

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KOREY BERNELL SHAW,

Defendant-Appellant.

UNPUBLISHED
November 29, 2012

No. 306273
Oakland Circuit Court
LC No. 2011-235401-FH

Before: JANSEN, P.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm) (second offense), MCL 750.227b. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to two to five years' imprisonment for his felon in possession of a firearm conviction and five years' imprisonment for his felony-firearm (second offense) conviction. Defendant appeals as of right. We affirm defendant's convictions, vacate his sentence and remand for resentencing consistent with this opinion.

First, defendant argues that the recording of Rodney Tatum's 911 call regarding this incident was inadmissible and violated the Confrontation Clause because Tatum was a witness against him and not available at trial for cross-examination by defendant, and Tatum's hearsay statements during the 911 call were not admissible as present sense impressions or excited utterances. We disagree.

This Court reviews a preserved issue of constitutional error, such as one concerning the right to confront a witness at trial, *de novo*. *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006). Unpreserved evidentiary issues are reviewed for plain error that affected the defendant's substantial rights. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999).

The Confrontation Clause gives a person accused of a crime the right to be confronted, face to face at trial, with the witnesses against him. *People v Fackelman*, 489 Mich 515, 528; 802 NW2d 552 (2011). When "the primary purpose of an interrogation is to respond to an "ongoing emergency," its purpose is not to create a record for trial and thus is not within the scope of the Clause." *Michigan v Bryant*, __ US __; 131 S Ct 1143, 1155; 179 L Ed 2d 93 (2011). Whether the primary purpose of an interrogation is to enable police assistance to meet an ongoing emergency is an objective inquiry. *Id.* at 1156.

An objective analysis of the circumstances of an encounter and the statements and actions of the parties to it provides the most accurate assessment of the “primary purpose of the interrogation.” The circumstances in which an encounter occurs—*e.g.*, at or near the scene of the crime versus at a police station, during an ongoing emergency or afterwards—are clearly matters of objective fact. The statements and actions of the parties must also be objectively evaluated. That is, the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals’ statements and actions and the circumstances in which the encounter occurred. [*Id.* (footnote omitted).]

When Tatum called 911 regarding this incident, 911 dispatcher Richard Waynick asked him questions to gather as much information as possible to give to the responding police officers. During this call, Tatum indicated that defendant had a shotgun. Tatum also stated that defendant was a convicted felon, which was a nonresponsive statement. Tatum indicated that defendant was at the home because Tatum was being evicted. Tatum’s actual purpose in making the 911 call is not the proper inquiry. *Bryant*, 131 S Ct at 1156. The record indicates that Tatum called 911 to report an emergency going on at the time of the call, which was the presence of defendant outside of his home with a shotgun, while Tatum was being threatened with eviction. It is objectively reasonable for one to seek emergency help in a situation where a person is outside their home with a shotgun threatening eviction. See *Id.* Therefore, the primary purpose of Tatum’s 911 call was to report, and get a response, for an ongoing emergency, and thus, the Confrontation Clause did not preclude the admission of the recording. See *Id.* at 1155.

Next, defendant argues that Tatum’s statements during the 911 call were not admissible hearsay under MRE 803(1) or (2). However, defendant did not preserve this issue for review.

“Hearsay¹ is not admissible except as provided by these rules.” MRE 802 (footnote added).

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

- (1) Present Sense Impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
- (2) Excited Utterance. 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. [MRE 803(1) and (2).]

¹ “Hearsay is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” MRE 801(c) (quotation marks omitted).

Admission of hearsay under MRE 803(1) requires three conditions: “(1) the statement must provide an explanation or description of the perceived event, (2) the declarant must personally perceive the event, and (3) the explanation or description must be “substantially contemporaneous” with the event.” *People v Hendrickson*, 459 Mich 229, 236; 586 NW2d 906 (1998) (citation omitted). “A statement is admissible under [the MRE 803(2)] exception if (1) there was a startling event and (2) the resulting statement was made while the declarant was under the excitement caused by that event.” *People v Layher*, 238 Mich App 573, 582; 607 NW2d 91 (1999).

