STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 7, 2013
v	No. 308620 Saginaw Circuit Court
SIMMION MARQUISE BROWN, Defendant-Appellant.	LC No. 11-035422-FC

Before: MURRAY, P.J., and MARKEY and WHITBECK, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions following a jury trial of assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, carrying a firearm with unlawful intent, MCL 750.226, and three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm.

The charges arose out of a nonfatal shooting on Christmas Day 2010. The victim identified defendant as the shooter at trial. In addition, three separate hearsay statements made by the victim after the shooting identifying defendant as the shooter were admitted as excited utterances. Defendant presented an alibi defense through his cousin, who testified that he was at a family gathering when the shooting occurred. In rebuttal, the prosecutor presented the testimony of defendant's aunt to contradict the timeline set forth by defendant's cousin. Following the testimony of defendant's aunt, the prosecutor called a police detective to rebut the aunt's trial testimony.

Defendant first argues that the trial court erred in admitting the testimony of the detective to "impeach" or "rebut" the testimony of defendant's aunt. We agree, but conclude that the error was harmless. We review a trial court's decision with respect to the admission of rebuttal testimony for an abuse of discretion. *People v Steele*, 283 Mich App 472, 485-486; 769 NW2d 256 (2009). "An abuse of discretion occurs . . . when the trial court chooses an outcome falling outside this principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

"Rebuttal evidence is limited to refuting, contradicting, or explaining evidence presented by the opposing party." *People v Humphreys*, 221 Mich App 443, 446; 561 NW2d 868 (1997). Further, "[t]he prosecution cannot introduce evidence on rebuttal unless it relates to a substantive rather than a collateral matter." *Id.* "[T]he test of whether rebuttal evidence was properly

admitted is . . . whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant." *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996).

Generally, "evidence of a prior inconsistent statement of the witness may be admitted to impeach a witness even though the statement tends directly to inculpate the defendant." *People v Kilbourn*, 454 Mich 677, 682; 563 NW2d 669 (1997).[1] However, *Kilbourn* Court stated, citing *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994), that the prosecution "cannot use a statement that directly tends to inculpate the defendant under the guise of impeachment when there is no other testimony from the witness for which his credibility is relevant to the case." *Id*. *Kilbourn* described the *Stanaway* rule as follows:

> [I]mpeachment should be disallowed when (1) the substance of the statement purportedly used to impeach the credibility of the witness is relevant to the central issue of the case, and (2) there is no other testimony from the witness for which his credibility was relevant to the case. [*Kilbourn*, 454 Mich at 683.]

Kilbourn observed that the *Stanaway* rule is "narrower than the similar rule in the federal courts" because in the federal courts, "impeachment may not be used as a subterfuge to place otherwise inadmissible hearsay before the jury." *Kilbourn*, 454 Mich 684 n 2. The *Stanaway* rule, in contrast, "is limited to hearsay statements that are relevant to the central issue of the case[.]" *Id*.

Here, the detective's testimony was improper impeachment testimony because it violated the two-part *Stanaway* rule as set forth in *Kilbourn*. First, the detective's testimony impeaching the aunt's testimony was "relevant to the central issue of the case" because it addressed defendant's alibi. *Kilbourn*, 454 Mich at 683. As previously noted, defendant's alibi was his only defense to the charges. Second, there was no other testimony from defendant's aunt "for which [her] credibility was relevant to the case." *Id*. The aunt's testimony was only relevant because she explained defendant's whereabouts on Christmas Day, i.e., his alibi. Third, the detective's rebuttal testimony impeached the aunt's testimony, i.e., evidence introduced by the prosecutor, not defendant. Thus, the trial court abused its discretion in admitting the testimony.

As noted earlier, however, after reviewing the record we conclude that the error was not outcome determinative. See *People v Houston*, 261 Mich App 463, 466; 683 NW2d 192 (2004) aff'd 473 Mich 399 (2005) ("A preserved nonconstitutional evidentiary error will not merit reversal unless it involves a substantial right, and, on review of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome-determinative."). The prosecutor argued during closing and rebuttal that defendant had a motive to shoot the victim because he was offended when he was refused a cigarette earlier in the day. The prosecutor emphasized the victim's in-court identification of defendant, as well as his hearsay statements made after the shooting identifying defendant. In contrast, the prosecutor only briefly referenced defendant's aunt and the detective's rebuttal testimony during his rebuttal argument, and only then to note that defendant's aunt did not tell the detective about dinner on Christmas Day.

