

STATE OF MICHIGAN
IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
Servitto, P.J., Fitzgerald and Talbot, JJ.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

vs

No. 133128

DAVID CARL BARRETT
Defendant-Appellee.

Lower Court No: 04-14530-AR
COA NO. 261328

133128

BRIEF OF THE PROSECUTING ATTORNEYS
ASSOCIATION OF MICHIGAN, AS AMICUS CURIAE
IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

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Statement of the Question

I.

MRE 803(2) contains no foundational requirement of proof of the startling event independent from the statement sought to be admitted. *People v Burton* contains that requirement, and is thus inconsistent with the text of the Rule. Should *Burton* should be overruled?

Amicus answers: “YES”

Statement of Facts

Amicus concurs in the statement of facts offered by the People of the State of Michigan.

Argument

I.

MRE 803(2) contains no foundational requirement of proof of the startling event independent from the statement sought to be admitted. *People v Burton* contains that requirement, and is thus inconsistent with the text of the Rule. *Burton* should be overruled.

Introduction

In considering the meaning of a text, it is wise to begin with the text itself, rather than any gloss which has been put upon it. MRE 803(2) provides:

The following [is] not excluded by the hearsay rule, even though the declarant is available as a witness: 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.

The foundation for admission, then, is detailed within the rule: that "1)... there be a startling event, and 2)... the resulting statement be made while under the excitement caused by the event."¹ If that foundation is met, then, under the text of the rule, the statement is admissible.²

Michigan has had for over several decades now an evidence code, and that code provides that the rules of the code "govern proceedings in the courts of this state to the extent and with the exceptions stated in Rule 1101."³ MRE 803(2) thus governs the admissibility "excited utterances" in the courts within the State, and though it contains no requirement of proof independent of the

¹ *People v. Smith*, 456 Mich. 543, 550 (1998).

² Laying aside for purposes here any confrontation issues that might arise with regard to unavailable declarants and testimonial statements. See *Crawford v. Washington*, 541 U.S. 36, 61, 124 S Ct 1354, 158 L.Ed.2d 177 (2004).

³ MRE 101.

statement sought to be admitted that the startling event occurred, that is the law in Michigan. The foundational requirements for admissibility of evidence are determined, by our evidence code, under MRE 104(a), which provides that "In making its determination [the court] is not bound by the Rules of Evidence except those with respect to privileges." There is nothing in either MRE 803(2) or MRE 104(a) that conditions admission of an excited utterance on proof of the startling event independent from the statement. How did this "rule" come about?

In *People v Burton*⁴ a woman was seen by an officer running down street in a twisted dress and no shoes, looking over shoulder as though she might be pursued. She appeared disheveled. After waiting "three to five" minutes for her to "simmer down" the officer asked what had happened, and could not get complete answers. After some more questions, she said that she had been sexually assaulted. When asked to clarify, she did not. She was driven around the neighborhood and identified defendant's house; by this time she had calmed down, and she gave more complete answers regarding the assault. At trial she denied the assault. The only proofs of the "startling event" so as to allow use of her statements to the officer were the statement itself, the circumstances of its making, and her appearance.

This court on review added a foundational requirement to the text of the rule, but not in the exercise of its rule-making authority—by publication for comment and eventual adoption of an amendment to the rule—and the rule has never been amended. Instead, in the context of decision the majority looked to the "the independent proof requirement of MRE 801(d)(2)(E)" which it—oddly, in the view of amicus—viewed as militating "in favor of *reading a similar requirement into*

⁴ *People v Burton*, 433 Mich 268 (1989).

the excited utterance rule" because it "evidences our disinclination to allow the 'bootstrapping' of hearsay evidence."⁵ The majority also found its conclusion "buttressed by criminal cases from other jurisdictions which have held hearsay statements inadmissible as excited utterances where no independent proof of the underlying startling event was presented."⁶

Discussion

A. A Rule-Based Approach to Evidentiary Questions

As amicus has observed, we have an evidence code in Michigan, and application of that code to evidentiary questions should be the norm for bench and bar. When in so doing the meaning of a rule of evidence is called into question, the principles of statutory interpretation are applied. This

⁵ *Burton*, at 282 (emphasis supplied). Rather than finding the presence of an "independent proof" requirement in the co-conspirator rule indicating that the *absence* of such a requirement in other rules is meaningful, the majority found it of "no significance" because the language in the co-conspirator rule was a codification of prior case law, while there was no such case law with regard to excited utterances. Respectfully, amicus submits this to be a *non sequitur*. Cf. Boyle, J, concurring in *People v Hendrickson*, 459 Mich 229, 247 (1998): "[A]t the time the Michigan Rules of Evidence were adopted, this Court was presumed to have had knowledge of the variance of opinion regarding extrinsic corroboration and chose not to require a corroboration requirement," and further observing that the absence of a corroboration requirement in MRE 803(2) is meaningful ("Where this Court chose to... impose an independent corroboration requirement, it did not hesitate to do so").

