

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC M. GIBBS,

Defendant-Appellant.

UNPUBLISHED

May 8, 1998

No. 199125

Recorder's Court

LC No. 95-011234

Before: Bandstra, P.J., and MacKenzie and N.O. Holowka*, JJ.

PER CURIAM.

Defendant was convicted by jury of three counts of third-degree criminal sexual conduct, MCL 750.520d; MSA 28.788(4), and sentenced to an enhanced term of imprisonment of twelve to twenty years, reflecting defendant's status as a second felony offender, MCL 769.10; MSA 28.1082. Defendant appeals as of right. We affirm.

Defendant argues that witness Reynolds' testimony was not admissible as an excited utterance, MRE 803(2), because the prosecutor failed to show the existence of the underlying startling event by evidence independent of the Reynolds' statements. *People v Burton*, 433 Mich 268, 294-299; 445 NW2d 133 (1989); *People v Kowalak (On Remand)*, 215 Mich App 554, 559-560; 546 NW2d 681 (1996). We reject defendant's argument.

The victim's testimony that she was sexually assaulted three times in defendant's home independently supports, by a preponderance of the evidence, a conclusion that a forcible sexual assault occurred; a forcible sexual assault constitutes a startling event. *Burton, supra* at 297-298; *People v Straight*, 430 Mich 418, 425; 424 NW2d 257 (1988).

Additionally, the victim testified that when she and defendant left the house after the sexual assault, defendant carried a handgun and she feared that defendant was going to kill her and hide her body. Reynolds testified that when the victim entered the Mobil station, she was crying and shaking and exhibited fear. Reynolds further testified that she followed the victim out of the station and observed a

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

dark-colored handgun in defendant's pocket. The victim testified that defendant hurried her out of the gas station by reminding her that he had the gun and by indicating that he had been involved in "trouble" in the past. This testimony constitutes independent evidence that is sufficient to establish that the stressful event was ongoing and that the victim was, at the time of her presence at the Mobil station, still under the influence of an overwhelming emotional condition. *Burton, supra*; *Kowalak, supra* at 558-560.

Defendant also argues that because the victim's statement to Reynolds that she had been raped was made in response to questions posed by Reynolds, the victim's statement was a product of reflective thought made after the effect of the exciting event had subsided. Again, we reject defendant's argument.

The fact that a statement has been made in response to questions does not in and of itself preclude the statement from being an excited utterance. *People v Hackney*, 183 Mich App 516, 524; 455 NW2d 358 (1990). The question to be answered is whether under the circumstances presented in the individual case, the declarant was in fact at the time the statement was offered still under the influence of an exciting event. *Id.* at 522-524. As explained above, there was ample evidence in the record that the victim was still under the influence of exciting events when she made the statements.

We affirm.

/s/ Richard A. Bandstra
/s/ Barbara B. MacKenzie
/s/ Nick O. Holowka