STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM CHENEY WILSON,

Defendant-Appellant.

UNPUBLISHED
December 13, 1996

No. 186417
LC No. 94-133058

Before: Young, P.J., and O'Connell and W.J. Nykamp,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of third-degree criminal sexual conduct, MCL 750.520d(1)(c); MSA 28.788(4)(1)(c) (victim mentally incapable), and sentenced to two to fifteen years' imprisonment. Defendant now appeals as of right. We affirm.

Defendant first argues that the trial court abused its discretion in allowing several witnesses to testify concerning hearsay statements made by defendant's wife. The evidence produced at trial indicated that defendant's wife left a voice-activated tape recorder running when she left her home, and returned to find, to her horror, a recording of her husband sexually assaulting her elderly mother. Several witnesses testified as to the statements made by defendant's wife shortly after hearing the audiotape. These statements were admitted pursuant to MRE 803(2), the excited utterance exception to the rule barring hearsay. Defendant contends that because there was no independent proof that defendant's wife heard the audiotape (in light of the fact that she did not testify because of defendant's invocation of the spousal privilege, MCL 600.2162; MSA 27A.2162), the admission of the testimony was improper.

Admission of hearsay testimony under the excited utterance exception is within the discretion of the trial court. *People v Kowalak (On Remand)*, 215 Mich App 554, 558; 546 NW2d 681 (1996). An abuse of discretion exists only where the court's decision is so violative of fact and logic that it evidences perversity of will, defiance of judgment, or the exercise of passion or bias. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995).

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

Hearsay testimony may be admissible if it constitutes an excited utterance. *People v Burton*, 433 Mich 268, 279-280; 445 NW2d 113 (1989). 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." MRE 803(2). The Supreme Court has set forth three criteria which must be met before a statement can be admitted into evidence as an excited utterance. *Kowalak, supra* at 557. First, the statement must arise out of a startling event; second, it must be made before there has been time for contrivance or misrepresentation by the declarant; and third, it must relate to the circumstances of the startling event. *Id*. Additionally, in order to admit an excited utterance, some independent proof, direct or circumstantial, that the startling event ever took place must be in evidence. *Burton*, *supra* at 294. Absent such independent proof, the witnesses' statements in court are not admissible. *Id.*

We find no abuse of discretion. The "startling event" in this case is not the rape itself, but, rather, the act of defendant's wife listening to the audiotape of the rape. Although there is no direct evidence that the startling event of Helen listening to the tape occurred, there is circumstantial evidence that she listened to the tape independent of her hearsay statements. Ferndale Police Officers Brian Czajkowski and Paul Simpson, the 911 dispatcher, Mary Czisinki and hospice nurse, Carol Mastalerz, all testified that Helen was hysterical or crying very hard. Officers Czajkowski and Simpson also testified that when they responded to Helen's 911 call at her house, she had a small black tape recorder in her hand. Officer Simpson stated that Helen played the tape for them. Both the officers heard the tape for themselves and determined that a crime had been committed. Officers Czajkowski specifically stated that after listening to the tape they had probable cause to believe that some type of criminal sexual conduct had occurred. There does not appear to be any other reason for Helen's hysteria, other than her listening to the tape. Rather, there was circumstantial evidence from which to infer that Helen listened to the tape and that is what caused her excitement. Accordingly, the trial court did not abuse its discretion in admitting Helen's statements as excited utterances.

Defendant also claims that the admission into evidence of the audiotape constituted an abuse of discretion because no proper foundation was laid. Because defendant supports this position with no authority, we consider it abandoned. *People v Granderson*, 211 Mich App 527, 530; 536 NW2d 293 (1995). However, were we to consider this issue, we would find no abuse of discretion because the voices on the audiotape were authenticated by the nurse of defendant's wife's mother, Alice Morgan, who was familiar with the voices of defendant and the victim. See MRE 901; *People v Berkey*, 437 Mich 40; 467 NW2d 6 (1991).

Defendant next argues that the limiting instructions, given by the trial court after three of the four hearsay statements in issue were admitted, were confusing and improperly led the jury to conclude that defendant's wife heard a tape of her mother being raped. Because defendant did not object at trial to any of the court's limiting instructions, we review the issue only to determine whether there was manifest injustice. *People v Van Dorsten*, 441 Mich 540, 545; 494 NW2d 737 (1993); *People v Sardy*, 216 Mich App 111, 113; 549 NW2d 23 (1996).

The limiting instructions were designed to caution the jury that although the hearsay statements of defendant's wife that were admitted through other witnesses suggested that she had actually seen the

rape, she had in fact only heard the audiotape. Although the limiting instructions imply that defendant's wife heard the audiotape, a fact in issue, there was other circumstantial evidence to indicate that she had in fact listened to the tape of the incident between defendant and the victim. Therefore, the court's limiting instructions did not result in manifest injustice.

Next, defendant argues that the following comment by the prosecutor was plain, reversible error:

> With respect to our case, your Honor, the People will not be calling [defendant's wife]. We are unable to do so because of law in the state of Michigan, and so I just want that to be clear for the record at this point in time.

Defendant did not object to the prosecutor's comment at trial. Therefore, appellate review is precluded, unless failure to review the issue would result in a miscarriage of justice or if a cautionary instruction could not have cured the prejudicial effect. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Although the prosecutor may comment on a defendant's failure to call a corroborating witness, he may not do so when failure to call the witness is the result of the defendant's exercise of his marital privilege. *People v Spencer*, 130 Mich App 527, 533; 343 NW2d 607 (1983). This is so because a prosecutor may not comment upon a defendant's reliance on, or exercise of, the privilege. *Id*. However, given that the jury heard evidence to lead them to believe that if [defendant's wife] testified her testimony would be adverse to defendant, even without the prosecutor's comment, we do not believe that our failure to review the issue will produce a miscarriage of justice.

Finally, defendant argues that the trial court abused its discretion in denying his request for a continuance to prepare to defend against the mentally incapable theory and as a result he was prejudiced and unable to adequately defendant against the charge against him. However, defendant has not preserved this issue because he did not move for a new trial pursuant to MCL 767.76; MSA 28.1016.

Affirmed.

/s/ Robert P. Young
/s/ Peter D. O'Connell
/s/ Wesley J. Nykamp