⁶ *Burton*, at 282. As will be seen, this view is the *minority* view.

means that where the language is clear and unambiguous, judicial construction is not permitted.⁷ We "[a]ccordingly, ...begin with the plain language of the court rule,"⁸ as it interacts with other rules.

The question here is the determination of the first foundational requirement under MRE 803(2), that there have been "a startling event." Given the requirement of the rule that the statement to be admitted be one "relating to a startling event or condition," the proponent of the evidence must demonstrate that such an event or condition occurred. To whom, and with what evidence? Our evidence code supplies the answer to all such questions regarding the rules of evidence by way of Rule 104(a): "Preliminary questions concerning the admissibility of evidence shall be determined by the court,.... In making its determination it is not bound by the Rules of Evidence except those with respect to privileges." There is thus a question preliminary to the admission of the statement of the declarant, and that is whether it concerns a startling event. The trial judge is to make the determination whether a startling event occurred, and in so doing may consider any evidence of any sort, except that barred by privilege.⁹ Nothing in the text of either MRE 803(2) or MRE 104(a)

⁷ *People v. Caban*, __Mich App__, 2007 WL 1290231 (NO. 264150, 5-3-2007). And see *Grievance Adm'r v. Underwood*, 462 Mich. 188, 193-194 (2000): "When called on to construe a court rule, this Court applies the legal principles that govern the construction and application of statutes. Accordingly, we begin with the plain language of the court rule. When that language is unambiguous, we must enforce the meaning expressed, without further judicial construction or interpretation."

⁸ *Grievance Adm'r v. Underwood*, at 194.

⁹ The only thing not supplied by the rules themselves is the standard of persuasion to be applied; it has been held that the preponderance standard applies to preliminary questions of admissibility under Rule 104(a). See *Bourjaily v. United States*, 483 U.S. 171, 175, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987); *People v. Hendrickson*, supra (Boyle, J., concurring),

prevents the trial judge from considering the statement to be admitted itself, nor requires evidence independent of that statement to support admission of the statement.

As Justice Boyle has observed, the additional foundational requirement contained in MRE 801(d)(2)(E) for the co-conspirator's exclusion from the hearsay rule is not without significance. That the rule promulgated by this court specifically requires as a foundational matter "on independent proof of the conspiracy" demonstrates quite clearly that when this limitation on Rule 104(a) was desired the court knew how to require it. That the court was, as the majority in *Burton* observed, codifying a case requirement where no such case requirement existed with regard to the excited utterance exception does not somehow implicitly place the same limitation in other rules where the text so limiting does not appear; indeed, it cuts the other way. If we are, as Justice Cavanaugh said in *Underwood*, to begin with the "plain text," and accept that text which is "clear and unambiguous," then the importing of the limitation of MRE 801(d)(2)(E) into MRE 803(2) cannot be justified on a textual basis.

Applying the rules of our evidence code to the question here leads to the conclusion that the statement under consideration may supply proof—and sufficient proof—that a startling event occurred.¹⁰

¹⁰ Indeed, this was precisely the conclusion of the United States Supreme Court with regard to the co-conspirator's exclusion for the hearsay definition in the *Bourjaily* case. That Court did not read an "independent proof" requirement into the rule, but added it through act of Congress (as is required for federal rules of evidence)—and it is not done so with regard to FRE 803(2): "The contents of the statement shall be considered but are not alone sufficient to establish the ...the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E)." There is no comparable provision with regard to FRE 803(2) and no federal court has ever read one in. See e.g. *United States v. Brown*, 254 F.3d 454, 459 (CA 3, 2001): "Brown contends, however, that the government failed

B. MRE 803(2) Should Not Be Amended to Require Independent Proof

A rules-based approach to the question presented here demonstrates that there is no requirement of independent proof in the rule, and, amicus submits respectfully, the court erred in "reading one in" in *Burton*. The ordinary process of amending rules of evidence could be employed, however, but should not be, for no such requirement should exist.

