STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

CHARLES EMIL HENDRICKSON,

Defendant-Appellee.

UNPUBLISHED
August 8, 1997

No. 193713
Marquette Circuit Court
LC No. 95-31156-AR

Before: O'Connell, P.J., and Sawyer and Markman, JJ.

PER CURIAM.

The present case illustrates the difficulties inherent in prosecuting an individual for domestic violence where the alleged victim recants and refuses to testify at trial. In the district court, defendant was charged with committing an act of domestic violence, MCL 750.81; MSA 28.276, despite the fact that the complainant, defendant's girlfriend, had recanted her allegations and was not called to testify at trial. Because of the absence of the complainant's testimony, the prosecution relied heavily on an audiotape of a 911 call made by the complainant, which was admitted into evidence as a present sense impression, MRE 803(1), over defendant's objection. A jury found defendant guilty.

Defendant appealed as of right to the circuit court, arguing that the audiotape constituted hearsay that did not fall within the present sense exception to the rule barring the introduction of hearsay evidence. The circuit court agreed, and reversed defendant's conviction.

The prosecution now appeals by leave granted, contending that no evidentiary error occurred and that defendant's conviction should be reinstated. Our review of the case law indicates the circuit court was correct. While the prosecution presents an emotionally compelling argument on appeal that the present sense impression exception to the rule against hearsay should be construed so as to allow the admission of the audiotape in the present case, we decline to contort MRE 803(1) to reach the result advocated by the prosecution. The prosecution's difficulties in the present case stem not from any inadequacy of the rules of evidence, but from the refusal of the complainant to testify at trial. The audiotape was not properly admitted into evidence and, because of this error, defendant's conviction must be reversed. Accordingly, the order of the circuit court is affirmed.

I

Defendant and his live-in girlfriend, Jenny Lou Mueller, spent the evening of October 8, 1994, at a bar in Republic, Michigan. The two appear to have become embroiled in an argument because of defendant's attempts to impress a former girlfriend who was, apparently, also at the bar. A slap was heard from the table defendant and Mueller shared, after which defendant was overheard to have said, "Please don't hit me again." As the two were leaving, Mueller appears to have stated to defendant, "Call 911." A prosecution witness who glimpsed Mueller's recumbent form in the parking lot testified that it was possible that Mueller had "lost her balance" and fallen, with the obvious implication being that Mueller may have had too much to drink. Mueller was seen leaving the parking lot without defendant.

At 12:43 a.m. on the morning of October 9, 1994, Mueller telephoned 911. Mueller's first words to the dispatcher were "Yes, I want someone to pick up Charles Hendrickson," that is, the defendant. She claimed that defendant had "just" beaten her, that he was either then leaving or had recently left their home, and that she had contacted a friend who would be taking her to a hospital. Her voice on the 911 audiotape was described at trial as strongly suggesting that "she had been drinking." To end the conversation, Mueller stated that her friend was arriving and that she had to go.

No evidence was introduced at trial indicating that Mueller had, in fact, contacted a friend about the incident, and Mueller later conceded that she did not seek medical assistance. Further, in her subsequent statement to a Michigan State Trooper, Mueller made an ambiguous statement seemingly indicating that defendant had first threatened *her* with prosecution for slapping *him*.

However, when interviewed by a state trooper some time after 7:00 a.m. that morning, Mueller did have injuries consistent with her having been beaten. She had bruises on one side of her face and neck, and one of her lips was swollen and lacerated. At that time, Mueller specifically averred that defendant had beaten her. Mueller had twice before alleged that defendant had assaulted her, but had never actively sought prosecution. Nevertheless, defendant was prosecuted for one of these alleged prior incidents, and eventually pleaded guilty.

Three days later, Mueller recanted her initial statement to the police. She stated that the incident had occurred at the bar, rather than at her home, and that the incident was her fault. Mueller later asserted her Fifth Amendment right against compelled self-incrimination and refused to testify at trial.[1]

From a legal perspective, an interesting picture thus emerges. Mueller was the only witness who could present direct evidence that an assault had occurred. However, Mueller had had several possible motives to fabricate her initial account, both jealousy and the desire to avoid prosecution for her own actions, and Mueller had, in fact, confessed that her initial account was at least in part untrue. Of course, photographic evidence of Mueller's injuries would have strongly corroborated her account that she had, at least at some point that evening, been assaulted. When Mueller asserted her Fifth Amendment right not to testify, however, the prosecution had no obvious way to introduce evidence that an assault had occurred at all. The prosecution would have been left with little beyond the testimony of other witnesses indicating that Mueller had slapped defendant, that is, that she had initiated

physical violence, and photographs of Mueller's injuries which were consistent with her having been struck.

