STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL PAUL ASH,

Defendant-Appellant.

UNPUBLISHED
February 25, 1997

No. 190234
Kalamazoo Circuit Court
LC No. 95-0255 FC

Before: Sawyer, P.J., and Neff and A. L. Garbrecht,* JJ.

PER CURIAM.

Defendant Michael Paul Ash was convicted by a jury of one count of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(f); MSA 28.788(2)(1)(f). Determined to be an habitual offender (second), MCL 769.10; MSA 28.1082, defendant was sentenced to ten to twenty-five years' imprisonment. Defendant appeals from his conviction as of right. We affirm.

I

Defendant argues that the testimony of Jessica Melson, George Elliott, Diane Anderson, and Melissa Wright regarding the complainant's statements that defendant raped her was inadmissible under MRE 803(2), the excited utterance exception to the rule against hearsay. The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995).

A statement is admissible under MRE 803(2) if the statement: (1) arises out of a startling event, (2) is made before there is some time for contrivance or misrepresentation by the declarant, and (3) relates to the circumstances of the startling event. *People v Kowalak (On Remand)*, 215 Mich App 554, 557; 546 NW2d 681 (1996). In addition, there must be independent proof, direct or circumstantial, that the startling event actually took place. *Id*. at 559. The burden rests with the party seeking to admit the evidence to show that the foundational requirements have been met. *People v Burton*, 433 Mich 268, 304 n 16; 445 NW2d 133 (1989).

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

A

When determining the "time for contrivance" requirement, this Court should examine the actual time period that elapsed in conjunction with the complainant's emotional state during the time period. *People v Zysk*, 149 Mich App 452, 457; 386 NW2d 213 (1986). In the present case, the complainant, her friend Melson, defendant, and Elliot were at a motel drinking alcohol and smoking marijuana. At one point in the evening, defendant agreed to drive the complainant to the home of Anderson, where a birthday party for Wright was taking place. Instead, defendant drove in the wrong direction, parked his truck on a side road, and forced the complainant to submit to sexual intercourse in the cab of the truck. Defendant then drove the complainant back to the motel.

Melson testified that when the complainant and defendant returned to the motel, the complainant was screaming and crying and told Melson that defendant had raped her. Elliott also testified that when the complainant returned to the hotel with defendant, her face was red and she was crying.

The complainant testified that she was still crying when she and Melson walked to a nearby restaurant and tried to call someone to pick them up. According to the complainant, her emotional state drew the attention of two older couples who offered to give her and Melson a ride to Anderson's house. The complainant testified that she was still crying when she arrived at Anderson's house. Anderson and Wright both testified that the complainant was crying and extremely upset and scared when she arrived at Anderson's house and told them that defendant had raped her.

There is no definite and fixed limit of time in determining whether a declaration comes within the excited utterance exception; indeed, the focus of MRE 803(2) is whether the declarant was still under the stress caused by the startling event. *People v Straight*, 430 Mich 418, 424-425; 424 NW2d 257 (1988). The time frame in this case is not certain; however, it appears that the complainant told Melson and Elliott no more than thirty minutes after the incident that defendant raped her; and her statements to Anderson and Wright appear to have been made no more than two hours after the incident. We note that time lapses exceeding two hours have been held not to preclude invocation of the excited utterance exception. See, e.g., *People v Hackney*, 183 Mich App 516, 523-524; 455 NW2d 358 (1990) (three to four hours); *Zysk, supra* at 457 (three hours).

Although the foundation for admission of the statements as excited utterances was a "close call" in this case, we find that the trial court did not abuse its discretion in admitting testimony regarding the complainant's statements under MRE 803(2). The above evidence reveals that complainant was visibly upset and fearful from the time she arrived back at the hotel until sometime after she reached Anderson's home. Considering her emotional state, it was unlikely that she had the opportunity to fabricate prior to making the statements. Mindful that a decision on a close evidentiary question ordinarily cannot be an abuse of discretion, *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995), we find no error in the admission of the challenged testimony.

Furthermore, even if we were to find error in the trial court's permitting Anderson and Wright to testify regarding the complainant's statements given the approximately two-hour time lapse, any error

was harmless because their testimony was cumulative of that already given by the victim, Melson, and Elliott.

B

Defendant also argues that the admission of the statements was improper because there was insufficient independent evidence that the sexual assault actually occurred. We disagree.

In *Burton, supra*, our Supreme Court held that an excited utterance must not be used to substantiate the event from which the utterance allegedly arose. To guard against this "bootstrapping" of hearsay evidence, there must be independent evidence that the underlying event actually took place. *Id*. at 295. In the instant case, the complainant's direct testimony regarding the details of the sexual assault provided the necessary independent proof of the underlying event. We find no error here.

II

Next, defendant contends that there was insufficient evidence from which the jury could find defendant guilty of CSC-I. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jacques*, 215 Mich App 699, 702-703; 547 NW2d 349 (1996).

Defendant insists that the prosecution failed to prove an essential element of CSC I -- that defendant caused "personal injury" to the complainant. MCL 750.520b(1)(f); MSA 28.788(2)(1)(f). Personal injury is defined as "bodily injury, disfigurement, mental anguish, chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ." MCL 750.520a(j); MSA 28.788(1)(j).

