

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY DARNELL CARR,

Defendant-Appellant.

UNPUBLISHED

April 20, 2006

No. 259187

Oakland Circuit Court

LC No. 2004-196310-FC

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

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to 264 to 909 months' imprisonment for the second-degree murder conviction and to a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

At approximately 1:00 a.m. on March 6, 2004, the victim was shot to death in the alley behind a home where he was staying shortly after arriving home from a party in a van owned and driven by defendant and occupied by several people. Defendant and the victim were friends, and the victim had fathered a child with defendant's sister, LaTia Carr. While the van was in the alley, defendant and the victim argued and then engaged in a physical altercation inside the van. Tyson Miller, a friend to both defendant and the victim, subsequently left the van with the victim and attempted to calm him. LaTia also left the van and stood outside. While Miller was talking to the victim, shots were fired from the driver's side of the van. As the victim fell to the ground, Miller observed defendant closing the driver's side door. Two .38 caliber bullets fatally injured the victim. One bullet entered his skull behind his left ear, and the other bullet entered his back. It was later determined that the bullets were fired from the same weapon, although that weapon was never recovered.

Tamela Dukes, who lived in the home where the victim was staying, heard a commotion and looked out her window before the shooting occurred. She initially saw two men and one woman standing near a van in the alley. Dukes heard the female yelling, and believed she said, "No Terry, no, no, Terry, no." Dukes observed a man on the driver's side of the van raise his arm. He was holding something. She then heard gunshots, and the victim fell to the ground.

After the shooting, LaTia told her boyfriend, Mario Smith, that defendant shot the victim. A box of .38 caliber cartridges was recovered from defendant's residence on March 8, 2004. Forensic testimony revealed that the bullets fired at the victim were comparable to the bullets recovered from defendant's residence. The evidence at trial also revealed that defendant was known to possess a .38 caliber weapon.

Defendant denied that he shot the victim. He admitted that he and the victim engaged in a physical altercation, but claimed that the victim then left the van. Thereafter, shots were fired. Defendant did not know who shot the victim. Defendant's friend, Layneisha Mosley, testified on defendant's behalf and indicated that she was in the van at the time of the shooting. She confirmed that defendant was inside the van when the shots were fired. Mosley admitted, however, that she provided contrary testimony at the time of the preliminary examination. Defendant's half-brother also testified on defendant's behalf at trial. He claimed that, after the shooting, Miller tried to hand him a weapon and asked him to dispose of it.

Defendant was charged with first-degree murder, and the jury convicted him of the lesser offense of second-degree murder.

On appeal, defendant argues that a new trial is warranted because the trial court admitted inadmissible hearsay on two separate occasions at trial. We review the admission of evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). The issue whether a rule of evidence precludes admissibility, however, is an issue of law that is reviewed de novo. *Id.*

Defendant first challenges the admission of testimony by Alfred Brownlee, Tyson Miller's roommate. Brownlee was permitted to testify, over objection, that Miller stated after the shooting that defendant killed the victim. The trial court determined that the testimony was proper impeachment testimony. We agree.

As a general rule, a prosecutor may impeach his own witness with a prior inconsistent statement even if that statement directly inculcates the defendant. *People v Kilbourn*, 454 Mich 677, 682; 563 NW2d 669 (1997). There is an exception to this general rule. *Id.* Prior statements of a witness may not be used for impeachment when the substance of the statement being offered to impeach the credibility of the witness is relevant to the central issue of the case and there is no other testimony from the witness for which his credibility was relevant. *Id.* at 683.

In this case, it is undisputed that the substance of Miller's prior statement to Brownlee was relevant to the central issue in this case, specifically whether defendant was the shooter. Moreover, there was other testimony from Miller about the case for which his credibility was relevant. Thus, the testimony does not fall within the exception to the general rule and the challenged impeachment testimony was proper. *Id.* Specifically, Miller was with the victim at the time he was shot, and he testified about the events leading up to the shooting. Miller also made statements to the police after the shooting, and he made statements to Brownlee. At trial, however, Miller claimed that he was "high and drunk" at the time of his initial police statements on the morning of the shooting and did not remember them. Miller's statements to Brownlee were made on that same morning. At trial, Miller initially denied telling Brownlee that defendant was the shooter. While Miller later agreed that he "could have" made that statement, he denied that he saw defendant shoot the victim. The challenged testimony was not

inadmissible hearsay because it was not offered to prove the truth of the matter asserted, MRE 801(c). Rather, Miller's prior statement to Brownlee, identifying defendant as the shooter, was proper impeachment testimony, and the trial court did not abuse its discretion in admitting that testimony. *Id.*

