

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY ALLISTER MASON,

Defendant-Appellant.

UNPUBLISHED

February 19, 2009

No. 282241

Ingham Circuit Court

LC No. 06-000223-FC

Before: Hoekstra, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317; and the trial court sentenced defendant to a prison term of twenty-five to forty years. Defendant appeals as of right. We affirm defendant's convictions and sentence, but vacate that part of the Judgment of Sentence that assessed restitution, costs, and the Crime Victim's Rights Fee.

FACTS

Defendant was charged in October 2005 with open murder for the 1973 stabbing death of 20-year-old Michigan State University (MSU) student Martin Brown. The prosecution's theory was that MSU student Stanley Price and defendant, both of whom are African-American, together had committed a random act of violence against the first convenient white target that they came across in the very early hours of March 11, 1973. The defense maintained that the prosecution failed to prove beyond a reasonable doubt that defendant was present and/or involved in the murder. The defense also offered an alternative suspect, Haywood Lockhart, as an accomplice to Price if Price had been involved in the killing.

Evidence was presented that Price and defendant were both instructors for the Black Topographical Library and Research Center (BTLRC, or "the center"), an organization that promoted "black issues" and encourages "blacks to stand up for their rights" through the use of meetings and classes designed to "provoke emotion and awareness." Christopher Hood, the director of the Detroit BTLRC, authorized Price and defendant to conduct a BTLRC meeting on the MSU campus on the evening of March 10, 1973. Hood testified that Price and defendant both wore standard BTLRC dress of solid green army fatigues and black combat boots when they left the center to go to MSU. Hood testified that defendant did not have a car, and that Price drove a Volkswagen. According to Hood, defendant telephoned him following the meeting on the MSU campus and indicated that the meeting was successful.

Around 1:20 a.m. on March 11, 1973, MSU student Andrea Gaines McCarthy was driving on campus when she observed the victim run into the street near the Sparty statute and Jenison Field House. The victim flagged her down and asked her to call an ambulance. McCarthy hailed a passing car, and James Antwine, an MSU student, stopped to help. As Antwine ran to call the police, he observed a Volkswagen parked by on the street in front of Jenison Field House.¹ About this same time, MSU police officer George Plummer arrived at the scene. The victim told Plummer that two black men wearing military fatigues had stabbed him. The ambulance driver overheard the victim describe his assailants to Plummer. The victim stated that he had been stabbed near Jenison Field House and that his attackers had headed west.² The victim died from his injuries later that night at Sparrow Hospital.

At about 12:45 a.m. on March 11, 1973, Samuel Wolfson, an MSU student, saw Price park his Volkswagen behind VanHuesen Hall. Wolfson saw Price and a man taller than Price get out of the vehicle and walk toward McDonald Hall. Both Price and the other man were wearing military fatigues. Wolfson identified Price as the driver of the Volkswagen from a photographic lineup.

At approximately 1:15 a.m. on March 11, 1973, MSU student Erik Johnson was walking with his girlfriend, Sue Forslund, when he saw two black men in military fatigues walking briskly along a bridge that is near Jenison Field House and Sparty. One of the men was short and muscular, wearing an army surplus jacket with fatigues. The other man was taller and slender, wearing a dark green army jacket with fatigues. Johnson picked Price from a photographic lineup as similar to the short man he observed. Forslund also noticed the two black men in military style clothing, and noticed that one of them was tall.

At about 1:30 a.m. on March 11, 1973, Ray Benner, an MSU student, saw two black men walking toward the Kellogg Center parking lot. He also noticed that police had gathered near the Sparty statute, and as he approached the scene he saw that they were gathered around the victim.

Testimony was presented that defendant and Price were friends with an MSU student named Haywood Lockhart, who lived on campus. Between midnight and 2:00 a.m. on March 11, 1973, two telephone calls came into Lockhart's dorm room. Lockhart's roommate, Gregory Miller, answered the phone the first time and woke Lockhart to take the call. When the phone rang again approximately one or 1-1/2 hours later, Miller answered but Lockhart was no longer in the room.

