

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHILDRED EARLIE JORDAN,

Defendant-Appellant.

UNPUBLISHED

April 19, 2007

No. 267152

Genesee Circuit Court

LC No. 05-015536-FC

Before: Neff, P.J., and O'Connell and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(c) (circumstances involving commission of any other felony), first-degree home invasion, 750.110a(2), and unarmed robbery, MCL 750.530. We affirm.

At about 6:00 a.m. on October 20, 1998¹ the victim called Flint 911 to report that someone was trying to break into her apartment. The police responded to the wrong address, and a man who had broken into her apartment through a window confronted the victim, a 73-year-old woman who used a walker. The intruder, defendant, tore the phone off the wall, robbed and raped the victim, and then fled.

The victim then went outside in her nightgown yelling for help. The owner/operator of a service station (Ferris) across the street responded and 911 was again called. The police arrived on the scene forty-five minutes to an hour after the first 911 call. When Ferris first encountered the victim she told him that she had been raped, but she failed to tell that to the police detective when he first questioned her, indicating only that the perpetrator demanded money (which she gave him), took her television, and then tore her phone off the wall.

¹ The long delay between the crime and the trial in the fall of 2005 was owing to the fact that the police had no leads to a suspect and only after DNA technology allowed a cross match was defendant identified as the perpetrator. In the meantime, the victim died.

After the detective left, the victim's landlord and close friend (Avery) arrived, and the victim told her about the break-in and theft but did not mention the rape. After speaking with Ferris, Avery asked the victim why she did not mention the rape, and the victim replied that the perpetrator told her that he would kill her if she told anyone. Avery then took her to the police station where she told the detective that she had been raped. A vaginal swab and a swab from the victim's clothing both matched defendant's DNA sample. The victim died before trial of causes unrelated to this case.

Defendant argues that the trial court erred when it held that the victim's statements to Ferris and Avery were admissible. We disagree.

The admissibility of evidence is within the sound discretion of the trial court and will not be reversed unless the trial court abused its discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). However, a preliminary question of law related to the admissibility of evidence is reviewed de novo. *Id.*

Crawford v Washington, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004), held that the Confrontation Clause² bars testimonial hearsay against a criminal defendant unless the declarant was unavailable, and defendant had a prior opportunity to cross-examine the declarant.³ *Crawford* also held that state hearsay rules could govern the admissibility of nontestimonial hearsay without offending the Confrontation Clause. *Id.* Thus, the Confrontation Clause does not bar the testimony at issue unless the statements of the declarant were "testimonial."

Defendant argues that declarant's statements were testimonial under *Davis v Washington*, 547 US __; 126 S Ct 2266, 2273 –2274; 165 L Ed 224 (2006), which provided:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Defendant further argues that Ferris should be considered an agent of the police because "he acted as a police agent in relaying [the victim's] report to the 911 operator and must have been seen as an agent . . . by the declarant [because] she told him 'to please call the police.'" Because defendant cites no authority to support his agency theory, this Court need not address defendant's agency argument. *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000) (citations omitted).

² US Const, Am VI.

³ There is no indication or argument made that defendant had any opportunity to cross-examine the victim.

Regardless, we conclude that Ferris was not an agent of the police. Although Ferris relayed information to the police at the request of the victim, this would at most *arguably* make him an agent of the victim. See *Meretta v Peach*, 195 Mich App 695, 697; 491 NW2d 278 (1992) (“An agency relationship may arise when there is a manifestation by the principal that the agent may act on his account.”)

We also reject defendant’s argument that Ferris should be treated as an agent of the police because the victim viewed him as such. An ostensible agency may be created “when the principal intentionally or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him.” *VanStelle v Macaskill*, 255 Mich App 1, 9; 662 NW2d 41 (2003). There is no indication that the police did anything to clothe Ferris as an agent.

Similarly, we reject defendant’s argument that Avery should be treated as an agent of the police. Avery testified that she and the victim were “like family,” had known each other for about 20 years, engaged in many activities together and the two were so close that Avery moved the victim into her home for years after the assault. Thus, it is clear that the victim did not view her long-time friend as an ostensible agent of the police, but as a friend concerned for her well being and need for treatment rather than to obtain statements for use in court.

Even assuming that either Ferris or Avery conducted the functional equivalent of a police interrogation, the victim’s statements were nontestimonial because they were made “under circumstances objectively indicating that the primary purpose of the interrogation [was] to enable police assistance to meet an ongoing emergency.” *Davis, supra* at 2273-2274. We hold that questions necessary to obtaining or providing emergency medical care are nontestimonial.⁴ The 73-year-old victim, clothed in her nightgown, was outside in the early morning hours yelling for help because she had just been raped and robbed. She had yet to have a police response to her calls for help and was in need of emergency medical treatment. Under the circumstances, “any reasonable listener would recognize that [the victim] was facing an ongoing emergency.” *Davis, supra* at 2276. Because all statements by the victim were necessary to resolving the ongoing emergency, the statements were nontestimonial. *Id.*

Defendant next argues that the Confrontation Clause barred admission of the victim’s statements to the detective and the 911 supervisor’s testimony concerning the victim’s statements to Ferris. We disagree.

Defendant argues at length that his oral request at trial for a “continuing objection to the hearsay . . . statements of the complaining witness” preserved his challenge to the victim’s statements to the detective and the 911 supervisor. However, after reviewing the text of

⁴ See *Massachusetts v Tang*, 66 Mass App Ct 53, 59; 845 NE2d 407 (2006) (“Emergency questioning designed to secure a volatile scene or provide medical care, however, is not related to the investigation of a crime and does not constitute interrogation.” (citations and internal quotations omitted). Cf. *People v Geno*, 261 Mich App 624, 631; 683 NW2d 687 (2004) (holding that a statement made to a director at a children’s center made after an alleged sexual assault occurred “did not constitute testimonial evidence under *Crawford*”)

defendant's objection, it is clear that defendant was referring to the statements that he challenged in his motion in limine and which the trial court ruled were admissible under the excited utterance exception to the hearsay rule. Defendant's motion in limine challenged only the victim's statements to Ferris and Avery. Because the admissibility of the statements of the 911 supervisor or the detective was never challenged before the trial court, this issue is not preserved. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994).

An appellate court will not reverse a conviction based on an unpreserved issue except for plain error that affected a defendant's substantial rights by resulting in the conviction of an actually innocent person or seriously affecting the integrity, fairness, or public reputation of the judicial proceedings. *People v Carines*, 460 Mich 750, 761, 764-767; 597 NW2d 130 (1999).

Defendant's argument about the testimony of the 911 supervisor⁵ must fail. The 911 supervisor did not answer either call, although she made the tape that was played in court from the originals and authenticated both the tape and the transcript made from it. Under these circumstances, the only conduct of law enforcement to be considered under *Davis, supra* at 2274 n 2 (which defendant cites) would be her action in making a tape for trial from the originals. Even though *Davis* held that a caller's responses to a 911 operator could be considered testimonial under certain circumstances, it is inapplicable here because the victim's statements were nontestimonial, as noted.

We also conclude that defendant declined to object to the victim's statements to the detective as a matter of trial strategy. Defendant argued in his opening statement that the evidence would show that the victim did not initially complain to police that she had been raped and that she only did so after being questioned by the friend. It does not appear that defendant could have shown this discrepancy without the hearsay testimony of the detective regarding what the victim told him, which likely explains why defendant still did not object after the trial court indicated that the excited utterance exception might not apply to the victim's statements to the detective. Thus, even assuming that the trial court should have ruled these statements inadmissible despite defendant's failure to object, any alleged error cannot be an error requiring reversal. See *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999) (holding that "error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence")

Regardless, assuming that the trial court erred in "admitting" the unchallenged testimony of the 911 supervisor or the detective regarding the victim's statements, any such error would not amount to plain error affecting defendant's substantial rights. *Jones, supra* at 355-356. Considering the DNA evidence linking defendant to the alleged rape, his testimony that he did not have sex with the victim, and the admissible statements by the victim to Ferris and Avery that she had been raped, defendant has not shown that this cumulative evidence resulted in the

⁵ Defendant's brief is somewhat confusing inasmuch as he refers to the testimony of the 911 operator. However, only the supervisor who authenticated a recording of the 911 calls testified and she did not testify to the content of the tapes.

conviction of an actually innocent person or undermined the integrity of the judicial system, *id.* at 355-356, so reversal is not warranted.

Defendant next argues that trial counsel denied him the effective assistance of counsel by failing to argue that plaintiff did not provide adequate independent evidence that the startling event actually occurred. We disagree.

Because no *Ginther* hearing was held, *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973), review is limited to errors apparent on the record. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003). “Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Questions of fact are reviewed for clear error, while questions of constitutional law are reviewed de novo. *Id.*

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel’s performance was deficient in that it fell below an objective standard of professional reasonableness, and that it is reasonably probable that but for counsel’s ineffective assistance, the result of the proceeding would have been different. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). “[D]efendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy.” *Riley, supra* at 140. “MRE 803(2) provides an exception to the hearsay rule for 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.’” *People v McLaughlin*, 258 Mich App 635, 659; 672 NW2d 860 (2003). Our Supreme Court held in *People v Burton*, 433 Mich 268, 294-295; 445 NW2d 133 (1989), that a party seeking to admit hearsay statements under the excited utterance exception cannot merely rely on the purported excited utterance itself to prove that the startling event occurred. Instead, the proponent must present independent direct or circumstantial evidence establishing by a preponderance of the evidence that the startling event actually occurred. *Id.*

We find that it would have been futile for trial counsel to argue that there was not sufficient independent evidence to show that a startling event actually occurred. Plaintiff presented eyewitness testimony that, bars had been removed from a window in the victim’s apartment and the window had been torn out, at least two witnesses testified that the victim’s lip had been injured, defendant’s semen was recovered from a vaginal swab taken from the victim and from her clothing.

Defendant next argues that defense counsel’s failure to object to the incorrect jury instruction on unarmed robbery denied him the effective assistance of counsel. We disagree.

Our Supreme Court held in *People v Randolph*, 466 Mich 533, 550; 648 NW2d 164 (2002), that the pre-amendment version of MCL 750.530 required that “[t]he force, violence or putting in fear must be used before or contemporaneous with the taking” and rejected the argument that the force⁶ could occur only in the flight, or retention of the property once taken.⁷

⁶ For brevity, we use the term “force” broadly to mean “force and violence, or . . . assault or putting [a present person] in fear” within the meaning of MCL 750.530, and we use the term (continued...)

Thus, because the instructions provided that the necessary force could occur in the course of committing the larceny, including the “attempt . . . , flight, . . . or attempt to retain the property or money[,]” the instructions were incorrect.

However, assuming that defense counsel’s failure to object “fell below an objective standard of professional reasonableness[,]” there is no reasonable probability that objecting would have made a difference. *Rodgers, supra* at 714. The exact sequence of events in the apartment was never clearly established, but it is unlikely that the jury could have found that any force occurred *only after* the larcenies (of the victim’s television and money) were complete. It is far more likely that the jury inferred that the assault preceded the theft of the television, at least. That is, the evidence could support a finding that a larceny was committed by defendant using the necessary force, the evidence could not support a finding that defendant used force, frightened the victim, or assaulted her only after completing a larceny, which occurred in *Randolph, supra* at 534-535. It would be patently unreasonable for a rational jury to conclude that defendant pocketed a 19-inch television and then sexually assaulted the victim, so he would necessarily have used force that put her in fear for her safety before taking the television.

Moreover, the victim’s 911 call clearly demonstrated her fear even before defendant gained entry into her apartment and defendant conceded during his new trial motion that the noise of the break-in would have immediately frightened the victim. The victim also told the detective that she gave defendant money after he broke in and demanded money, and there is no indication or argument made that the victim would have willingly handed over money had she not been afraid. Accordingly, because there is simply no evidence that would support a finding that defendant only frightened or used force in an attempt to commit larceny or to escape or retain the property, it is overwhelmingly likely that the jury found that defendant accomplished a larceny by force or placing the victim in fear, so that the error in the jury instruction was harmless.

Affirmed.

/s/ Janet T. Neff
/s/ Peter D. O’Connell
/s/ Christopher M. Murray

(...continued)

“larceny” to mean “rob, steal and take [property] from the person of another, or in his presence”

⁷ In contrast, the current version of MCL 750.530 provides that the necessary force may occur “in the course of committing a larceny[,] [which] includes acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property.”