To overcome the obstacles created by Mueller's invocation of the Fifth Amendment, the prosecution attempted to introduce at trial the audiotape of Mueller's 911 call as evidence that an assault had occurred, that is, as substantive evidence. The prosecution contended that Mueller's statements to the 911 dispatcher constituted a present sense impression and were, accordingly, admissible as an exception to the rule of evidence excluding hearsay.[2] The defendant argued to the contrary, but the district court ultimately allowed the audiotape into evidence, and it was played for the jury. As set forth above, defendant was convicted, which conviction was overturned on appeal by the circuit court. The prosecution now appeals the reversal of defendant's conviction.

II

The issue on appeal is a narrow one, namely, whether the audiotape of Mueller's conversation with the 911 dispatcher was properly admitted pursuant to MRE 803(1), the present sense exception to the rule barring hearsay.

As set forth in the confrontation clauses of the United States and Michigan Constitutions, in every criminal prosecution the accused enjoys "the right . . . to be confronted with the witnesses against him." US Const, Am VI; Const 1963, Art I, § 20. The purpose of the confrontation clause is to prevent out-of-court statements from being used against a criminal defendant in lieu of in-court testimony, *Mitchell v Hoke*, 930 F2d 1, 2 (CA 2, 1991), and to ensure

> a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor on the stand and the manner in which he gives his testimony whether he is worthy of belief. [*Douglas v Alabama*, 380 US 415, 418-419; 13 L Ed 2d 934; 85 S Ct 1074 (1965), quoting *Mattox v US*, 156 US 237, 242-243; 39 L Ed 409; 15 S Ct 337 (1895).]

Rules barring the introduction of hearsay evidence serve a purpose similar to that served by the confrontation clause. *Mitchell*, *supra*. "Hearsay" is defined to be "a statement, other than the 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, in general, inadmissible. MRE 802.

However, there exist numerous exceptions to the rule against hearsay. See MRE 803, 803A, 804; see also MRE 801(d). It is generally accepted that "if evidence is admissible pursuant to 'a firmly rooted hearsay exception,' it generally does not offend the confrontation clause." *Mitchell*, *supra*, quoting *Ohio v Roberts*, 448 US 56, 65; 65 L Ed 2d 597; 100 S Ct 2531 (1980).

At issue in the present case is MRE 803(1), the present sense impression exception to the rule barring the introduction of hearsay evidence. This rule of evidence provides that a "statement describing

or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter," is not excluded by the hearsay rule. MRE 803(1) is identical to its federal counterpart, FRE 803(1). The Advisory Committee Notes to FRE 801(1) explain that "[t]he underlying theory of [803(1)] is that substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation." The Notes further clarify that, "[w]ith respect to the *time element*, [803(1)] recognizes that in many, if not most, instances precise contemporaneity is not possible and hence a slight lapse is allowed" (emphasis in original).[3]

This Court, quoting *United States v Narciso*, 446 F Supp 252, 288 (ED Mich, 1977), offered a similar explanation in *Hewitt v Grand Trunk W R Co*, 123 Mich App 309, 317; 333 NW2d 264 (1983), stating

> Underlying Rule 803(1) is the assumption that statements of perception substantially contemporaneous with an event are highly trustworthy because: (1) the statement being simultaneous with the event there is no memory problem; (2) there is little or no time for calculated misstatement; and (3) the statement is usually made to one who had equal opportunity to observe and check misstatements." (Quoting Weinstein and Berger, Weinstein's Evidence, ¶ 803(1)[01].) [Emphasis removed.]

III

In the present case, we agree with the circuit court that the audiotape of Mueller's 911 call did not fall within the present sense impression exception. Considering all of the evidence, and not just that evidence ultimately determined to be admissible, MRE 104(a), admission of the audiotape of the 911 call under the circumstances of the present case constituted an abuse of discretion.

One of the primary reasons a present sense impression that would otherwise constitute hearsay is considered sufficiently trustworthy so as to justify its admission into evidence, as explained in *Hewitt*, *supra*, quoting *Narciso*, *supra*, is the fact that "there is little or no time for calculated misstatement." Here, however, not only was there time for calculated misstatement, there was motive, and the record strongly suggests that this motive was acted upon.

