

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BOBBY L. MOLDEN,

Defendant-Appellant.

UNPUBLISHED

September 16, 2003

No. 240355

Wayne Circuit Court

LC No. 01-001949

Before: Owens, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (sexual contact with a person under the age of thirteen), and assault with intent to commit criminal sexual conduct in the second degree, MCL 750.520g(2). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On appeal, defendant first argues that reversible error occurred when the trial court admitted into evidence, as an excited utterance, a hearsay statement made by the victim to her aunt disclosing the sexual contact. We review the trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

Hearsay is not admissible at trial unless a specific exception is applicable to the statement. See MRE 801; MRE 802. The excited utterance exception permits the admission of statements "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). Accordingly, the excited utterance must (1) arise out of a startling event, and (2) be made while the declarant was under the excitement caused by that event. See *People v Layher*, 238 Mich App 573, 582; 607 NW2d 91 (1999).

In this case, the victim's aunt testified that she had gone to visit the victim and upon her arrival it was brought to her attention that something had happened. The victim was scared, shaking, crying, and kept asking for her father. The aunt took the victim upstairs to a bedroom where the victim told her that defendant had come into her room that night and "felt on her bottom and that when she woke up and sat in the bed he continued to come into her room and she sat up and then she said when she fell asleep again, later on that night or morning, he came in her room again she said and he felt on her breasts."

Defendant claims that the victim's statements to her aunt were not admissible because too much time had elapsed between the time of the assaults and when the statements were made. However, the question whether a statement was made while under the excitement of the event is not strictly one of time, but of the possibility of conscious reflection. *People v Smith*, 456 Mich 543, 551; 581 NW2d 654 (1998). Here, the evidence reveals that after the first assault, the victim turned on the light in her room and stayed up all night in an attempt to prevent another assault and, finally, when it got light outside and she fell asleep, defendant assaulted her again. The victim's statements to her aunt were made after the assaults—startling events—and the victim was still under the excitement caused by the events as is evidenced by her behavior—she was scared, shaking, crying, and repeatedly asking for her father. Therefore, the trial court did not abuse its discretion in admitting the victim's statements pursuant to MRE 803(2).

Next, defendant argues that his motion for directed verdict should have been granted because there was no evidence that his touching of the victim was for a sexual purpose. We disagree. Considering the evidence presented by the prosecution in the light most favorable to the prosecution, we conclude that a rational trier of fact could find the essential elements of the crime were proved beyond a reasonable doubt. See *People v Mayhew*, 236 Mich App 112, 124-125; 600 NW2d 370 (1999).

An essential element of second-degree criminal sexual conduct is that of “sexual contact.” See MCL 750.520c(1); *People v Lemons*, 454 Mich 234, 253; 562 NW2d 447 (1997). In January of 2001, the time of this incident, MCL 750.520a(k) defined “sexual contact” as including “intentional touching [that could] reasonably be construed as being for the purpose of sexual arousal or gratification.” Here, defendant waited until the victim was asleep before he touched her buttock and breasts and admitted to police that he was attracted to little girls, had a problem with touching little girls, and could not stop himself. Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found that defendant touched the victim for the purpose of sexual arousal or gratification. See *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Therefore, the trial court properly denied defendant's motion for directed verdict.

Next, defendant argues that the trial court should have sua sponte issued a curative instruction to the jury or declared a mistrial with regard to defendant's outbursts during jury selection and after the prosecutor's opening statement. We disagree. Defendant fails to set forth any law in support of his claim that the trial court should have, on its own initiative, issued a curative instruction or declared a mistrial under the circumstances presented. We will not search for such supporting authority. See *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997). Further, defendant has failed to establish plain error warranting reversal. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Defendant's expression of dissatisfaction with his attorney and question to the court as to whether “the jury should be informed of what they call lesser included offense” in the presence of the jury were not sufficient grounds to sua sponte grant a mistrial or issue a curative instruction. See *People v Ortiz-Kehoe*, 237 Mich App 508, 514; 603 NW2d 802 (1999).

Finally, defendant argues that his minimum sentence of eighty-six months to fifteen years for the CSC II conviction was “disproportionate to the circumstances of the acts involved and violates the principle of proportionality in sentencing” because “defendant touched the complainant for a matter of seconds on her buttocks and breast.” We disagree. Because

defendant does not contend that there was an error in scoring the guidelines or that inaccurate information was relied on in determining his sentence and the minimum sentence is within the appropriate guidelines sentence range, we must affirm the sentence. See MCL 769.34(10).

Affirmed.

/s/ Donald S. Owens
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter