STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH LLOYD FIELDS,

Defendant-Appellant.

UNPUBLISHED
December 19, 2006

No. 265139
Wayne Circuit Court
LC No. 05-002559-01

Before: Jansen, P.J., and Sawyer and Bandstra, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of extortion, MCL 750.213, and third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(b)(force or coercion). Defendant was sentenced as a habitual offender, MCL 769.11, to concurrent prison terms of four-and-one-half to twenty years for the extortion conviction and 75 to 180 months for the CSC III conviction. He appeals as of right. We affirm.

Defendant first argues that complainant's hearsay statements were not admissible as prior consistent statements because they were introduced to bolster his credibility and did not fall within any recognized exception permitting their introduction. Defendant also argues that the statements were not admissible as excited utterances. We agree that the statements are not admissible as prior consistent statements. However, we disagree with defendant's argument that they are not admissible as excited utterances.

To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal. MRE 103(a)(1); *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994). In this case, defendant did not object to the admission of the relevant testimony at trial and, therefore, did not preserve the evidentiary issue for review. Therefore, appellate review is limited to whether the admission of the evidence constituted plain error that affected defendant's substantial rights. *People v Spanke*, 254 Mich App 642, 644; 658 NW2d 504 (2003).

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. MRE 801(c). Hearsay is not admissible unless the rules of evidence provide otherwise. MRE 802. One exception to the hearsay rule is for an excited utterance. MRE 803(2). An excited utterance is defined as 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." *Id*. The rationale behind the excited utterance exception is that "it is perceived that a person who is still under the 'sway of excitement precipitated by an external startling event will not have the reflective capacity essential for fabrication so that any utterance will be spontaneous and trustworthy.' " *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998), quoting 5 Weinstein, Evidence (2d ed), § 803.04[1], p 803-19.

Our Supreme Court has established "two primary requirements for excited utterances: 1) that there be a startling event, and 2) that the resulting statement be made while under the excitement caused by the event." *Smith, supra* at 550, citing *People v Straight*, 430 Mich 418, 424; 424 NW2d 257 (1988). In regard to the second requirement, the focus should be on whether there was a "lack of capacity to fabricate" and not "the lack of time to fabricate." *Smith, supra* at 550-551. However, "the time that passes between the event and the statement is an important factor to be considered in determining whether the declarant was still under the stress of the event when the statement was made, [but] it is not dispositive." *Id*. at 551. Another factor in determining if the statement was made while under the excitement caused by the event is whether it was made in response to questioning. *Id*. at 553. Again, the inquiry is "whether it appears that the statement was the result of reflective thought." *Id*.

In *Straight, supra* at 418, our Supreme Court held inadmissible as an excited utterance the testimony of the five-year-old alleged victim's statements that were made during a physical examination one month after the alleged sexual assault occurred. The Court stated that "[c]ertainly the declarant was under stress, but one cannot safely say that this stress resulted from the alleged assault rather than from a combination of the medical examination and repeated questioning" by her parents. *Id*. at 426.

In *Smith, supra* at 543, the complainant, a sixteen-year-old male, was allegedly sexually assaulted by the defendant, a thirty-one-year-old bodybuilder, who outweighed the complainant by about one hundred pounds. *Id*. at 545-548. According to the complainant, the defendant held scissors to the complainant's neck to force compliance. *Id*. at 548. The defendant dropped the complainant off at his home at approximately 1:45 a.m. *Id*. The complainant was "tearful and emotional," and his mother "inquired if anything was wrong," to which he replied, "'Oh, mom, leave me alone.' " *Id*. The complainant took an hour-long bath and remained very emotional throughout the morning until he uncharacteristically went to sleep at 5:30 a.m. on the living room couch. *Id*. At 11:00 a.m. that same morning the complainant awoke and requested that his father buy him a weight bench. *Id*. at 548-549. The complainant started crying and rocking back and forth. *Id*. at 549. His mother asked him what was wrong and he responded, "Oh, mom, I had to be sucked off last night before I can [sic] even come home." The defense counsel objected to this statement, but the court admitted it as an excited utterance. *Id*. at 549. Our Supreme Court held that the complainant's "continuing level of stress arising from the assault . . . precluded any possibility of fabrication." *Id*. at 553.

