

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL LORENZO FRANKLIN,

Defendant-Appellant.

UNPUBLISHED
November 1, 2005

No. 256067
Oakland Circuit Court
LC No. 2003-192276-FC

Before: Cavanagh, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

A jury convicted defendant of three counts of first-degree premeditated murder, MCL 750.316(1)(a), for the murder of his ex-wife, Machekia Robinson, and two of her three daughters, Rockell Johnson and Taria Johnson. The trial court sentenced defendant as an habitual fourth offender, MCL 769.12, to three terms of life imprisonment without possibility of parole. Defendant appeals as of right. We affirm.

Defendant first argues that certain statements Machekia made to other individuals regarding his past conduct do not fall within the parameters of MRE 803(3) and should have been excluded as hearsay. We review the trial court's decision to admit evidence for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412, 670 NW2d 659 (2003). However, whether evidence is admissible under a particular rule of evidence is a question of law that this Court reviews de novo. *Id.* Moreover, an evidentiary error does not merit reversal in a criminal case unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Smith*, 243 Mich App 657, 680; 625 NW2d 46 (2000).

We need not reach the merits of this issue because, to the extent that there was any possible error in the admission of this evidence, the error was harmless in light of the overwhelming independent evidence of guilt. On the night of the murders, defendant was seen entering Machekia's home. A witness heard loud arguing coming from Machekia's home while the car defendant had borrowed was parked in front. Traces of Machekia's blood were found in the car, and traces of Machekia's and Rockell's blood were found on items that the police found buried in the backyard of the house where defendant was staying, including defendant's temporary driver's license. Further bloodstained items, including a knife of the same brand as the utensils at Machekia's residence, as well as shoes and clothing similar to that worn by defendant on the night of the murders, were found in a vacant house near the home where

defendant was staying. Lastly, defendant's daughter, who witnessed the incident, identified defendant as the perpetrator. In light of this overwhelming evidence of guilt, it cannot be said that, but for the testimony regarding Machekia's statements, the outcome of the trial would have been different.

Defendant also contends that the admission of the hearsay statements at issue violated his constitutional confrontation rights. Because defendant did not preserve this issue below, our review is only for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant cannot be entitled to relief under this standard because any violation of defendant's confrontation rights in this regard would not have affected defendant's substantial rights in light of the overwhelming evidence of guilt independent of the evidence at issue.

Defendant next argues that his daughter's statement identifying him as the killer did not qualify as an excited utterance under MRE 803(2) and, therefore, was inadmissible hearsay. We disagree.

We review the trial court's decision to admit evidence for an abuse of discretion. *McDaniel, supra* at 412. An abuse of discretion exists only where an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000).

Defendant first argues that D'anajeh's statement does not meet the requirements of MRE 803(2) because the statement was made eight to twelve hours after witnessing the actual act of killing thus giving D'anajeh time to fabricate her statement. We disagree. An excited utterance is defined 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." MRE 803(2). There are two primary requirements for admission of an excited utterance: (1) that there be a startling event, and (2) that the resulting statement be made while under the excitement caused by the event. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). Our Supreme Court has explained, "The rule allows hearsay testimony that would otherwise be excluded because it is perceived 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.'" *Id.*, quoting 5 Weinstein, Evidence (2d ed). § 803.04[1], p 803-19. While the time that passes between the startling event and the statement is an important factor in determining whether the declarant was still under the stress of the event, it is not dispositive. *Id.* at 551. It is "the lack of capacity to fabricate, not the lack of time to fabricate, that is the focus of the excited utterance rule." *Id.* Additionally, "[p]hysical factors, such as shock, unconsciousness, or pain, may prolong the period in which the risk of fabrication is reduced to an acceptable minimum." *Id.* at 551-552, quoting 5 Weinstein, *supra*, § 803.04[4], pp. 803-804.

Undoubtedly, witnessing the brutal murder of one's parent and siblings qualifies as a startling event. The stress produced by witnessing these horrific acts was prolonged by the fact that D'anajeh, who at the time of the event was a month shy of turning four years old, spent the night in a dark house with her deceased mother and sisters. D'anajeh made her statement shortly after she was taken out of the house. Officer Sean Oelke testified that D'anajeh "was visibly

shaken, upset, crying.” It is clear from the circumstances in this case that she was still under the stress of the startling event. See *People v Crump*, 216 Mich App 210, 213; 549 NW2d 36 (1996). Accordingly, D’anajeh’s statement that her “daddy” killed her mother and sisters fell under the excited utterance exception because there is no evidence in the record that would suggest D’anajeh was capable of reflective fabrication.

Defendant also argues that the statement does not fall within the excited utterance exception because it was in direct response to police questioning. We disagree. It is well established that the fact that a statement is made in response to questioning does not automatically place the statement outside the parameters of the exception. *Smith, supra* at 553. Whether a statement procured by questioning qualifies under the exception depends on “the circumstances of the questioning and whether it appears that the statement was the result of reflective thought.” *Id.* In *People v Straight*, 430 Mich 418, 425-426; 424 NW2d 257 (1988), our Supreme Court held that a four year old declarant’s response after repeated questioning from her parents was not admissible because the mode of questioning was persistent and suggestive. In contrast, in *Smith, supra*, the Court concluded that under the circumstances of that case, there was nothing regarding the inquiry that would undermine a conclusion that the response to the questioning resulted from the stress of the assault, not from the stress of the questioning. *Smith, supra* at 553-554.

Here, detective Paul McDougal simply asked D’anajeh what had happened to her mother and sisters and D’anajeh responded that “daddy” killed them with a knife. The circumstances surrounding D’anajeh’s questioning evince that her statements were made while still under the stress of witnessing her mother and siblings being murdered and having to spend the night alone with the corpses, not, as defendant suggests, from the nature of the detective’s questioning. Accordingly, we hold that the trial court did not abuse its discretion in admitting D’anajeh’s identification statement under the excited utterance exception.

Defendant also asserts that the admission of D’anajeh’s statement violated his constitutional right to confrontation. Defendant has abandoned this argument by failing to meaningfully argue its merits. See *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). Even if plaintiff had not abandoned this argument on appeal, we would find no error. The Confrontation Clause does not bar nontestimonial statements if the prosecution can establish that the declarant is unavailable as a witness and the statements bear adequate indicia of reliability, or if the statements fall within “a firmly rooted hearsay exception.” *People v Shepherd*, 263 Mich App 665, 676; 689 NW2d 721 (2004). D’anajeh’s statements were not testimonial under *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). In addition, the excited utterance hearsay exception is firmly rooted. *White v Illinois*, 502 US 346, 355-356 n8; 112 S Ct 736; 116 L Ed 2d 848 (1992). Therefore, there was no plain error.

Defendant last argues that the trial court erred when it denied his request for a second-degree murder instruction, even though he acknowledges that under *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002), he is not entitled to such an instruction. Defendant contends that *Cornell* was wrongly decided and should be overruled. However, even were we so inclined, this

Court is without the authority to overrule our Supreme Court. *Ferguson v Gonyaw*, 64 Mich App 685, 694; 236 NW2d 543 (1975).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Brian K. Zahra