# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MIGUEL SIERRA,

Defendant-Appellant.

UNPUBLISHED
November 13, 1998

No. 197536
Kent Circuit Court
LC No. 95-002781 FC

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHANO ESQUIVEL,

Defendant-Appellant.

No. 197537
Kent Circuit Court
LC No. 95-002781 FC

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Before: Gage, P.J., and Reilly and Jansen, JJ.

PER CURIAM.

Following a joint trial before a single jury, defendants were each convicted of two counts of assault with intent to commit murder, MCL 750.83; MSA 28.278, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). They were thereafter sentenced to identical terms of fifteen to fifty years' imprisonment for each of their assault with intent to commit murder convictions and to two years' imprisonment for their felony-firearm convictions. Defendants appeal as of right. We affirm.

This case arises out of a drive-by shooting that occurred during the early morning hours of July 16, 1995, in the City of Grand Rapids. Several people (approximately five) were sitting on the porch of a house located on Sheridan Avenue when a brown van occupied by four people drove by. Four or

five gunshots were fired from the van toward the occupants of the porch. One of the complainants, Gerardo Villanueva, was shot in the left upper arm and the bullet traveled across his chest and struck his right arm. The other complainant, Alfonso Morales, was not struck by any bullets. There was evidence at trial showing that at least two different weapons were fired.

Docket No. 197536

I.

On appeal, defendant Sierra first argues that the trial court erred in allowing certain police officers to testify regarding Morales' on-the-scene identification of him as one of the perpetrators. He contends that the admission of the police officers' testimony violated his right to counsel because the on-the-scene identification occurred without counsel being present. He also contends the testimony of the police officers constituted inadmissible hearsay. We disagree with both contentions.

A.

With respect to defendant Sierra's "right to counsel" argument, this Court has recently held that where the police promptly conduct an on-the-scene corporeal identification without counsel present for the benefit of the accused, such an on-the-scene confrontation is reasonable police practice and no right to counsel is violated. *People v Winters*, 225 Mich 718, 728; 571 NW2d 764 (1997).[1] The facts of this case fit squarely within the rule set forth in *Winters*. About thirty minutes after the shooting occurred, police officers brought Morales to the arrest scene to view the two defendants who were seated in the rear of separate police vehicles. Morales identified defendant Sierra to police officers as being one of the men in the brown van. Although neither defendant had counsel present during the identification, such identification procedure by the police officers in this case was proper. *Id.* at 728-729. Accordingly, no right to counsel was violated where the police officers conducted a prompt, corporeal, on-the-scene identification after the shooting occurred.

B.

With respect to defendant Sierra's hearsay argument, we first note that defendant preserved his claim of error with an objection at trial. The trial court ruled that the police officers' testimony regarding Morales' statements of identification given at the hospital and at the scene of the arrest, although hearsay, was admissible pursuant to MRE 803(1) (present sense impression), MRE 803(2) (excited utterance), or MRE 803(24) and 804(b)(6) (the so-called "catch-all" exceptions). The decision to admit or exclude evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *Id.*

An exception to the hearsay rule is made if the statement qualifies as an excited utterance. MRE 803(2); *People v Gee*, 406 Mich 279, 282; 278 NW2d 304 (1979). To qualify as an excited utterance, a statement must (1) arise out of a startling event or condition, (2) be made before there has

been time to contrive or misrepresent, and (3) relate to the circumstances of the startling event or condition. MRE 802(3); *Gee*, *supra* at 282. The second requirement addresses the issue of whether the statement was made while the declarant was still under the influence of an overwhelming emotional condition. Properly understood, it relates to capacity to fabricate rather than lack of time to fabricate. *People v Hackney*, 183 Mich App 516, 522; 455 NW2d 358 (1990); see also *People v Zysk*, 149 Mich App 452, 457; 386 NW2d 213 (1986) (holding that a statement made by a rape victim three hours after an assault qualified as an excited utterance: "While the actual lapse of time between the event and the statement is a significant factor, its significance depends largely on the character of the event.").