There is no question that a sexual assault is a startling event. The issue is whether complainant made the statements while still under the stress caused by the event. Complainant's demeanor on the telephone was described as "very frantic" by his father. In the car, complainant was "very scared" and a "little incoherent," and he testified that he "couldn't really say nothing" and did not "know if [he] was in shock or what." When he got home, complainant "broke down" and told his parents what had happened. Under the rationale of *Smith*, it is unlikely that

complainant had the mental capacity to fabricate the statements or engage in reflective thought during this time given his demeanor and the fact that he was extremely intoxicated.

This case differs markedly from *Straight* in that the inadmissible statements in *Straight* were made one month after the sexual assault had occurred and were in response to repeated specific questioning by the alleged victim's parents. See *Straight, supra* at 421 & n 1. In contrast, complainant's statements in this case were made some hours after the alleged sexual assault and in response to his father's open-ended question, "what the problem was." Indeed, this case presents more compelling circumstances to admit the hearsay statements than in *Smith* because considerably less time had passed between the alleged sexual assault and the statements. In *Smith*, the complainant came home, was out of the defendant's presence, received an inquiry from his mother, took an hour long bath, went to sleep, and then made the hearsay statements. Here, complainant was out of the presence of defendant for less than an hour before he made most of the statements. Accordingly, there was no plain error in admitting the hearsay testimony at issue because it was admissible under the excited utterance exception.

Defendant next argues that his trial counsel was ineffective for failing to object to the hearsay statements discussed above. We disagree. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2004). To succeed on a claim of ineffective assistance of counsel where the issue is counsel's performance, a defendant must satisfy a two-prong test. First, a defendant needs to show that the acts of trial counsel did not meet an objective standard of reasonableness without the benefit of hindsight. *Strickland v Washington*, 466 US 668, 691; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). Second, the defendant must prove that the unreasonable conduct was prejudicial, i.e., "defendant must show that but for counsel's error there is a reasonable probability that the result of the proceeding would have been different and that the result of the proceeding was fundamentally unfair or unreliable." *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996). As explained previously, defense counsel's objection to the hearsay statements would have been futile because they are admissible under the excited utterance exception. Thus, trial counsel did not fall below an objective standard of reasonableness in failing to object to this evidence.

Defendant also argues that he is entitled to resentencing because he was sentenced before a different judge than the judge who presided at his bench trial and did not receive a sentence that was personalized to the circumstances of his case. "Generally, a defendant should be sentenced by the judge who presided at his trial, provided that the judge is reasonably available." *People v Pierce*, 158 Mich App 113, 115; 404 NW2d 230 (1987); see also *People v Clemons*, 407 Mich 939; 291 NW2d 927 (1979). However, here, defendant has not brought forth any facts in his brief alleging that the trial judge was reasonably available to preside at the sentencing hearing and no such facts are apparent from review of the record. Therefore, defendant's argument regarding the different judge at sentencing fails because he has not shown plain error, i.e., that it is clear the judge at trial was reasonably available.

Defendant next claims there were no facts found at trial that indicated complainant suffered psychological injury requiring counseling, and the court's scoring of this variable violates the principles of *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), and its progeny. More specifically, defendant claims the sentencing court cannot depart above the appropriately scored minimum guidelines based on facts not found beyond a

reasonable doubt at trial. Due process requires that, other than as to the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum be admitted by the defendant or submitted to a jury and proved beyond a reasonable doubt, *Apprendi*, *supra*, 530 US at 490; *People v Drohan*, 475 Mich 140, 148, 155-156; 715 NW2d 778 (2006), and, as to determinate sentences, the relevant statutory maximum is the maximum which may be imposed without any additional findings, *Blakely v Washington*, 542 US 296, 303-304; 124 S Ct 2531; 159 L Ed 2d 403 (2004). This limitation on factual findings applies to determinate statutory sentencing and does not affect the indeterminate sentencing embodied in the Michigan sentencing guidelines. *People v McCuller*, 475 Mich 176, 180; 715 NW2d 798 (2006); *Drohan*, *supra* at 160, 164. Therefore, defendant's claim that the sentencing court scored the minimum sentencing guidelines based on facts not found beyond a reasonable doubt at trial in violation of the Sixth Amendment fails.

