

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ANWAR TAWFIQ MADANAT,

Defendant-Appellee.

UNPUBLISHED

January 14, 2003

No. 237195

Charlevoix Circuit Court

LC No. 01-059909-FH

Before: Meter, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Defendant, appeals as of right his bench trial conviction for criminal sexual conduct – second degree, MCL 750.520c(1)(b). He was sentenced to five months’ in jail. We affirm.

Defendant resided with his girlfriend Mary Dulinski, and her three daughters, Kelly, Amy, and Lisa¹ in a home in Boyne Falls, Michigan. Defendant and Mary met on the internet, and some months later defendant moved in with Mary and her daughters. On May 31, 2001, Mary’s car was repossessed and Kelly moved out of the house to live with her father. Mary was very upset and was drinking heavily, eventually got sick, and defendant and Lisa put her to bed some time between 8:00 p.m. and 10:00 p.m.

After putting her mother to bed, Lisa went into her bedroom and played games on her computer. Defendant came into her room, sat behind her on the chair in front of the computer, reached around in front of her and touched her chest and inner thighs over her clothes. Lisa jumped out of the chair and told defendant she was tired and was going to bed. Defendant kissed her on the mouth using his tongue and then left the room after she told him to stop and pushed him away. Lisa locked the door to her room and cried. About a half an hour later Lisa crawled out of her bedroom window and climbed into her sister Amy’s room. She was scared and crying and told her sister that she did not know what to do, and that defendant had just molested her. Lisa then returned to her room through the windows. Lisa did not sleep that night.

Defendant denied doing anything inappropriate on the evening in question. He stated that he was only in Lisa’s room for two or three minutes and although he sat behind Lisa on the same

¹ Lisa’s date of birth is February 18, 1986, making her fifteen years old on the day of the incident.

chair at the computer, he was not close to her. Defendant testified that he only “tapped” her on the thigh area, and denied touching her breasts. He admitted to kissing her but stated that he only kissed her on the head, and it was not a “French kiss.”

On appeal, defendant argues that the trial court erred when it allowed testimony regarding Lisa’s out-of-court statements about the alleged sexual touching to school administrators when the statements did not qualify as excited utterances under MRE 803(2). We disagree. The decision to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling. *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

MRE 803(2) defines an excited utterance as “[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.” A hearsay statement is admissible as an excited utterance if it was made by the declarant while under the excitement caused by a startling event. The statement must have been made before there was time to contrive and misrepresent, and must have related to the circumstances of the startling event. *People v Smith*, 456 Mich 543, 550-551, 581 NW2d 654 (1998). Our Supreme Court recently recognized that the focus of the excited utterance rule is the “lack of capacity to fabricate, not the lack of time to fabricate,” and the relevant inquiry is one concerning “the possibility for conscious reflection.” *Id.* Although the time that passed between the startling event and the utterance is relevant to determine if the declarant was still under the stress of the event, it is not dispositive, and it is necessary to consider whether there was a plausible explanation for the delay. *Id.* “The trial court’s determination whether the declarant was still under the stress of the event is given wide discretion.” *Id.* at 552 citing McCormick, Evidence (3d ed), § 297, p 857.

We find that defendant touching Lisa in a sexual manner was a startling event. Thus, the question before us becomes if Lisa was still under the overwhelming influence of the event while she made the statement, making the statement reliable and admissible. *Smith, supra*, 456 Mich 552. The sexual touching occurred sometime in the late evening. Lisa was immediately upset, and locked her bedroom door. After climbing through her window to her sister’s room, Lisa was startled, upset, and crying when she told her sister that defendant molested her and that she did not know what to do. Lisa was up all night, did not eat breakfast the next morning, and just wanted to get out of the house. Lisa burst into tears at school upon seeing a friend, and instead of going to class cried to her friend. Jim Rummer, a school administrator, happened upon Lisa and her friend and said that Lisa was extremely upset to the point of almost hyperventilating. Although having a few minutes to compose herself, Lisa was still very upset, crying, and visibly shaken when she told Rummer about the sexual touching.

Our review of record reveals that the circumstances previous to and surrounding the occasion show that Lisa made the statement while still under the overwhelming influence of the event. *Smith, supra*, 456 Mich 552. The circumstances illustrate the fact that Lisa was “under a continuing level of stress” arising from the sexual touching that precluded the possibility of fabrication when she made the statements in question. *Id.* at 552-553. Therefore, applying the

rule of *Smith, supra*, to the present case, together with the fact that the trial court had wide discretion when determining whether Lisa was still under the stress of the event, we find that the trial court did not abuse its discretion when it allowed the challenged testimony regarding Lisa's out-of-court statements about the sexual touching because the statements qualified as excited utterances under MRE 803(2). *Starr, supra*, 457 Mich 494; *Smith, supra*, 456 Mich 550-551.

Defendant next argues that the trial court erred when it allowed testimony from Trooper John Janicki regarding out-of-court statements from Lisa's sister Amy because the statements did not fall into any hearsay exception. Hearsay is testimony regarding another person's unsworn, out-of-court assertions, offered to prove the truth of the matter asserted, and is presumptively inadmissible, subject to several exceptions and exemptions provided by the rules of evidence. See MRE 801 and 802. In other words, hearsay is a "statement, other than the one made by the declarant while testifying, offered in evidence to prove the truth of the matter asserted." MRE 801(c); *People v Bartlett*, 231 Mich App 139, 159; 585 NW2d 341 (1998).

Defendant argues that the trial court abused its discretion by allowing Janicki to testify about a prior statement made by Lisa's sister, Amy. Defendant claims that the testimony was hearsay and therefore inadmissible. During trial, Amy testified that she "could have heard" Lisa say "leave me alone" on the evening in question, "but [she] had been hearing things." Janicki testified that when he interviewed Lisa shortly after the event, she told him that she heard Lisa say "leave me alone" when defendant was in Lisa's room. Because Janicki's testimony was not offered to prove the truth of the matter asserted, (i.e. that Lisa had said "leave me alone" to defendant on the night in question), but rather to contradict Amy's testimony at trial that she may not have heard the statement but was hearing things, it was not hearsay. Instead, we find that it was proper testimony, and the trial court did not abuse its discretion in allowing the testimony. *Starr, supra*, 457 Mich 494.

Affirmed.

/s/ Patrick M. Meter

/s/ Janet T. Neff

/s/ Pat M. Donofrio