Defendant's reliance on *People v Stanaway*, 446 Mich 643, 688-693; 521 NW2d 557 (1994), to argue that the impeachment testimony was improper is misplaced. In this case, unlike *Stanaway*, Miller provided testimony outside of that related to the subject of the impeachment. We additionally note that defendant makes a cursory statement that the impeachment testimony was not used as impeachment evidence by the prosecutor during his closing argument. However, defendant has not properly raised an issue on appeal with respect to the prosecutor's closing argument. An issue is not properly presented where it is not raised in the statement of the questions presented. *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999). Moreover, defendant does not explain or rationalize his position with respect to the prosecutor's closing argument and does not cite authority to support that the closing argument requires reversal. An appellant may not merely announce a position and leave it to this Court to discover and rationalize the basis for his claims and he may not give cursory treatment to an issue with little or no citation to authority. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Defendant also challenges as inadmissible hearsay a statement made by LaTia to Smith. Smith testified that, after the shooting, LaTia told him that defendant shot the victim. This statement was admitted as an excited utterance over defendant's objection.

A trial court's determination that a statement is admissible as an excited utterance is given wide discretion. *People v Smith*, 456 Mich 543, 552; 581 NW2d 654 (1998).

MRE 803(2) permits the admission of statements "relating to a startling event or condition made while the declarant was under the stress of the excitement caused by the event or condition." A statement is admissible under this exception if (1) there was a startling event and (2) the resulting statement was made while the declarant was under the excitement caused by that event. While the time that passes between the event and the statement is important in determining whether the declarant was still under the stress of the excitement when the statement was made, the focus of the exception is on the declarant's "lack of capacity to fabricate, not the lack of time to fabricate." [*People v Layher*, 238 Mich App 573, 582-583; 607 NW2d 91 (1999) (citations omitted).]

In *Smith*, *supra* at 551, the Court stated:

Though the time that passes between the event and the statement is an important factor to be considered in determining whether the declarant was still under the stress of the event when the statement was made, it is not dispositive. It is necessary to consider whether there was a plausible explanation for the delay. [Citation omitted.]

Whether a statement made in response to questioning should be excluded under MRE 803(2) depends on the circumstances and whether it appears that the statement was the result of

reflective thought. *Smith, supra* at 553. Where nothing in the record reveals that the challenged statement resulted from the stress of questioning as opposed to the stress of the event, the evidence does not have to be excluded. *Id.* at 554.

In this case, the evidence revealed that LaTia was outside the van at the time the victim was shot and made statements at the time of, or directly before, the shooting. She subsequently reentered the van, and defendant drove her, Miller, and several others directly to his home. During the ride, there was a lot of crying in the van. Nothing was said. Smith was waiting outside defendant's house and, when the van arrived, he saw LaTia. She was shaking and crying. She continued crying the entire time that the gathered group remained at defendant's house, approximately 20 minutes. The group then proceeded to the apartment of defendant's mother. Smith and LaTia went in separate vehicles. Upon Smith's arrival at the apartment, which took 45 minutes because he was stopped by the police, he observed that LaTia was still upset and crying. Smith asked her what was wrong, and she stated that defendant and the victim got into a scuffle and defendant shot the victim.

LaTia made the statement after the group arrived at the apartment and Smith had the opportunity to talk to her. Smith did not question LaTia other than simply inquire about what was wrong. The record does not reveal that LaTia's statement was the result of stress from questioning as opposed to stress from the event. The circumstances preceding and surrounding the statement reveal that it was made while LaTia was still under the overwhelming influence of watching defendant, her brother, shoot the victim, who was the father of her child. The trial court did not abuse its discretion in determining that the statement was admissible as an excited utterance.

Finally, defendant argues that he was sentenced in violation of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), because several offense variables were scored based on facts that were not determined by a jury. We disagree. In *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), the Court indicated that *Blakely* is inapplicable to Michigan's indeterminate sentencing system. We are bound by that decision. *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004), lv gtd 472 Mich 881 (2005). See also *People v Wilson*, 265 Mich App 386, 399; 695 NW2d 351 (2005).

Affirmed.

/s/ Jessica R. Cooper
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald