

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WALTER ANDREWS,

Defendant-Appellant.

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UNPUBLISHED

October 4, 1996

No. 182109

LC No. 94000975

Before: Saad, P.J., Corrigan and R.A. Benson,\* JJ.

PER CURIAM.

Defendant appeals by right his convictions by jury of first-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). We affirm.

On January 3, 1994, defendant's roommate told him that the victim had stolen \$300 and pills from her. Defendant and his brother armed themselves with guns and searched for the victim at the homes of the decedent's relatives and friends. Defendant and his brother found the victim in a car. The victim ran from the car and witnesses then heard gunshots. The decedent's body was found two days later in a nearby alley. Defendant subsequently admitted to his roommate that he had shot at the decedent that night, but denied hitting him.

Defendant first argues that the trial court abused its discretion in limiting testimony related to defendant's theory of defense and thereby denied defendant the right to present a defense and to confront the witnesses against him. We disagree. Although a defendant has the constitutional right to present a defense, this right may be limited by rules designed to protect the integrity and reliability of the evidence presented. *People v Hayes*, 421 Mich 271, 278-280; 364 NW2d 635 (1984). Further, a defendant's right to present a defense does not include the right to cross-examine witnesses on irrelevant issues. *People v Hackett*, 421 Mich 338, 344; 365 NW2d 120 (1984). The excluded cross-examination questions were either irrelevant to the defense theory, were made irrelevant by the

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\* Circuit judge, sitting on the Court of Appeals by assignment.

prior testimony of the witnesses, or called for the witness to testify to hearsay to justify the excluded impeachment. Therefore, the trial court did not abuse its discretion in limiting defendant's cross-examination.

Defendant next argues that the trial court erred in admitting a codefendant's statements into evidence against defendant. Out-of-court statements made by an accomplice or codefendant are admissible under an exception to the hearsay rule if the codefendant made the statements in furtherance of, and during the course of, a conspiracy. MRE 801(d)(2)(E); *People v Rockwell*, 188 Mich App 405, 408; 470 NW2d 673 (1991). The conspiracy must be demonstrated by evidence independent of the statements to be introduced, *People v Cadle*, 204 Mich App 646, 654; 516 NW2d 520 (1994), and must be shown by a preponderance of the evidence, *Rockwell, supra* at 408. In this case, considering defendant's statements and the actions of defendant and his codefendant, evidence of which was presented prior to the trial court's ruling, sufficient circumstantial evidence supported an inference that defendant and his codefendant conspired to assault or murder the decedent. See *People v Cotton*, 191 Mich App 377, 392; 478 NW2d 681 (1991).

Defendant also claims that the trial court improperly precluded defendant from reading questions asked by the district court during the preliminary examination to impeach a witness. The district court properly questioned a witness to clarify his testimony. *People v Weathersby*, 204 Mich App 98, 109; 514 NW2d 493 (1994). The trial court abused its discretion by preventing defendant from presenting the context of the witness' prior inconsistent testimony, from which the jury might have inferred that the witness' testimony about the crucial issue of identification was not credible. *People v Mumford*, 183 Mich App 149, 153; 455 NW2d 51 (1990). Because the court allowed defendant to cross-examine the witness regarding the certainty of his identification at other points during the trial, however, this error was harmless beyond a reasonable doubt. *People v Minor*, 213 Mich App 682, 684-689; 541 NW2d 576 (1995).

Finally, defendant claims that the court erred in finding that an out-of-court statement by decedent, when he stated that someone shot at him on the night of the murder, was an excited utterance. A hearsay statement may not be admitted under the excited utterance exception to the hearsay rule unless independent evidence shows that the startling event actually occurred and that the declarant made the statement sufficiently close in time to the startling event to prevent fabrication. *People v Burton*, 433 Mich 268, 280, 294; 445 NW2d 133 (1989). Although defendant contests both prongs on appeal, at trial he argued only that insufficient evidence existed to show that the decedent made the statement relatively soon after the startling event. Whether independent evidence that the startling event existed is therefore not preserved for appeal. *People v Lino (After Remand)*, 213 Mich App 89, 94; 539 NW2d 545 (1995).

Several pieces of circumstantial evidence considered cumulatively may provide a sufficient foundation for a finding that a hearsay statement is an excited utterance. *People v Kowalak (On Remand)*, 215 Mich App 554, 559-560; 546 NW2d 681 (1996). The testimony of James Wright, at

whose house the victim stayed, comprised the independent evidence supporting an excited utterance characterization in this case. Wright testified that the decedent, on the night of the murder, entered the home and said in a concerned and upset manner that someone had shot at him down the street. Within one hour, defendant and his brother appeared at Wright's home and searched for the victim, while holding Wright at gunpoint. Given those facts, we legitimately may infer that the decedent made the statement soon after the startling event. *Id.* at 558-559.

Moreover, because decedent did not identify who fired the shots, this statement supports the defense theory that a second person was looking for and murdered decedent to the same extent that it supports the prosecution theory. Reversal is not required because this information could not have affected the verdict; therefore, the error, if any, was harmless beyond a reasonable doubt. *People v Stanaway*, 446 Mich 643, 694 n 53; 521 NW2d 557 (1994).

Affirmed.

/s/ Henry William Saad

/s/ Maura D. Corrigan

/s/ Robert A. Benson