

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES L. NICHOLAS,

Defendant-Appellant.

UNPUBLISHED

June 18, 2009

No. 283850

Wayne Circuit Court

LC No. 07-003451-FC

Before: Borrello, P.J., and Meter and Stephens, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree, premeditated murder, MCL 750.316(1)(a), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life imprisonment for the murder conviction and to a concurrent prison term of 38 to 60 months for the felon-in-possession conviction, to be served consecutively to a two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arose from the shooting death of Reginald "Nuts" Nunnally, who was shot three times in the head.

On appeal, defendant challenges the trial court's decision to admit various out-of-court statements made by Natheerulean "Scooby" Mason on the night of the shooting. The statements were made to the victim's housemate, Danny Wilson, and to a responding police officer, David Kline. Although defendant objected to the admission of the statements on the ground that they were hearsay, the court found that they were admissible under the excited-utterance exception to the hearsay rule. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006).

Under the excited-utterance exception, MRE 803(2), a statement, although hearsay, is not excluded by the hearsay rule if it relates to a startling event or condition and was made while the declarant was under the stress of excitement caused by the event or condition. *People v Barrett*, 480 Mich 125, 131; 747 NW2d 797 (2008). The rationale for this exception is that a person who is still under the "sway of excitement precipitated by an external startling event will not have the reflective capacity essential for fabrication so that any utterance will be spontaneous and trustworthy." *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998) (internal citation and quotation marks omitted). There are two requirements for a statement to be admitted as an

excited utterance: (1) that there be a startling event, and (2) that the resulting excitement be made while the declarant is still under the excitement caused by the event. *Id.* A trial court's determination whether a declarant was still under the stress of the event is given wide discretion. *Id.* at 552.

At trial, the victim's housemate, Danny Wilson, testified that he was with the victim on the night of the shooting, but left the house for approximately an hour. When he returned, he met Mason outside the house. According to Wilson, Mason seemed "startled" and was not talking normally. Mason told him that defendant had returned to the house and chased the victim with a gun. Wilson found the victim lying inside the house and saw that he had been shot. He called the police, who arrived five or ten minutes later. Officer Kline testified that he spoke to Mason within ten minutes after he arrived. Mason was "very hyper," "wouldn't hold still," and spoke fast. Mason told him that she was "woken by a gunshot" and saw defendant standing over the victim while holding a gun in his hand; defendant then ran out the side door.

This testimony showed that there was a startling event, i.e., a shooting. In addition, Mason's statements related to that event and were made approximately an hour after the shooting occurred. Further, Wilson's and Officer Kline's testimony describing Mason's emotional state was sufficient to establish that she was still under the stress of the excitement caused by the event when she made the statements. Thus, the trial court did not abuse its discretion in admitting the statements as excited utterances.¹

Defendant argues that defense counsel was ineffective for not using Wilson's preliminary-examination testimony to challenge the foundation for admitting Mason's statements to Wilson. At the preliminary examination, Wilson testified that when he saw Mason, she "was somewhat 'extorted,'" meaning, "You won't believe what just happened." When asked if she was "excited," Wilson responded, "No." However, regardless of how this not-entirely-clear testimony may be characterized, the trial court's decision to admit Mason's statements to Wilson was properly based on the testimony presented at trial, which was sufficient to show that Mason's statements qualified as excited utterances, notwithstanding defense counsel's objection and notwithstanding the preliminary-examination testimony. Thus, defendant's ineffective-assistance claim must fail. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001) (discussing the standard for evaluating ineffective-assistance claims).

Defendant also argues that even if Mason's statements to Officer Kline qualify as excited utterances, their admission at trial violated his constitutional right of confrontation. At trial, defendant objected to the testimony only on the ground that it was hearsay. He did not object on the ground that admission of the testimony would violate his constitutional right of confrontation. Therefore, defendant's Confrontation Clause challenge is not preserved. *People v Bauder*, 269 Mich App 174, 177-178; 712 NW2d 506 (2005); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Thus, we review this issue under the plain-error rule. *People v*

¹ Defendant mentions the present-sense-impression exception to the hearsay rule in his appellate brief. See MRE 803(1). However, the testimony was not admitted under this exception and the exception need not be discussed in this opinion.

Carines, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To avoid forfeiture under the plain-error rule, three requirements must be met: “(1) error must have occurred, (2) the error was plain, i.e., clear or obvious, (3) and the plain error affected substantial rights.” *Id.* “The third requirement generally requires a showing of prejudice, i.e. that the error affected the outcome of the lower court proceedings.” *Id.*

A defendant has the right to be confronted with the witnesses against him or her. *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610(2007). The Confrontation Clause prohibits the admission of out-of-court “testimonial” statements unless the declarant was unavailable at trial and the defendant had a prior opportunity for cross-examination. *Id.*; *People v Taylor*, 482 Mich 368, 377; 759 NW2d 361 (2008). Testimonial statements include statements made during police interrogations, if the circumstances objectively indicate that the primary purpose of the interrogation was to establish or prove past events potentially relevant to later criminal prosecution. *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006); *Taylor, supra* at 377-378; *People v Walker (On Remand)*, 273 Mich App 56, 61; 728 NW2d 902 (2006); *People v Jordan*, 275 Mich App 659, 663; 739 NW2d 706 (2007).

In this case, Officer Kline spoke to Mason to acquire information to provide to the homicide department. Mason’s statements to officer Kline were made under circumstances that objectively indicate a primary purpose to establish past events relating to the victim’s shooting. Therefore, the statements were testimonial. However, we conclude that the admission of the statements did not affect defendant’s substantial rights. Independent evidence was presented that defendant and the victim were involved in an argument shortly before the shooting, that defendant was asked to leave the victim’s house, and that defendant left the house, later returned with a gun, and chased the victim. In addition, witness Jerry Simmons testified that he saw defendant after the shooting and defendant told him that he needed a place to stay because of a problem on the “west side.” When the witness asked defendant about the nature of the problem, defendant stated that he got into a confrontation with the victim, left the victim’s house, and then came back and killed him. In light of this substantial, properly-admitted evidence, we conclude that the admission of Mason’s statements to Officer Kline did not affect the outcome of the proceedings. Therefore, reversal is not required.

Similarly, because there is no reasonable probability that the result of the trial would have been different if Mason’s statements to Officer Kline had not been admitted, defendant cannot establish the requisite prejudice necessary to prevail on his ineffective-assistance claim with respect to counsel’s failure to raise an objection based on the Confrontation Clause. *Carbin, supra* at 600.

Affirmed.

/s/ Stephen L. Borrello
/s/ Patrick M. Meter
/s/ Cynthia Diane Stephens