A

With regard to bodily injury, the complainant testified that defendant jumped out of his truck after the complainant and struggled with her on the ground, during which time he punched her in the chest and face. The complainant testified that after defendant pushed her back into the truck he choked her. The complainant also sustained painful scratches on her face, neck and wrist from struggling with defendant before the sexual assault. The scratches were observed by several of the witnesses, including Dr. Mason and Deputy Timmerman. The complainant also testified that she felt pain when defendant forcibly penetrated her vagina.

Although the complainant's physical injuries were not serious, the injury suffered need not be permanent or substantial in order to satisfy the bodily injury component of CSC-I. *People v Jenkins*, 121 Mich App 195, 198; 328 NW2d 403 (1982). Viewed in a light most favorable to the prosecution, the evidence presented would allow a rational trier of fact to find that the complainant had suffered bodily injury.

B

Defendant also argues that there was insufficient evidence that the complainant suffered mental anguish. The term mental anguish, as used in MCL 750.520a(j); MSA 28.788(1)(j), means "extreme or excruciating pain, distress, or suffering of the mind." *People v Petrella*, 424 Mich 221, 227; 380 NW2d 11 (1985). In *Petrella*, our Supreme Court set forth the following factors to be considered in determining whether mental anguish has been proven beyond a reasonable doubt:

> (1) Testimony that the victim was upset, crying, sobbing, or hysterical during or after the assault.
>
> (2) The need by the victim for psychiatric or psychological care or treatment.
>
> (3) Some interference with the victim's ability to conduct a normal life, such as absence from the workplace.
>
> (4) Fear for the victim's life or safety, or that of those near to her.
>
> (5) Feelings of anger and humiliation by the victim.
>
> (6) Evidence that the victim was prescribed some sort of medication to treat her anxiety, insomnia, or other symptoms.
>
> (7) Evidence that the emotional or psychological effects of the assault were long-lasting.
>
> (8) A lingering fear, anxiety, or apprehension about being in vulnerable situations in which the victim may be subject to another attack.
>
> (9) The fact that the victim was the assailant's natural father [*Id*. at 270-271]

The Court stressed that each case must be decided upon its own facts, and that no single factor should be seen as necessary to a finding of mental anguish. *Id*. at 270.

Applying these factors to the present case, there was testimony from the complainant and several witnesses that the complainant was scared, crying and upset for a period of at least two hours after the sexual assault. The complainant also testified that she had experienced nightmares as result of the incident. When asked at trial, eight months after the sexual assault, how long she continued to have the nightmares, the complainant responded, "Every time I think about it, really, I end up having nightmares about it."

The fact that the complainant in this case was crying and upset from the time she returned to the hotel until sometime after she reached Anderson's house approximately two hours later, standing alone, is probably not sufficient evidence of mental anguish. See *id.* at 272-275. However, the complainant's

emotional state following the incident, coupled with her recurring nightmares regarding the event, is sufficient evidence from which the jury could reasonably find mental anguish beyond a reasonable doubt.

In sum, we find that the prosecution presented sufficient evidence to sustain the jury's determination that defendant's sexual assault caused the complainant to suffer personal injury. Therefore, defendant's challenge to the sufficiency of the evidence must fail.

III

Finally, defendant claims on appeal that the trial court erred in permitting the endorsement of prosecution witness Elliott after the trial had begun. The trial court's decision to allow the late endorsement of a witness is reviewed by this Court for an abuse of discretion. *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995).

In this case, the prosecution did not include Elliott in the list of witnesses required to be filed thirty days before trial. MCL 767.40a(3); MSA 28.980(1)(3). On the first day of trial, after the jury had been sworn, but before opening statements, the prosecution moved the court to add Elliott to its list of witnesses. The prosecution explained that it did not learn of Elliott's whereabouts until earlier that afternoon. Although the prosecutor had not actually spoken with Elliott at the time of the motion, the prosecutor had information that defendant had confessed the crime to Elliott.

MCL 767.40a(4); MSA 28.980(1)(4) permits the prosecutor's late endorsement of a witness at any time upon leave of the court and for good cause shown. The court found that the prosecution had presented good cause for not having previously listed the witness and expressed its willingness to consider a continuance. Defense counsel elected to reserve any further argument until after he had an opportunity to interview Elliott the following morning. Although concerned with the effect of further delay on the jury, the court expressed its willingness to consider a continuance. However, the following day there was no renewed discussion on the record regarding Elliott's late endorsement, and Elliott was called to testify without objection. Under the circumstances, defendant's failure to renew his objection to Elliott's testimony or request a continuance resulted in a waiver or failure to preserve the issue on appeal. See *People v Lakin*, 30 Mich App 441, 445-446; 186 NW2d 867 (1981).

Nonetheless, we find no abuse of discretion in the trial court's decision to permit the prosecution's late endorsement of the witness. Ordinarily, the late endorsement of a witness is permitted and a continuance is granted to prevent possible prejudice to the defendant. *People v Suchy*, 143 Mich App 136, 141; 371 NW2d 502 (1985). Although defendant claims that there is insufficient evidence on the record to show that the prosecution lacked knowledge of Elliott's whereabouts before the first day of trial, defendant did not seek to develop a record supporting this claim, and provides nothing more than bare allegations on appeal. Moreover, defendant has failed to explain how he was prejudiced by the delay. Under these circumstances, the trial court did not abuse its discretion in permitting the late endorsement of the prosecution's witness.

Affirmed.

/s/ David H. Sawyer
/s/ Janet T. Neff
/s/ Allen L. Garbrecht