According to Lockhart, defendant and Price both spoke to him on the phone in his dorm room in the early morning hours of March 11. They asked Lockhart to meet them somewhere on campus. When Lockhart met Price and defendant, they asked him to provide them with an alibi and to tell anyone who asked that they were with Lockhart all night. Lockhart agreed to provide the alibi. The three men then all jumped onto a moving train and planned to jump off the train

¹ Witnesses noticed the Volkswagen because street parking at night on campus is prohibited.

² The officer testified that a westward heading was in the direction of the Kellogg Center and the Brody Complex of dormitories.

near his dorm. Once the train slowed enough for them to jump off, Lockhart walked to his dorm, and defendant and price walked in the opposite direction.

At approximately 5:00 a.m. on March 11, MSU student John Demyer, who lived in Holden Hall along with Price, saw Price on the elevator with another black man who was taller and more slender than Price. Demyer indicated that both Price and the other man were wearing military fatigues and lace-up boots. Demyer stated that Price wore glasses and sideburns with slightly long hair, and that the taller man had shorter hair. Demyer testified that Price and the other man exited the elevator on the third floor where Price lived.

Hood testified that defendant, who lived at the center and opened it daily to the public, did not open the center on the morning of March 11 as usual. Between 2:00 p.m. and 5:00 p.m. that day, defendant and Price visited Hood in a Detroit YMCA. Price was in fatigues, but defendant was not. Hood was not able to talk to the men at the time because he was busy. Hood did not see Price again after this visit.

At around 6:00 or 7:00 p.m. the same day, defendant was talking with a small group of people, including Hood, at the center. Defendant boasted that "I snuck up on that Honkey and I stabbed him." Hood had heard about the murder at MSU, and had seen defendant carry a knife in the past. Over the next few days, defendant's demeanor changed. Hood observed that defendant was sleeping more, was not taking care of himself, and was depressed. In 1973, Hood made an anonymous telephone call to MSU police regarding the victim's murder.

While investigating the scene on March 11, police officers noticed a Volkswagen parked in front of Jenison Field House. The officers watched the vehicle throughout the night. At approximately 6:30 a.m. the Volkswagen drove away. Officers subsequently stopped the Volkswagen, which was occupied by Price. Price was wearing army fatigue pants, combat boots, and a blue air force parka. Price was verbally belligerent when he exited the vehicle, but agreed to go to the police station for questioning. He was released after approximately 45 minutes.

Around noon on March 11, MSU student William Handrich, who was the assistant head resident of Holden Hall, saw Price in the Holden Hall cafeteria. Price was the black student aide on the staff of East Holden Hall. Price was dressed in dark green camouflage pants, a dark green t-shirt, and black combat boots. Handrich commented to Price on the murder that occurred on campus the night before. Price was "acting hyper, with abrupt speech," and told Handrich that the police did not have a motive for the killing and that "the dude who did that must have had to have been crazy to stab him 10 times." At the time Price made the comments, the general public had not been made aware of the number of times the victim had been stabbed.

When police interviewed Lockhart for the first time, he indicated that Price was with him in his dorm room during the evening of March 10 and the early morning of March 11, 1973. According to Lockhart, he did not mention defendant because the police asked only about Price. After interviewing Lockhart, the police interviewed Lockhart's roommate, Gregory Miller. Miller indicated that Price was not in Lockhart and Miller's dorm room on March 10 or 11, 1973. When confronted with Miller's statement, Lockhart admitted to lying to give Price and defendant an alibi. Lockhart was the first person to tell police that defendant was with Price on March 11, 1973.

Police officers later discovered that the MSU parking permit on Price's vehicle was stolen. Officers arrested Price on March 12, 1973, based on the stolen permit. On March 13, 1973, officers searched Price's dorm room and retrieved a set of military fatigues.³ Officers also saw the victim's name, "MARTY," written on the wall near the telephone.

MSU student Roberta Clover and Price dated in 1973, but according to Clover she and Price were "broken up" around the time of the murder. Roberta did not return to MSU the term after the murder. She married Price in October 1973, and they had two children together. According to Roberta, the marriage was filled with violence.