The record indicates that Tatum made the 911 call regarding this incident while defendant was allegedly outside of Tatum’s home with a shotgun. Therefore, the trial court did not err in admitting Tatum’s 911 call into evidence because this hearsay evidence was a present sense impression since the record indicates that Tatum was describing the incident of defendant possessing a shotgun outside of his home while it was occurring or substantially contemporaneous with the incident. *Hendrickson*, 459 Mich at 236. Additionally, the trial court did not err by admitting the hearsay evidence because it was also an excited utterance, because defendant’s presence outside of Tatum’s home with a shotgun could be considered a startling event, and because he made the call while defendant was outside of his home with the shotgun or substantially contemporaneous with the incident, Tatum was under the excitement caused by the incident when he made the call. *Layher*, 238 Mich App at 582.

Next, defendant argues that evidence from a “second location,” a home at 23416 Park Place, Southfield, Michigan, of a shotgun and an item of mail were inadmissible because the location was not part of the *res gestae* of the incident and because the admission of evidence was unfairly prejudicial. We disagree.

Defendant did not object to the admission of evidence from the home at 23416 Park Place, which was the shotgun and an item of mail with defendant’s name and the address of the home on it. Therefore, this issue has not been preserved for review. This Court reviews unpreserved evidentiary issues for plain error affecting the defendant’s substantial rights. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004); *People v Douglas*, 296 Mich App 186, 191; 817 NW2d 640 (2012).

“*Res gestae* are the circumstances, facts and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character.” *People v Eisenberg*, 72 Mich App 106, 118; 249 NW2d 313 (1976). “[C]onduct and demeanor of a person charged with crime at the time of, or shortly before or after the offense is claimed to have been committed, may be shown as a part of the *res gestae*.” *People v Castillo*, 82 Mich App 476, 479; 266 NW2d 460 (1978). Generally, “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” MRE 404(b)(1). However, “MRE 404(b) does not preclude evidence of criminal actions accompanying an escape [or attempted escape] because these actions are part of the *res gestae* of the incident.” *People v McGhee*, 268 Mich App 600, 613; 709 NW2d 595 (2005); *People v Coleman*, 210 Mich App 1, 5; 532 NW2d 885 (1995).

On January 17, 2011, at approximately 8:30 a.m., Kenneth Perryman was at his home located at 23668 Lasher Road, Southfield, Michigan. Perryman observed and heard, through his

bedroom window, his neighbor arguing with defendant. Perryman observed defendant, while standing at the back of a gray Expedition, reach into the back of the truck and pull out a shotgun and point it in the direction of the neighbor. Perryman then called 911. Additionally, Tatum called 911 regarding this incident and reported that defendant had a shotgun outside of Tatum's home.

On January 17, 2011, at approximately 8:30 a.m., Southfield police officer Kenneth Rochon received a dispatch call regarding this incident. Initially, Rochon was dispatched to 23668 Lasher Road. However, Rochon proceeded to 23416 Park Place, Southfield, Michigan, because he received information that defendant lived at that location. Additionally, police officers responded to the 23416 Park Place location because, allegedly, there was a gun involved and a possible hostage situation involving defendant's wife, Cheryl Shaw. Rochon arrived at 23416 Park Place approximately five minutes after he received the dispatch information. Defendant was found and arrested inside the home. Subsequently, pursuant to a search warrant, Rochon searched the location, whereby a shotgun was recovered from the master bedroom closet and a piece of mail from First Premiere Bank with defendant's name and the address of the home on it. The mail acknowledged the Bank's receipt of defendant's application for a MasterCard and was found either on the nightstand or in the nightstand drawer in the master bedroom.