Finally, defendant claims his sentence was not individualized because the sentencing judge adopted a policy to score OV 4 for any forcible rape. Ten points are appropriate for OV 4 where the defendant caused "[s]erious psychological injury requiring professional treatment . . . ." MCL 777.34(1)(a). The statute also instructs, "Score 10 points if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive." MCL 777.34(2). Accordingly, this Court has held that "[t]here is no requirement that the victim actually receive psychological treatment" after being sexually assaulted. *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004), lv gtd 474 Mich 1099 (2006). This Court further stated that "[b]ecause the victim testified that she was fearful during the encounter with defendant, we find that the evidence presented was sufficient to support the trial court's decision to score OV 4 at ten points." *Id*. Thus, there was sufficient evidence to support the sentencing court's scoring of OV 4 given the testimony of the complainant's mother at sentencing as to his psychological damage. Because an objection to the scoring of OV 4 and to the alleged violation of scoring OV 3, OV 4, and OV 10 in violation of *Apprendi* and *Blakely* would have been meritless, defense counsel was not constitutionally ineffective at sentencing.

Also, the sentencing judge did not adopt a policy that removed his discretion to individualize defendant's sentence as defendant contends. Defendant asserts that the sentencing judge's following statement adopts a policy of scoring OV 4 anytime there is a forcible rape:

> So I'm thinking that any time you're forced to do something, which you claim are nasty facts and nasty situations, that being forced to do the nasty has to have some sort of effect on you, whether you're high or whether you're sober; and that in the report itself it says that he was emotionally and physically scarred as a result of the instant offense. Responsible for the medical bills. I think my discretion would say that is there something objective that you can point to or that can be pointed to that suggests that this person may require professional treatment. And my answer to that is yes. Yes.

The sentencing judge's language above indicates that he did not adopt a policy that removed his discretion to tailor the sentence to defendant's circumstances. The use of "he," "instant offense," and "this person" demonstrates that the sentencing judge was referring to complainant specifically in this situation and that he was not adopting any sort of policy.

Defendant cites *People v Chapa*, 407 Mich 309; 284 NW2d 340 (1979), for the proposition that the sentencing judge adopted a policy of presuming psychological injury anytime there is a sexual assault. Defendant's reliance on this case is misplaced. *Chapa* stands for the proposition that a county policy of being severe with drug dealers cannot remove the sentencing court's discretion to individualize the defendant's sentence to his specific circumstances. *Id*. at 310-311. This Court distinguished *Chapa* from a situation where a single judge admitted to taking a " 'hard attitude' toward narcotic dealing . . . ." *People v Hooks*, 101 Mich App 673, 681-682; 300 NW2d 677 (1980). *Hooks* is distinguishable from *Chapa* because it involved a judge who tended to be more severe on a certain issue whereas in *Chapa* "a local policy of mandatory prison terms for heroin dealers prevented the judge from exercising his sentencing discretion." *Hooks, supra* at 682.

Hooks undermines defendant's assertion that "[i]t matters not whether a sentencing policy is set by a group of judges as in *Chapa*, or is a policy of a single judge; a policy represents a failure to individualize sentence [sic] and constitutes a reversible failure to exercise discretion." The sentencing judge's determination that the victim suffered psychological injury did not remove his ability to exercise discretion and individualize defendant's sentence as occurred in *Chapa*. Complainant's mother testified at sentencing that after her son was "beaten and raped by someone he thought was a lifelong friend, he now trusts no one." The sentencing judge specifically discussed defendant's situation at length in the sentencing hearing. This is different from *Chapa* where the sentencing judge merely deferred to the county policy of maximizing the sentence of drug offenders.

Affirmed.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Richard A. Bandstra