In this case, the circumstances preceding and surrounding Morales' statements of identification suggest that that the statements were made while Morales was still under the overwhelming influence of the drive-by shooting of his house and the wounding of his friend, Villanueva. Police Officer Bryan Boone testified that when he first saw Morales in the hospital, Morales was crying, was "very, very upset," and had blood on his pants. Morales' description of defendant Sierra related to a startling event (the drive-by shooting) while he was under the stress of excitement caused by the shooting. Thus, the trial court did not abuse its discretion in allowing the police officers to testify regarding Morales' description of the events to them at the hospital.

Likewise, the facts suggest that Morales was still under the stress of the drive-by shooting when he made the on-the-scene identification of defendant Sierra. Police Officer Peter McWatters testified that Officer Boone brought Morales to the police car and Morales immediately became upset and cried when he saw defendant Sierra. Officer Boone testified that Morales was visibly upset, crying, and shaking when he brought Morales to the arrest scene. When getting ready to leave, Morales saw the van and again "broke down and started crying." Such evidence supports the trial court's conclusion that Morales was still under the stress of excitement caused by the drive-by shooting when he identified defendants at the arrest scene.

Accordingly, we hold that the trial court did not abuse its discretion in allowing the police officers to testify regarding Morales' identification of defendant Sierra at the hospital and at the arrest scene pursuant to the excited utterance exception to the hearsay rule. Because we conclude that the challenged hearsay testimony was admissible under MRE 803(2), we offer no opinion as to the propriety of the trial court's reliance on MRE 803(1), 803(24), and 804(b)(6).[2]

II.

Next, defendant Sierra argues, for the first time, that the trial court erred in admitting Morales' preliminary examination testimony into evidence at trial, when Morales did not appear to testify in person. Specifically, defendant Sierra contends that Morales' prior testimony was inadmissible because the prosecution did not exercise due diligence in attempting to locate and produce Morales for trial. This claim of error was not preserved for appeal.

During the testimony of one of the police officers present during Morales' on-the-scene identification of defendants, counsel for defendant Esquivel argued that the prosecution should not be

allowed to admit Morales' statements to the police through the hearsay testimony of the police officers, when Morales was not going to be present for cross-examination at trial and his preliminary examination testimony did not fully address the content of those statements. Defendant Sierra's attorney shared this concern. In the course of discussing the matter of the officer's testimony, and without prompting from the parties, the trial court asked the prosecutor to "fill the record in on the whereabouts of Mr. Morales and what efforts have been made to locate him." The prosecutor explained that Morales had been missing for some time, and that the most recent information (as of the previous day) indicated that Morales was likely being held somewhere, presumably as an illegal alien, after being "picked up" by "the border patrol." Defendant Sierra did not respond to the prosecutor's explanation of the efforts to produce Morales, and at no time during the trial did he ever suggest that these efforts had been anything less than duly diligent. Two days later, Morales' preliminary examination testimony was read into the record without any objection from defendant Sierra. Finally, during closing arguments, counsel for defendant Sierra argued that Morales' testimony "under oath" at the preliminary examination undermined the credibility of the more damaging testimony from the police officers regarding Morales' statements after the incident. In so doing, she re-read a portion of Morales' preliminary examination testimony in which he stated that he was "not sure who had the gun." Accordingly, neither the prosecution's due diligence (or lack thereof), nor the admissibility of Morales' preliminary examination testimony were ever disputed issues at trial.

In order to preserve an evidentiary issue for appellate review, a party must make a timely objection at trial specifying the same ground as is asserted on appeal. MRE 103(a)(1); *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992). Absent an objection, this Court may only take notice of plain errors affecting substantial rights. MRE 103(d). As noted above, defendant Sierra raised no such objection in this case. In fact, the record suggests that defendant Sierra's trial counsel welcomed – or at the very least deemed proper – the trial court's decision to admit the evidence. She did not object to its admission, but instead made beneficial use of it during her closing argument. Therefore, it would be improper to allow defendant to assign error to the trial court's decision to admit Morales' preliminary examination testimony into evidence. A defendant should not be allowed to assign error on appeal to something his own counsel deemed proper at trial, because to do so would allow the defendant to harbor error as an appellate parachute. See, e.g., *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998); cf. *People v Harris*, 127 Mich App 538, 543-544; 339 NW2d 45 (1983).