Five minutes after this incident was reported to have happened, police arrived at the 23416 Park Place location, arrested defendant and executed the search warrant. The shotgun and mail were recovered in close proximity to each other. The evidence of, and from, the location where defendant went immediately after this incident happened was contemporaneous with the incident, and therefore, was part of the *res gestae* of the incident. *Castillo*, 82 Mich App at 479; *Eisenberg*, 72 Mich App at 118. Therefore, the trial court did not err by admitting into evidence the shotgun and mail recovered from the 23416 Park Place location. Defendant's argument is without merit.

Lastly, defendant argues that the trial court erred in scoring offense variable 19 (OV 19) at 10 points. We agree.

"This Court reviews *de novo* questions of statutory construction." *People v Ryan*, 295 Mich App 388, 400; 819 NW2d 55 (2012). "This Court reviews a trial court's scoring of a sentencing guidelines variable for clear error." *People v Lockett*, 295 Mich App 165, 182; 814 NW2d 295 (2012). "This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v Phelps*, 288 Mich App 123, 135; 791 NW2d 732 (2010) (quotation marks and citations omitted). This Court will affirm a trial court's decision regarding sentencing scoring where there is evidence existing to support the score. *Id.*

"Offense variable 19 is threat to the security of a penal institution or court or interference with the administration of justice or the rendering of emergency services." MCL 777.49. Ten points are to be scored for OV 19 when "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). "Conduct that occurs before criminal charges are filed can form the basis for interference, or attempted interference, with the administration of justice, and OV 19 may be scored for this conduct where applicable." *People v Barbee*, 470 Mich 283, 288; 681 NW2d 348 (2004).

[T]he phrase “interfered with or attempted to interfere with the administration of justice” encompasses more than just the actual judicial process. Law enforcement officers are an integral component in the administration of justice, regardless of whether they are operating directly pursuant to a court order. [*Id.* at 287-288.]

Defendant was convicted of felony-firearm (second offense), MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. The trial court scored OV 19 at 10 points. Defendant concedes that he did not immediately respond when police officers were climbing the stairway inside the apartment. Additionally, the record indicates that as Rochon entered the apartment located at 23416 Park Place, which has a stairwell of 15 stairs leading up immediately off the front door, Rochon yelled for defendant to show himself and show his hands. Rochon repeated the warning for defendant to show his hands. Rochon then yelled for defendant to tell him where he was at. Rochon made these statements as he was climbing the stairs, which were completely surrounded by a partial wall. Rochon made these requests of defendant for safety reasons because there was allegedly a gun involved. Rochon testified that when he got to the top of the stairs, defendant stood up and had his hands raised.

The trial court ruled as follows regarding the issue:

[M]y recollection of Deputy Rochon’s testimony was that from the moment they entered into the stairwell they yelled for the defendant to show himself with his hands raised. It took the -- and I know it wouldn’t probably take too much time to -- to ascend a certain number of stairs, but during that whole time the deputy is yelling that and it wasn’t until the deputy reached the top stair with his gun drawn that the defendant raised himself from a crouched position, which would indicate to the court that he was attempting to hide and raise his hands, so, I am not going to change the scoring of OV-19.

We find that the record does not contain evidence to sufficiently support the trial court’s scoring of OV 19. Rochon testified that he was making his requests to defendant as he was ascending the staircase. He was climbing the stairs at a “medium” pace and defendant stood as Rochon got to the top of the staircase. While defendant may not have immediately stood in response to Rochon’s command, the record demonstrates that any delay on defendant’s part was so brief that it cannot be interpreted as an attempt to interfere with the administration of justice. Consequently, the trial court erred in scoring 10 points for OV 19. Had the trial court properly scored OV 19, defendant’s minimum sentencing guidelines range would have been 7 to 46 months, as opposed to 10 to 46 months. “When a sentence is based on a scoring error, resentencing is required.” *People v Jamison*, 292 Mich App 440, 443; 807 NW2d 427 (2011).

We affirm defendant’s convictions, vacate his sentence and remand for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Cynthia Diane Stephens
/s/ Michael J. Riordan