opinions. The trial court did not coerce or threaten the jury into reaching a decision. Therefore, defendant has failed to show any error.

Finally, defendant claims that the cumulative effect of the errors at trial denied him a fair trial. However, because defendant has not established any error, his cumulative error argument fails.

Affirmed.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Peter D. O'Connell