On April 20, 1989, Roberta called the MSU police department and spoke to Detective Bernard Burns. According to Burns, Roberta told him that she was calling because her husband had threatened to kill her. She told Burns that Price said he would kill her "just like that white boy at Michigan State, Martin Brown." Roberta did not specifically say when Price made the threat, but referred to the threat as the reason for her call and indicated that he had made a similar threat three years earlier. Roberta further stated that while she was on the phone with Burns, she was sitting in her home with her two children on her lap and a gun for protection. Roberta told Burns that Price discarded the knife used in the murder in a sewer grate behind the Brody complex of dorms at MSU. She also stated that Price's accomplice in the murder was Gary Mason. She indicated that she called MSU police because local police agencies had not helped her in the past and she "wanted to make it stop." From 1989 until a police interview in October 2004, Roberta never changed her story.

Roberta testified that she was interviewed by police in February 2005 and claimed at that time that she never made the 1989 phone call to MSU police. However, in March 2005, she admitted that she did call MSU police in 1989, but that she had lied about everything she told Detective Burns because she was angry with Price.

The United States Marshall's Service arrested defendant in a San Diego homeless shelter on October 4, 2005, on a vagrancy warrant and he was taken to the San Diego jail. Ingham County Detective Jason Ferguson met with defendant at the San Diego jail and explained that he had a warrant for defendant's arrest for open murder. Defendant initially denied that he knew Price. Defendant was extradited to Michigan on October 7, 2005. Ferguson and two other detectives accompanied defendant on an airplane back to Michigan. During the flight, defendant asked to talk to Ferguson. Defendant explained that his mother had raised him to hate white people, and that was part of the reason he ended up living at the center. Defendant described the center as a group that facilitated hatred against white people in Detroit, and that the center required him to participate in certain acts against white people. When Ferguson mentioned "Marty," defendant said, "I'm guilty of this, I did this, and I have to own up to it, what happened, I'm responsible for this but I'm not the only one." Defendant also stated "this incident happened to him because of his hatred towards white people." Defendant further indicated that someday he would like to "meet with Marty's family face-to-face and tell them why this happened."

³ Forensic testing on the fatigues did not reveal any physical evidence.

Defendant argues that the trial court abused its discretion by admitting, as excited utterances under the hearsay exception provided in MRE 803(2), statements made by Roberta to Detective Burns during the 1989 phone call. We disagree.

The trial court initially instructed the jurors that they could not consider statements made by Roberta during the 1989 phone call as substantive evidence. However, during discussions regarding the jury instructions, the trial court concluded that the statements should be admitted as substantive evidence under MRE 803(2) because the statements were made during a time when Price threatened to kill Roberta.⁴ A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008).

The hearsay exception for excited utterances allows admission of “[a] statement relating to a startling event or condition made while the declarant was under the stress of the excitement caused by the event or condition.” MRE 803(2). Sufficient evidence (1) that the startling event actually occurred, and (2) that the declarant was still under the stress of it, must be presented. *People v Barrett*, 480 Mich 125, 133-134; 747 NW2d 797 (2008). The statement itself may be part of the evidence that establishes the underlying exciting event. *Id.* at 134. The declarant must have made the statement before there was time to contrive and misrepresent, and must have related to the circumstances of the startling event. *People v Smith*, 456 Mich 543, 550-551; 581 NW2d 654 (1998). The lack of capacity to fabricate in the time provided is the focus. *Id.* at 551-552. Although the time that passed between the startling event and the utterance is relevant in determining whether the declarant was still under the stress of the event, it is not dispositive, and it is necessary to consider whether there was a plausible explanation for the delay. *Id.* A trial court's determination whether the declarant was still under the stress of the event is given wide discretion. *Id.*

