

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MELVIN L. BYLES,

Defendant-Appellee.

UNPUBLISHED

February 26, 1999

No. 212225

Recorder's Court

LC No. 98-003903

Before: McDonald, P.J., and Hood and Doctoroff, JJ.

PER CURIAM.

The people appeal by right an order of the Recorder's Court dismissing this case without prejudice, upon granting defendant's motion to quash the information charging second-degree criminal sexual conduct involving a person under thirteen years of age. MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). We reverse and remand for reinstatement of the charge. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

When deciding a motion to quash the information, a reviewing court may not substitute its judgment for that of the magistrate but may reverse the magistrate's determination of the sufficiency of the evidence to establish probable cause only if an abuse of discretion is apparent on the record. This Court reviews the trial court's decision de novo to determine whether there has been an abuse of the magistrate's discretion. E.g., *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997).

Here, defendant's motion to quash was based upon a challenge to the admissibility of certain hearsay evidence relied upon by the magistrate, namely, the complainant's statements to a police officer investigating the incident and the tape of a 911 call the police purportedly received from the complainant within the preceding ten minutes. Evidentiary issues are likewise reviewed for an abuse discretion. E.g., *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998); *People v Kowalak, (On Remand)*, 215 Mich App 554, 558; 546 NW2s 681 (1996), lv den 453 Mich 947 (1996).

The trial court concluded that the magistrate abused her discretion by admitting the hearsay evidence of the complainant's statements under the excited utterance exception to the hearsay rule, MRE 803(3). Specifically, the trial court opined there was insufficient independent proof that the

underlying startling event occurred, as required by *People v Burton*, 433 Mich 268; 445 NW2d 133 (1989). We disagree.

This is not a case like *Burton, supra*, where the independent circumstantial proof was insufficient to establish a foundation for the excited utterance exception by a preponderance of the evidence in light of contradictory, direct eyewitness testimony that the event never occurred. See 433 Mich at 297-299. Rather, in this case, as in *Kowalak, supra*, there is strong circumstantial evidence tending to corroborate the stressful event described in the hearsay statements, such as the fact that the knob on the door to the victim's bedroom was broken off, consistent with the victim's statement indicating that defendant broke into her locked bedroom. The fact that the victim immediately sought help from the police is also consistent with victim's reported threat to her personal security. See 215 Mich App at 560. As in *Kowalak*, and unlike *Burton*, this circumstantial evidence was not countered by evidence suggesting an alternative, exculpatory scenario. While the question may be a close one, there was no abuse of discretion by the magistrate. *People v Smith, supra* 456 Mich at 550.

Reversed and remanded for reinstatement of the charge. We do not retain jurisdiction.

/s/ Gary R. McDonald

/s/ Harold Hood

/s/ Martin M. Doctoroff