The purpose of appellate preservation requirements is to induce litigants to do everything they can in the trial court to prevent error, eliminate its prejudice, or at least create a record of the error and its prejudice. E.g. *People v Taylor*, 195 Mich App 57, 60; 489 NW2d 99 (1992); see also *People v Grant*, 445 Mich 535, 551; 5290 NW2d 123 (1994). Thus, an appellant generally bears the burden of furnishing the reviewing court with a record that "verifies the basis of any argument on which reversal or other claim for appellate relief is predicated." *Petraszewsky v Keeth (On Remand)*, 201 Mich App 535, 540; 506 NW2d 890 (1993); see also *People v Kowalski*, 230 Mich App 464, 488; ___ NW2d ___ (1998) (Corrigan, C.J., concurring). Here, without the benefit of a due diligence hearing and findings of fact from the trial court, the issue is unpreserved because we cannot discern the extent of the prosecution's efforts, if any, to locate Morales prior to trial. Cf. *People v Lee*, 391 Mich 618,

626-627; 218 NW2d 655 (1974); *Winters*, *supra* at 729. Perhaps if defendant Sierra had requested a formal due diligence hearing in conjunction with an objection to the admission of Morales' preliminary examination testimony, the prosecutor would have been able to create a sufficient factual record. However, in the absence of such a request, the prosecutor's brief unchallenged response to the trial court's informal inquiry provides an inadequate basis for review.

It bears noting that defendant's newly-minted allegation of error contains a constitutional dimension. See *People v Burwick*, 450 Mich 281, 290 n 12; 537 NW2d 813 (1995). Important constitutional questions may be raised on appeal for the first time and considered by the appellate court when the alleged error could have been decisive to the outcome. See, e.g., *Grant*, *supra* at 547; *People v Johnson*, 215 Mich App 658, 669; 547 NW2d 65 (1996). However, this Court is not required to review all unpreserved allegations of constitutional error. See, e.g., *Winters*, *supra* at 729; *People v Hogan*, 225 Mich App 431, 437-438; 571 NW2d 737 (1997). With respect to the particular allegation of error first raised in this appeal, review by this Court would be inappropriate for all of the reasons stated above. Hence, we decline to address the merits of defendant Sierra's argument.

Finally, even if we were inclined to consider the merits of defendant Sierra's argument, we could not do so, because we believe that the admission of Morales' preliminary examination testimony, if indeed it was unpreserved error, could not have been decisive to the outcome of this case. See, e.g., *Grant*, *supra* at 547, 553. Police officers McWatters and Boone, the officers who spoke with Morales after the incident, testified at trial in relative detail about Morales' description of the shooting and the events leading up to it. According to these officers, Morales emphatically identified defendant Sierra as having a gun and being one of the persons who shot out of the van. By comparison, the transcript of Morales' preliminary examination testimony was much less descriptive and much less incriminating. Although Morales tentatively identified defendant Sierra as being one of four persons in the brown van when it passed by his house at a time prior to the shooting, he could not confirm that defendant Sierra ever had a gun, or that defendant Sierra was even in the van at the time of the shooting. Consequently, the transcript of Morales' preliminary examination testimony was cumulative of (and much less compelling than) the police officers' testimony. Therefore, we conclude that even if the admission of Morales' preliminary examination testimony constituted error, it could not have been decisive to the outcome of this case. Cf. *People v Solomon (Amended Opinion)*, 220 Mich App 527, 531; 560 NW2d 651 (1996); *People v Crawford*, 187 Mich App 344, 353; 467 NW2d 818 (1991); *People v Dixon*, 161 Mich App 388, 396; 411 NW2d 760 (1987). Our conclusion is bolstered by the fact that defendant Sierra's own attorney relied heavily on the evidence during her closing argument.

III.

Finally, we reject defendant Sierra's claim that his sentences for the assault convictions were disproportionate. Defendant Sierra's sentences were within the guidelines. A sentence imposed within an applicable sentencing guideline range is presumptively neither excessively severe nor unfairly disparate. *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996). Nevertheless, a sentence within a guidelines range can conceivably violate proportionality in unusual circumstances. *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990). Defendant claims that his fifteen-year

minimum sentences for the assault with intent to kill convictions were disproportionately severe because he has no prior criminal convictions and he has a good work history. However, this Court has held that a defendant's employment and lack of criminal history are not unusual circumstances which overcome the presumption. *People v Daniel*, 207 Mich App 47, 54; 523 Nw2d 830 (1994). Moreover, defendant Sierra opened fire on a porch where approximately five individuals were located, and succeeded in seriously injuring one of those individuals. As noted by the trial court during sentencing, defendant Sierra's actions demonstrated a total disregard for life and were the type of behavior that "absolutely terrorizes the community." The trial court did not abuse its discretion when it imposed defendant Sierra's sentences.