With respect to the time requirement, for a statement to constitute a present sense impression as that term is used in MRE 803(1) that statement must have been made "while the declarant was perceiving the event or condition, or immediately thereafter." While Mueller's statement to the 911 dispatcher implies that the alleged assault had ceased only moments before, the testimony of other witnesses as well as Mueller's subsequent recantation strongly undermine this notion. Mueller later stated that the blows had been struck (both hers and defendant's) at the bar up to approximately forty-five minutes before her telephone call. The testimony of a witness at the bar supports Mueller's later account – the witness had heard Mueller mention 911 in the parking lot and, from the witness' passing glance, suspected Mueller may have fallen. These facts certainly raise a doubt as to whether Mueller's statements to the 911 dispatcher truly occurred "immediately" after the event in question.

More significantly, however, the record contains strong hints that Mueller had reason to make "calculated misstatements." She was apparently jealous of defendant's actions toward another woman and had struck him at the bar in front of witnesses. In fact, her first words to the 911 dispatcher revealed that she was not seeking medical assistance, that she was not seeking police protection, but that she wanted the police "to pick up Charles Hendrickson." This statement certainly suggests an ulterior motive in Mueller's 911 call.

Finally, Mueller later admitted that her statements to the 911 dispatcher contained fabrications. Her invocation of her Fifth Amendment right to decline to testify also lend strength to the suspicion that her alleged present sense impression was not as ingenuous as one might expect.

Thus, the tape of Mueller's statements to the 911 dispatcher lacked those indicia of reliability that stand as the foundation of the present sense impression exception to the rule barring hearsay. We would emphasize that we are not "finding" that Mueller, in fact, fabricated the bulk of her statements to the 911 dispatcher, a question that is not, in any event, before this Court. However, we are ruling that the conflicting evidence deprives the audiotape of Mueller's statements of the reliability that is the quintessence of present sense impressions. Given the inconsistencies, this is precisely the type of situation that cries out for the jury's consideration of Mueller's "demeanor on the stand and the manner in which [she] gives [her] testimony [to determine whether Mueller] is worthy of belief." *Douglas*, *supra*, quoting *Mattox*, *supra*. Under these circumstances, the admission of the audiotape constituted an abuse of discretion. *People v Sawyer*, 222 Mich App 1, 5; ___ NW2d ___ (1997).

IV

We would emphasize that the question presented on appeal is not whether defendant assaulted Mueller. Rather, the question is whether certain evidence was properly admitted in the prosecution of defendant. It is well to keep this distinction in mind.

We are not oblivious to the fact that the photographs of Mueller are strong evidence that Mueller was assaulted *at some point* during the late evening of October 8, 1994. Other circumstantial evidence suggests that it was defendant who committed this assault. However, the question on appeal is whether Mueller's statements to the 911 dispatcher constituted a *present* sense impression. The fact that Mueller appears to have been assaulted at some point does not necessarily lead to the conclusion that her statements to the dispatcher reflected a *present* sense impression. Indeed, we have concluded above that, regardless whether defendant assaulted Mueller, there is strong reason to doubt that her statements to the dispatcher constituted a present sense impression.

In light of the significant evidence that defendant did, in fact, assault Mueller, however, one may legitimately question whether defendant committed a crime and "got off," whether he "beat the system." Assuming for the purpose of argument that defendant did assault Mueller, we would note that reversal of defendant's conviction stems not from the circuit court's construction of MRE 803(1), but from Mueller's recantation of her initial statement and from her refusal to testify at defendant's trial. Assuming, again, that defendant assaulted Mueller, had she testified at trial, defendant's conviction would have been virtually assured in light of the corroborating evidence, and that conviction would have

been properly obtained. However, Mueller refused to testify, drastically limiting the amount of evidence that could legitimately be introduced against defendant. If justice was not served in the present case, it is not the fault of the rules of evidence.

Affirmed.

/s/ Peter D. O'Connell
/s/ David H. Sawyer

[1] It is unclear whether Mueller feared prosecution for filing a false police report or feared prosecution for some type of assaultive crime in light of the fact that she later suggested that she had been the instigator of the confrontation.

[2] At trial, the prosecution also contended that Mueller's statements constituted an excited utterance, and therefore fell within the eponymous exception to the hearsay rule. MRE 803(2). The prosecution has since abandoned this argument.

[3] It is well to contrast MRE 803(1) with MRE 803(2), the excited utterance exception. MRE 803(2) is also identical to its federal counterpart, FRE 803(2), and provides that 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" is not excluded by the hearsay rule. The Advisory Committee Notes to FRE 803(2) take pains to emphasize that while FRE 803(2) allows statements made while the declarant was under the stress or excitement of the event, which is to say, there is no strict time requirement, FRE 803(1) is limited to statements made while the event was taking place or *immediately* thereafter.