A. Startling Event or Condition

The trial court found that Roberta was under the stress of a domestic assault and a threat to kill by Price and that she was holding a gun in her lap at the time she made the statements during her 1989 phone call. Thus, the court found that a startling event occurred – Price's threat to kill Roberta “just like he killed that white boy at MSU” – and that her statements related to the threat to kill, thereby satisfying the first requirement for admitting Roberta's statements as excited utterances. Defendant asserts that the excited utterance alone cannot provide sufficient evidence to establish that the startling event occurred. In support of this argument, defendant cites *People v Burton*, 433 Mich 268; 445 NW2d 133 (1989). However, in *Barrett, supra*, the Court overruled *Burton* and held that the statement may be considered in conjunction with other evidence in establishing the existence of the startling event. *Barrett, supra* at 132. *Barrett* did

⁴ The trial court also found that the statements could be admitted under the “catch-all” hearsay exception provided in MRE 803(24).

not hold that a statement proffered as the excited utterance standing alone is insufficient to establish the existence of a startling event. Indeed, the *Barrett* Court noted that it did not need to “reach the question whether the statement standing alone could supply the evidence of the startling event” because “there clearly was independent evidence to corroborate the existence of the startling event or condition.” *Id.* at 132. Thus, contrary to defendant’s suggestion, the Court did not hold that a statement standing alone could not supply the evidence of the startling event. Rather, the Court held that “a trial court may consider *any* evidence regardless of that evidence’s admissibility at trial, as long as the evidence is not privileged, in determining whether the evidence proffered for admission at trial is admissible.” *Id.* at 134. In light of Roberta’s statements to Detective Burns that defendant threatened to kill her “like he did that white boy at MSU”, and that she was sitting in her home with her children and a gun on her lap, we find no error in the trial court’s finding that Roberta’s statements related to a startling event.

B. The Stress of the Startling Event

Defendant also argues that the trial court erred by finding that Roberta made the statements while under the excitement of the startling event. He maintains that no evidence was presented with regard to when defendant threatened to kill Roberta. The trial court found that Roberta’s state of mind at the time she made the telephone call did not indicate that she had the capacity to fabricate. Roberta indicated to Detective Burns that she was calling because her husband had threatened to kill her, and that he would kill her “just like that white boy at Michigan State, Martin Brown.” While Roberta did not specifically state when Price had made the threat, she cited the threat as the reason for her call and indicated that he had made the same threat three years earlier. Roberta also stated that while she was on the phone with Burns, she was sitting in her home with a gun to protect herself. She indicated that she called the MSU police because the local agencies had not helped her in the past and she “wanted to make it stop.” Taken together, this evidence suggests that Price’s threat to kill was imminent and that Price was acting under that threat when she made the telephone call. The trial court did not abuse its discretion when it found that Roberta was under the stress of the startling event when she made the telephone call. The trial court did not abuse its discretion by admitting Roberta’s statements in her 1989 telephone call under the excited utterance exception to the hearsay rule.

Even assuming that the trial court erred by admitting Roberta’s 1989 statements as excited utterances, considering the entire record, any error is harmless. The harmless error doctrine presumes that a preserved, nonconstitutional error is not a ground for reversal unless, after an examination of the entire cause, it affirmatively appears that it was more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999).

Evidence on the whole record showed that defendant was on the MSU campus with Price on March 10, 1973, to make a presentation on behalf of the BTLRC. Defendant and Price were wearing the BTLRC standard clothing of army fatigues and combat boots when they left for campus. The victim told Plummer that his assailants wore fatigue clothing. Witnesses in the vicinity of the crime scene near the time of the crime testified that they observed two men in fatigues walking briskly westward near the Sparty statue and away from the Jenison Field House. Evidence was also presented that defendant and Price asked Haywood Lockhart to provide an alibi for them for the night of March 10 and the early morning hours of March 11. William Handrich testified that around noon on March 11 he spoke with defendant on campus and during

a conversation about the murder defendant commented that “someone would have been crazy to stab him ten times.” Defendant’s comment was made at a time when details of the victim’s injuries had not been released to the public. Hood testified that defendant did not return to the center until the afternoon of March 11, and that he boasted that he “snuck up on that Honkey and I stabbed him.” And, after being arrested, defendant told Detective Ferguson of his involvement with the BTLRC, and that he was required to participate in certain acts against white people. When Ferguson mentioned “Marty,” defendant said, “I’m guilty of this, I did this, and I have to own up to it, what happened, I’m responsible for this, but I’m not the only one.” Defendant further stated that he would like to meet with the victim’s family “and tell them why this happened.” Again, after a review of the record, the trial court’s error in admitting Roberta’s statements under the excited utterance exception hearsay exception was harmless and does not require reversal. *Lukity, supra* at 496.