[1] Under MRE 607, the prosecution may impeach its own witness. *Kilbourn*, 454 Mich at 682.

Moreover, the detective's testimony only served to undermine the credibility of the aunt's testimony, and the prosecutor had already directly questioned defendant's aunt about her conversation with detectives on the night of December 25. Thus, the detective's testimony was mostly cumulative to the prosecutor's examination of defendant's aunt; the detective's testimony did not present any significant new facts to the jury. The admission of these statements was not outcome determinative, and thus the error was harmless.

Defendant next argues that the trial court erred in admitting the testimony of a second detective who indicated that another detective was "familiar" with defendant. "Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. The testimony was relevant because it explained why detectives returned to the police station to create photograph lineups for examination by the victim. While the relevance was minimal, it nevertheless showed the jury how and why the detectives proceeded with the investigation on the day of the shooting. See *People v Aldrich*, 246 Mich App 101, 115; 631 NW2d 67 (2001) ("[A] jury is entitled to hear the 'complete story' of the matter in issue."). Thus, the second detective's testimony was relevant.

Still, relevant evidence may be excluded when it is "unfairly prejudicial." *People v Danto*, 294 Mich App 596, 600; 822 NW2d 600 (2011). "Unfair prejudice may arise where considerations extraneous to the merits of the case, such as jury bias, sympathy, anger, or shock, are injected." *Id*. The second detective's testimony was not unfairly prejudicial for at least two reasons. First, there is nothing in the statement, "[the detective] was familiar with him," that suggests a history of criminal activity by defendant. The other detective could have known defendant in a personal or professional capacity wholly unrelated to criminal activity. Second, defendant conceded at trial that he had previously been convicted of a felony prohibiting him from legally possessing a firearm.

Finally, defendant argues that the trial court erred in admitting three separate hearsay statements made by the victim identifying him as the shooter. The trial court admitted the three statements based on its finding that they were all excited utterances. Under MRE 803(2), ordinarily inadmissible hearsay may be admissible as an "excited utterance." *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). MRE 803(2) defines "excited utterance" 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." Thus, an excited utterance is admissible when (1) there is a startling event, and (2) the resulting statement is made while under the excitement caused by the event. *Id.* at 550. As we have previously noted, the statement must also relate to the startling event. *People v Verburg*, 170 Mich App 490, 495; 430 NW2d 775 (1988).

There is no dispute that a startling event (i.e., the shooting) occurred, nor is there any dispute that the challenged statements related to the startling event. Thus, the issue is whether the challenged statements were made while the victim was under the excitement caused by the startling event. They were if "the statement was made before there was time to contrive and misrepresent[.]" *Smith*, 456 Mich at 550.

Defendant specifically challenges three separate statements in evidence identifying him as the perpetrator: (1) the testimony of the victim's then-girlfriend that the victim told her in his

bedroom that defendant shot him; (2) the 911 recording where the victim is heard stating that defendant shot him; and (3) the testimony of the victim's daughter that the victim told her in the hospital that defendant shot him.

The first two hearsay statements identified above were properly admitted as excited utterances because the victim did not have time to "contrive and misrepresent." *Smith*, 456 Mich at 550. Testimony showed that the statements were made within minutes after the shooting. Given the victim's physical condition after the shooting, as well as the respective testimony of his daughter and then-girlfriend indicating that he was emotionally distraught, the trial court did not abuse its discretion in admitting this testimony under the excited utterance exception to the hearsay rule.

Further, although the third hearsay statement was made some time after the shooting, we conclude that the trial court did not abuse its discretion in admitting it as an excited utterance. "Though 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, it is not dispositive." *Smith*, 456 Mich at 551. The victim's daughter testified that the victim was in poor condition and "had tears down his face" when he told her at the hospital that defendant was the shooter. This testimony suggests that the victim was still under the excitement of the startling event when he made the statement to his daughter. Given the victim's serious medical condition and drug treatment at the time of the statement, *id*. at 551-552, we conclude that the trial court did not abuse its discretion in admitting the victim's statement to his daughter in the hospital as an excited utterance.

Affirmed.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ William C. Whitbeck