Docket No. 197537

IV.

Defendant Esquivel first argues that the prosecutor did not present sufficient evidence that he intended to kill either victim. We disagree. When determining whether sufficient evidence has been presented to sustain a conviction, the court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

In order to prove the crime of assault with intent to commit murder, the prosecution must prove the following elements: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v Hoffman*, 225 Mich 103, 111; 570 NW2d 146 (1997). The intent to kill may be proven by inference from any facts in evidence. *Id.*

Taken in a light most favorable to the prosecution, there was sufficient evidence to sustain defendant Esquivel's convictions of assault with intent to commit murder. The evidence showed that approximately five persons were on the front porch of a house when a blue car drove by. Someone in the car asked, "Where are the Latin Kings?" Later, the occupants of the blue car drove by in a brown van. Someone in the van shouted, "Sur Trece,"[3] and several gunshots were fired at the house. It was determined by the police that at least two different guns were used and eight to fifteen shots were fired at the house. The gunshots hit the house and porch and vehicles parked on the street. While Morales was able to escape any injury, Villanueva was shot once in the arm and the bullet traveled across his chest and struck his other arm. Morales identified both defendants as being in the van at the time of the shooting.[4] The fact that neither complainant was shot in a "vital organ" is not dispositive as defendant Esquivel contends. Accordingly, we hold that there was sufficient evidence presented and the reasonable inference drawn from that evidence could lead the jury to find that defendant Esquivel intended to kill the complainants.

V.

Defendant Esquivel next argues that the trial court applied the wrong standard of review in deciding his motion for new trial based on the great weight of the evidence. We disagree. A trial court

may grant a motion for new trial based on the great weight of the evidence only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). We review the trial court's decision for an abuse of discretion. See, e.g., *People v Torres (On Remand)*, 222 Mich App 411, 415; 564 NW2d 149 (1997).

Following his conviction, defendant Esquivel moved for a new trial, claiming that the jury's verdict was against the great weight of the evidence because there was no evidence of an intent to kill. The trial court issued an order denying defendant's motion because "the evidence at trial was sufficient to prove each element of the offenses of which defendant herein was convicted." In the motion for new trial, defendant only contended that the evidence was insufficient to prove actual intent to kill. The trial court correctly ruled that there was sufficient evidence of defendant Esquivel's intent to kill. Accordingly, the trial court did not apply the wrong standard of review, or abuse its discretion.

Affirmed.

/s/ Hilda R. Gage
/s/ Maureen P. Reilly

[1] Pursuant to MCR 7.215(H) the *Winters* decision is controlling authority. We note that a different holding regarding this issue set forth in *People v Miller*, 208 Mich App 495; 528 NW2d 819 (1995), was ordered "to have no precedential force or effect." 450 Mich 955 (1995).

[2] We disagree with the dissent's contention that statements of identification are not admissible as substantive evidence if they do not meet the requirements of MRE 801(d)(1)(C). By its terms, MRE 801(d) merely states that certain prior statements of identification are "not hearsay." It does not provide that out-of-court statements of identification are otherwise inadmissible, and the dissent cites no persuasive legal authority for this proposition. We also note that the dissent's Confrontation Clause concerns are alleviated by the fact that Morales' out-of-court statements were admissible pursuant to a firmly-rooted exception to the hearsay rule. See *People v Poole*, 444 Mich 151, 162-163; 506 NW2d 505 (1993), citing *Ohio v Roberts*, 448 US 56, 66; 100 S Ct 2531; 65 L Ed 2d 597 (1980); see also *Idaho v Wright*, 497 US 805, 827; 110 S Ct 3139; 111 L Ed 2d 638 (1990).

[3] "Sur trece" is Spanish for "South thirteen" and represents a gang name.

[4] We note that defendant Esquivel does not challenge the introduction of Morales' identification testimony or the preliminary examination testimony on appeal despite the fact that Morales did not testify at trial.