II

Defendant argues that the trial court denied defendant the right to present a defense and to have effective assistance of counsel when it refused to instruct the jury on accessory after the fact. We review claims of instructional error de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

It is the function of the trial court to clearly present the case to the jury and instruct them on the applicable law. *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001). Jury instructions must include all the elements of the charged offense, and must not exclude material issues, defenses, and theories if the evidence supports them. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). Jury instructions must be read as a whole to determine if the trial court committed error requiring reversal. *Katt, supra* at 310. The instructions need not be perfect, but must fairly present the issues and sufficiently protect the defendant’s rights. *Id.*, quoting *Canales, supra* at 574.

Here, defense counsel requested an instruction on the offense of accessory after the fact before presenting his closing argument. The trial court agreed to instruct the jury on the offense of accessory after the fact. In his closing argument, however, defense counsel never argued to the jury that the jury should find defendant guilty of accessory after the fact. Rather, defense counsel’s closing argument focused on inconsistencies in the evidence and suggested that it was Haywood Lockhart, not defendant, who was with Price at the time of the murder.

After closing arguments, the prosecutor asserted that the trial court could not instruct the jury on the offense of accessory after the fact because the offense is not a cognate offense of murder. Defendant then requested an instruction on the offense of accessory after the fact as a theory of defense. The trial court declined to provide the instruction.

Accessory after the fact is a common law crime punishing “one, who with knowledge of another’s guilt, renders assistance to a felon in an effort to hinder his detection, arrest, trial or punishment.” *People v Perry*, 460 Mich 55, 59, 61; 594 NW2d 477 (1999). This offense is akin to obstruction of justice. *Id.* at 62. Accessory after the fact is not a cognate offense of murder. *Id.* at 62-63. Rather, the offense of accessory after the fact is a separate and distinct offense that may only occur after murder is committed. *People v Bargy*, 71 Mich App 609, 614-615 n 5, 616-617; 248 NW2d 636 (1976). Thus, the trial court properly refused to instruct the jury on the

offense of accessory after the fact. *People v Smith*, 478 Mich 64, 73; 731 NW2d 411 (2007). We reject defendant's claim that he was denied due process of law because the trial court would not give an instruction that accorded with his theory of the case. As noted above, the defense was that defendant was innocent and that Haywood Lockhart was the individual who assisted Price in the murder. Nothing prevented defendant from urging that defense. Defense counsel diligently cross-examined the prosecution witnesses, and, though he declined the opportunity, defendant was free to present proofs to the jury.

III

Defendant argues, and the prosecutor concedes, that the trial lacked authority⁵ to impose restitution, the Crime Victim's Rights Fee, and costs because the offense for which defendant was convicted was committed in 1973.⁶ We therefore vacate that portion of the Judgment of Sentence that assessed restitution, costs, and the Crime Victim's Rights Fee.⁷

Defendant's conviction and sentence are affirmed, but that part of the Judgment of Sentence that assessed restitution, costs, and the Crime Victim's Rights Fee is vacated.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra

⁵ It was not until the 1985 passage of the Crime Victim's Rights Act, MCL 780.751 *et seq.*, and related amendments of the Code of Criminal Procedure, specifically MCL 769.1a, that the trial courts were authorized to order restitution in conjunction with a prison sentence for offenses occurring on or after July 10, 1985.

⁶ On August 13, 2008, the trial court signed an order granting defendant's Motion to Stay Financial Assessments Pending Appeal "until further order of this Court."

⁷ We need not determine whether restitution, the Crime Victim's Rights Fee, and costs can be imposed as part of a sentence for second-degree murder under MCL 750.137 for crimes committed after July 10, 1985, as such a determination is not necessary to the resolution of this appeal.