STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY D. GIVENS,

Defendant-Appellant.

UNPUBLISHED
October 31, 1997

No. 195243
Recorder's Court
LC No. 95-013285

Before: Saad, P.J., and O'Connell and M. J. Matuzak*, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and assault and battery, MCL 750.81; MSA 28.277. We affirm.

On September 14, 1995, at approximately 12:30 a.m., defendant entered the house of his former girlfriend, Lynette Riggins, and discovered another man, Alton Reid, asleep on her living room couch. Defendant stabbed him twice in the chest and twice in the back of the neck with a paring knife. Defendant then attacked Riggins, cutting her ankle.

The police were called and within ten minutes of the stabbing, the police arrived at the house and immediately began looking for defendant. Defendant was located approximately one and one-half blocks from the house. After detaining defendant, the police returned to the house. At that time, Riggins related the events surrounding the stabbing to the police. Defendant was ultimately convicted of assault and battery and assault with intent to do great bodily harm less than murder.

Defendant's first argument on appeal is that the trial court erred in allowing Riggins' statement to a police officer to be admitted at trial. The statement at issue concerns Riggins' account of the events: that defendant entered the house through the window, stabbed her friend, fought with her, and that she stabbed defendant with a barbecue fork in self-defense. Defendant argues that the statement constitutes hearsay which does not fall within the excited utterance exception, MRE 803(2), and that it should

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

therefore have been excluded. We disagree. We review the trial court's decision to admit Riggins' testimony for an abuse of discretion, *People v Kowalak (On Remand)*, 215 Mich App 554, 558; 546 NW2d 681 (1996), and conclude that the statement fits within the excited utterance exception.

Three factors must be established before a statement can be admitted under the excited utterance exception: (1) the statement must arise out of a startling event, (2) the statement must be made before there has been time for contrivance or misrepresentation by the declarant, and (3) the statement must relate to the circumstances of the event. *Kowalak*, *supra* at 557. There is no definite or fixed limit of time in determining whether a statement comes within the excited utterance exception. *Id*. at 559 (quoting *Browning v Spiech*, 63 Mich App 271, 277; 234 NW2d 479 [1975]). *Id*. After reviewing the record, this Court concludes that all three factors were established in this case. We find that Riggins' statement arose out of the stabbings, which were undoubtedly a startling event. Furthermore, we believe that she did not have the time to fabricate or misrepresent the events. The statement was made almost immediately after the stabbings occurred and Riggins made the statement while she was still under the excitement and stress of the startling event. Finally, Riggins' statement was directly related to the stabbings. We therefore conclude that the trial court's decision to admit the evidence was not an abuse of discretion. In any event, even if the trial court erred in admitting Riggins' statements, the error was harmless because the statements were cumulative of Riggins' testimony at trial. See, e.g., *People v Meeboer (On Remand)*, 181 Mich App 365, 373; 449 NW2d 124 (1989), aff'd 439 Mich 310 (1992); MCL 769.26; MSA 28.1096 (no verdict shall be set aside due to the improper admission of evidence unless there is a miscarriage of justice), MCR 2.613(A) (harmless error rule). Since Riggins' testimony at trial was virtually identical to the statement made to the police officer, we do not believe that defendant was prejudiced by the admission of the statement in question.

Defendant next argues that there was insufficient evidence to convict him of assault with intent to do great bodily harm less than murder. Defendant specifically points to the type of weapon used and the extent of Reid's injuries. We disagree. In reviewing a claim related to the sufficiency of the evidence in a particular case, we 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 Medlyn*, 215 Mich App 338, 340; 544 NW2d 759 (1996). The elements of the crime of assault with intent to do great bodily harm are (1) an assault, (2) coupled with an intent to do great bodily harm less than murder. *People v Lugo*, 214 Mich App 699, 710; 542 NW2d 921 (1995). Intent may be inferred from the defendant's conduct and the circumstances surrounding the offense. *People v Johnson*, 54 Mich App 303, 304; 220 NW2d 705 (1974). In this case, defendant stabbed Alton Reid twice in the chest and twice to the back of the neck with a paring knife while Mr. Reid lay defenseless, asleep on a couch. We find that defendant's actions were serious enough for a rational trier of fact to infer that he intended to do great bodily harm less than murder.

Affirmed.

/s/ Henry William Saad
/s/ Peter D. O'Connell
/s/ Michael J. Matuzak