

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

KENNETH DUANE LINDSTROM,

Defendant-Appellee.

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UNPUBLISHED

September 18, 2003

No. 240284

Washtenaw Circuit Court

LC No. 01-001758-FH

Before: Smolenski, P.J., and Murphy and Wilder, JJ.

PER CURIAM.

The prosecutor appeals as of right from an order quashing the information charging defendant with felonious assault, MCL 750.82.<sup>1</sup> We reverse and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

When an officer responded to a call at the victim's apartment, the victim was distraught, crying, and disheveled. There was blood on her face and the floor, a bruise under her eye, and she had a scalp wound. A glass table lamp was lying on the couch. The shade was somewhere on the floor. The victim told the officer that defendant had struck her on the head with the lamp. This statement was admitted at the preliminary examination under MRE 803(2) as an "excited utterance." The district court stated:

I think at least there was a basic foundation for an excited utterance based on the fact that she was testifying about the injury and appeared to be excited as a result of it, and in terms of the time issue, I think the fact that she was in the process of being treated – as the officer testified that she still had blood on her face, although there was no direct testimony relating to the time of the assault. I think it's – it's a reasonable inference that it was fairly close in time to the statement based on the present treatment of the injuries.

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<sup>1</sup> Defendant asserts that he was also bound over for trial on a charge of tapping or cutting a telephone line, MCL 750.540. The preliminary examination transcript indicates that he was bound over on this charge. However, the order binding defendant over for trial indicates that this count was dismissed and that defendant was bound over on the felonious assault charge only.

After being bound over for trial, the trial judge quashed the information, concluding that the victim's statement itself was used to prove the assault, and determining that the utterance cannot be used to prove the startling event that gives rise to it.

The prosecutor argues that the officer's observations at the scene were sufficient to establish the assault for purposes of the hearsay exception. In *People v Burton*, 433 Mich 268, 298-299; 445 NW2d 133 (1989), the Supreme Court held that an excited utterance was not admissible absent independent proof establishing the startling event by a preponderance of the evidence without consideration of the excited utterance. However, in *People v Hendrickson*, 459 Mich 229, 231; 586 NW2d 906 (1998), a plurality of three held that photographs of a domestic violence victim depicting injuries consistent with an assault provided sufficient independent evidence that an assault had occurred to admit the victim's statements that the defendant had just beaten her as a present sense impression. Another plurality of three opined that "*Burton* was erroneously decided, and the excited utterance exception requires no independent corroborative evidence." *Id.* at 241.

Here, the evidence, blood on the victim's face and floor, a bruise under the victim's eye, a scalp wound, the victim's disheveled appearance, and a lamp lying on the couch, is consistent with an assault with a lamp and the fact that a startling event occurred of a magnitude sufficient to cause the victim injury. Thus, the court erred in quashing the information on this ground.

Defendant argues that the information should nonetheless have been quashed because there may have been time to contrive and fabricate the statement. If the interval of time between the startling event and the statement is sufficiently long to allow this to take place, the foundation for an excited utterance has not been satisfied. *People v Gee*, 406 Mich 279, 282; 278 NW2d 304 (1979). The statement must be made "when the witness was still under the influence of an overwhelming emotional condition." *People v Straight*, 430 Mich 418, 425; 424 NW2d 257 (1988). That the victim was crying and distraught suggests that she was still reacting to the assault at the time she made the statement. Moreover, that she was being treated for her injuries suggests that it had not been long before they occurred. Although ambiguous, the officer's testimony appears to be that he noticed drops of blood on the floor as he was escorting emergency personnel out and she was being transported, suggesting that she was still bleeding. Although there is no direct evidence reflecting the interval of time between the assault and the statement, the trial court's inference that it was close in time was not an abuse of discretion. See *People v Talley*, 410 Mich 378, 385-386; 301 NW2d 809 (1981), overruled in part on other grounds in *People v Kaufman*, 457 Mich 266, 276; 577 NW2d 466 (1998).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski  
/s/ William B. Murphy  
/s/ Kurtis T. Wilder