

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LONNIE BERNARD ROBERSON,

Defendant-Appellant.

UNPUBLISHED

June 24, 1997

No. 192239

Muskegon Circuit Court

LC No. 95-38168-FC

Before: Reilly, P.J., and Hood and Murphy, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree criminal sexual conduct, MCL 750.520b(1)(e); MSA 28.788(2)(1)(e) (actor armed with weapon). The trial court subsequently found defendant guilty of being an habitual offender, fourth offense, MCL 769.10; MSA 28.1082. Defendant was sentenced to 35 to 100 years' imprisonment. Defendant appeals as of right. We affirm.

The victim in this case alleged that defendant held a knife to her neck and forced himself into the driver's seat of her vehicle while she was using a local payphone, blindfolded her, drove her to an alley, and then forced her to engage in three separate acts of oral sex, two acts of vaginal intercourse, and one act of anal sex. The victim testified that defendant was a complete stranger, and later identified him as her assailant while viewing mug shots at the police station. Defendant, on the other hand, claimed that he and the victim knew one another, that they had had sexual relations in the past, and that they engaged in consensual sex on the day in question. It was defendant's theory that the victim was merely fabricating the assault allegations because she was upset about defendant losing approximately \$16 of her money in a botched drug deal. The issues of consent and credibility were essential to the resolution of the case.

I

Defendant first argues that the trial court erred in allowing the prosecution to present a recording of the 9-1-1 call placed by the victim while standing outside the police station immediately following the alleged assault, and the responding officer's testimony concerning the statements the victim made to him when explaining what had happened to her. Defendant maintains that both the tape and the officer's

testimony constitute inadmissible hearsay that, contrary to the trial court's holding, do not qualify as an excited utterance exception to the hearsay rule, noting that the victim's statements were the product of police questioning and were not spontaneous in nature. We disagree.

A trial court's decision to admit evidence will not be reversed absent an abuse of discretion. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). The standard for reviewing an abuse of discretion is narrow; the result must have been so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias. *Id.*

We find that the taped conversation between the 9-1-1 central dispatch officer and the victim was properly admitted nonhearsay evidence. Hearsay is "a statement, other than 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); *People v Fisher*, 220 Mich App 133, 152; 559 NW2d 318 (1996). While the recording of the 9-1-1 call without question includes out-of-court statements made by the victim, we find that the tape was not played to the jury to prove the truth of what the victim reported, but rather, as evidence of the victim's state of mind and demeanor at the time she placed the call, as noted by the prosecution during trial. Even after reviewing the "cold" record of the 9-1-1 call, we agree with the prosecution that the tone of the call provided first-hand evidence to support the finding that the victim was emotionally distraught, and strongly suggested that she was not fabricating the story. The trial court did not abuse its discretion in allowing for the admission of the 9-1-1 recording.

With respect to the officer's testimony, we find that although his testimony included hearsay statements made by the victim following the assault, those statements were properly admitted as excited utterances. An excited utterance is "[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(2). There is no definite and fixed limit of time in determining whether a declaration comes within the excited utterance exception, *People v Kowalak (On Remand)*, 215 Mich App 554, 559; 546 NW2d 681 (1996), and even if a victim's statements were made in response to an officer's questioning, they may nonetheless be admissible as excited utterances if made under the stress of the excitement, *People v Sanders*, 163 Mich App 606, 611; 415 NW2d 218 (1987).

Here, the record clearly establishes that the victim was still under the emotional stress and excitement caused by the sexual assault at the time she spoke to the responding officer, and in fact remained so even after being admitted to the hospital emergency room almost half an hour later. The evidence shows that the victim drove immediately to the police station following the assault, and that the 9-1-1 dispatch officer described the victim as being "a very distraught female" who was having a hard time relating what had happened to her. The responding officer testified that upon approaching the victim he noticed that she was crying, that she appeared fearful, and that she was physically trembling as she clutched her baby. The officer also added that the victim continued sobbing off-and-on to the point that she was unable to complete some of her sentences. In addition, the examining physician reported that the victim was crying and appeared "quite emotionally distraught." Under the circumstances, the trial court did not abuse its discretion in admitting the evidence.

Defendant next argues that the trial court erred in allowing the prosecutor to impeach his credibility by questioning him about a prior conviction. Specifically, defendant maintains that his 1982 robbery conviction was irrelevant and of little probative value. We disagree. The trial court's decision to allow impeachment by evidence of prior conviction is within its sound discretion and will not be reversed on appeal absent abuse of that discretion. *Coleman, supra* at 6.

A witness' credibility, including the defendant should he decide to take the stand, may be impeached with prior convictions, MCL 600.2159; MSA 27A.2159, if the convictions satisfy the criteria set forth in MRE 609. *People v Allen*, 429 Mich 558; 420 NW2d 499 (1988); *People v Cross*, 202 Mich App 138, 146; 508 NW2d 144 (1993). MRE 609(a)(2) provides, in relevant part, that evidence that a witness has been convicted of a crime is admissible for purposes of impeachment where

the crime contained an element of theft, and

(A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and

(B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.

For purposes of the probative value determination required by subrule (a)(2)(B), the court must consider the age of the conviction and the degree to which the conviction of the crime is indicative of veracity. MRE 609(b). If a determination of prejudicial effect is required, the court should consider the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify. *Id.* In addition, evidence of a conviction under MRE 609 is not admissible if a period of more than ten years had elapsed since either the date of the conviction or the release of the witness from the confinement imposed for that conviction, whichever is later. MRE 609(c).

In allowing for the impeachment by the prior conviction, the trial court found that defendant's 1982 armed robbery conviction contained an element of theft, which was "strongly indicative of veracity," that the conviction had "significant probative value" with respect to the issue of credibility, and noted that defendant had just been released from prison for that conviction in January 1995. The court also found that the probative value outweighed the potential prejudice considering that the elements of robbery are far different from those of first-degree CSC, and that the case hinged on the credibility of the parties. Finally, the prosecutor agreed to refer to the conviction as "robbery" rather than "armed robbery." The court agreed that it would "soften" the prejudice by having the conviction referred to only as "robbery," rather than "armed robbery," eliminating any reference to the use of a weapon.

Here, considering that defendant was arrested for the instant offense less than five months after he was released from prison for his 1982 armed robbery conviction, that the robbery conviction was

very different from the charged offense, that the admission of the prior conviction had no effect on defendant's decision to testify, and that this case was essentially a credibility contest concerning the issue of consent, we find that the trial court did not abuse its discretion in determining that the probative value of defendant's prior conviction outweighed its potential for prejudice. Furthermore, we note that although not necessary in determining prejudice, the jurors were specifically instructed by the court concerning the use of the prior conviction during their deliberations, and it was never revealed to them that defendant's prior conviction actually involved the use of a weapon.¹

Affirmed.

/s/ Maureen P. Reilly

/s/ Harold Hood

/s/ William B. Murphy

¹ We note that this Court recently found it unnecessary to determine whether the trial court abused its discretion in refusing to exclude evidence of a defendant's prior conviction where reasonable jurors would find the defendant guilty beyond a reasonable doubt even if evidence of the prior conviction had been suppressed. *People v Coleman*, 210 Mich App 1, 6; 532 NW2d 885 (1995). In the present case, the prosecution presented strong evidence of defendant's guilt. Thus, even if we found an error, it would be deemed harmless.