

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

DEANGELO ANTONIO WHEELER,

Respondent-Appellant.

UNPUBLISHED

March 20, 2007

No. 267091

Wayne Circuit Court

Family Division

LC No. 03-420464-DL

Before: Cooper, P.J., and Cavanagh and Meter, JJ.

COOPER, P.J. (*concurring*).

Respondent appeals as of right his adjudication for assault with intent to commit criminal sexual conduct. The majority affirms and I agree with the outcome, but write separately to note two differences in analysis.

The first difference relates to the issue of the victim's mother's testimony that the victim had been diagnosed with the sexually transmitted disease (STD) trichomonas. I agree with the majority that the testimony was relevant to establish why the victim's mother began questioning the victim about possible causes of the STD, which led to the victim stating that she had been assaulted. Likewise, I accept that this reasoning may make a valid case that the testimony was not offered to prove the truth of the matter asserted. However, the trial court should have weighed this evidence for admissibility under MRE 403.¹ Had it done so, I believe it might have found this highly inflammatory hearsay to be more prejudicial than probative. I note also that the whole issue could have been avoided by simply bringing in evidence that the victim actually did contract the STD.

The second difference in analysis relates to the second allegation of hearsay. I agree with the majority that the mother's testimony about what her daughter told her about the assault was properly admissible under MRE 803A. Although the majority opinion notes that the

¹ MRE 403: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

admissibility of the challenged statement rests on MRE 803A, the majority also suggests that an argument could be made that the statement qualified as an excited utterance. I disagree, and would find that, given the particular facts of this case, the bounds of the excited utterance rule cannot possibly stretch so far as to include the statements at issue. I note also that during oral arguments in this matter, the prosecutor agreed that the challenged statements did not qualify as excited utterances.

MRE 803(2), the “excited utterance” rule, provides that: “[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” is not excluded by the hearsay rule. Rule 803 includes twenty-four exceptions to the hearsay rule; twenty-three are narrowly tailored to allow in a particular class of evidence based on some indicator of reliability that is sufficient to overcome the presumption against hearsay as unreliable evidence, and one is a catch-all provision that allows a trial judge to use structured discretion in allowing evidence. The depth and breadth of the exceptions² and exclusions indicate that they are intended to cover the spectrum of allowable hearsay. It seems logical to conclude then that they are not to be stretched beyond the limits of rational application if a particular statement cannot reasonably be fit into any of the categories. However relevant and probative a statement might be, if the rules are circumvented to allow it, then the rules will cease to protect the integrity of judicial proceedings.

Here, the hearsay statements were made by the victim to her mother one and a half to two months after the assault. Arguably, a victim of assault may continue to suffer from the “stress . . . caused by the event or condition” for a very long time, indeed possibly forever. However, it does not follow that a statement made about an event two months after the event carries the same indicia of reliability and truthfulness as a statement made when in more direct reaction to the startling event. Although the time lapse is not of itself dispositive, *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998), logically there must be some limit on how long is too long.

The point of limiting the time during which a statement might qualify as an excited utterance is to separate the fabrications from the unfettered reactions, and that means examining the circumstances and weighing the “possibility of fabrication” against the possibility that “the statement was made out of a continuing state of emotional shock precipitated by the assault.” *People v Layher*, 238 Mich App 573, 584; 607 NW2d 91 (1999) (Finding the statements at issue were excited utterances despite the passage of time between the assault and the statements, given the specific facts and circumstances of the case.)

The victim in *Layher* was just five years old when she was assaulted, and this factor weighed significantly in the finding that her statements about the assault were excited utterances. I would note that MRE 803A serves this same interest of justice for very young victims, who may delay beyond the logical bounds of the excited utterance range before disclosing abuse. That rule exists because children may and do delay such reporting, for all of the reasons recounted in *Layher*.

² MRE 804 adds seven more exceptions to the hearsay rule, differing from MRE 803 in that the witness must be unavailable for these exceptions to apply.

I would also note that the age of the victim is not the only relevant factor in determining how long the period for excited utterances might extend. In *People v Straight*, 430 Mich 418, 426; 424 NW2d 257 (1988), for example, where the victim was only four years old at the time of the assault, our Supreme Court noted: “The difficulty in this case arises because the statements at issue were made approximately one month after the alleged assault, immediately after a medical examination of the child's pelvic area, and after repeated questioning by her parents.” Conversely, in *Layher*, the first statements the victim made about the abuse were spontaneous:

complainant's mother, Adeline Layher, testified that when complainant was five years old, she sent her into the house to retrieve a clothes basket. When complainant did not return, Layher went inside the house and found complainant naked and crying behind a door. Over objection, Layher testified that complainant told her immediately after the incident, both at home and at the hospital, that "her uncle had touched her in the wrong places," . . . [*Id.* at 582.]

As the majority correctly notes, this victim did make additional statements during a therapy session one week after the incident, and defendant did object to those statements. In rejecting defendant’s argument that the time lag should preclude admission of the hearsay statements, the Court distinguished *Straight*, finding that “there is no record evidence to support his [defendant’s] claim that Layher or the therapist repeatedly and emotionally asked complainant what happened until she answered.” *Id.* at 584. It is this distinction that I find relevant here.

This case is more factually analogous to *Straight* than to *Layher*, because the victim here was questioned by her mother after the diagnosis of STD, rather than spontaneously telling the story as part of an emotional outburst that is clearly a reaction to a traumatic event.

Here I would find, despite the victim’s age, eight years old at the time of the assault, that two months is simply too long a delay to support the inference that the statement was made out of a continuing state of emotional shock, particularly where, as here, the victim did not spontaneously report the abuse. To hold otherwise would turn a narrow gap in the rule into a gaping loophole.

Nonetheless, because the evidence was still admissible under MRE 803A, there is no prejudice to the defendant, and I would affirm.

/s/ Jessica R. Cooper