Burton represents a minority view, the contrary view being taken by most states and by evidence scholars. The general scholarly view is that the statement itself may provide the proof, and the only proof, of the event or condition to which it refers.¹¹ One eminent Michigan commentator, Dean Robinson, has expressed the view that "*Burton* should be reconsidered," observing that the independent proof requirement greatly undermines "the utility of the exception by causing valuable evidence to be excluded."¹² As put by one eminent commentator:

Academic commentators tend to agree that the hearsay statement itself is sufficient proof of the exciting event without resort to independent corroborating evidence, in both theory and practice. Most jurisdictions also find the statement in itself sufficient. Similarly, many courts have held that the appearance, behavior and condition of the declarant may establish, without other independent evidence, that a startling event occurred. In addition, the Advisory Committee Note to Federal Rule 803(2) describes rulings holding the statement itself sufficient as 'increasing' and the 'prevailing practice.'

to provide evidence of the startling event other than Hughes's discussion of the hearsay statements themselves. This argument, however, fails in light of the generally prevailing rule that an excited utterance may of itself be sufficient to establish the occurrence of the startling event."

¹¹ 2 McCormick, *Evidence* (4th Ed.), § 271, p.214-215; 4 Graham, *Handbook of Federal Evidence* (6th ed), § 803.1, p.387-388.

¹² Robinson, Longhofer, and Ankers, *Michigan Court Rules Practice: Evidence*, § 803.2, p.111-112.

See Fed.R.Evid. 803 Advisory Committee's Note, 56 F.R.D. 183, 305.¹³

Most jurisdictions take the same view.¹⁴ And even in states taking a more restrictive view the evidence found inadequate in *Burton* would be sufficient—"many courts have held that the appearance, behavior and condition of the declarant may establish, without other independent evidence, that a startling event occurred."¹⁵

Conclusion

The text of our evidence code does not allow the reading (the "reading into") engaged in by *Burton*, for the reasons above stated and the reasons ably stated by counsel for the People of the State of Michigan. Nor should any amendment of Rule 803(2) be attempted now.

¹³ See Graham, fn. 11.

¹⁴ See e.g. *United States v Brown*, supra; *Wetherbee v. Safety Cas. Co.*, 219 F.2d 274, 277-78 (CA 5,1955); *Wheeler v. United States*, 211 F.2d 19, 24 (1953); *State v. Smith*, 178 W.Va. 104, 358 S.E.2d 188, 194-95 (1987); *People v. Franklin*, 683 P.2d 775, 781-82 (Colo.1984); *Johnston v. W.S. Nott Co.*, 183 Minn. 309, 236 N.W. 466, 467 (1931); and *Commonwealth v. Alvarado*, 36 Mass.App.Ct. 604, 634 N.E.2d 132, 133 (1994), cited in *State v. Young*, 161 P.3d 967, 975 -976 (Wash.,2007).

¹⁵ *United States v. Brown*, supra, at 459-60. And see *State v. Young*, 161 P.3d 967 (Wash.,2007). There the court recognized that "the majority of jurisdictions have explicitly held that independent corroborative proof of the startling event is not required to admit excited utterance evidence," and that "[s]cholars not only acknowledge that 'the statement itself ... certainly can be considered' but assert that the generally prevailing practice is to consider the statement itself sufficient proof of the exciting event," but adopted an intermediate rule requiring "evidence independent from the bare words of the statement to corroborate that a startling event occurred," allowing as sufficient corroboration the "behavior, appearance, and condition, appraisals of the declarant by others, and the circumstances under which the statement is made."

Relief

WHEREFORE, amicus requests that the Court of Appeals be reversed and the evidence held admissible.

Respectfully submitted,

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COA No. 261328

PROOF OF SERVICE

STATE OF MICHIGAN)

ss

COUNTY OF WAYNE)

The undersigned deponent, being duly sworn, deposes and says that he/she served a true copy of **BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN, AS AMICUS CURIAE IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN** upon:

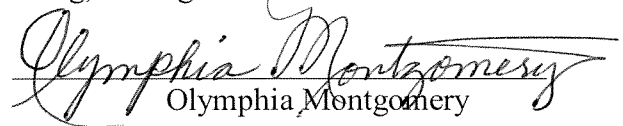
WILLIAM J. VAILLIENCOURT, JR. - (P-39115)

PATRICK K. EHLMANN - (P-31644)

The within named attorney for defendant, by DEPOSITING SAID PLEADING IN THE U.S. MAIL IN THE CITY OF DETROIT, enclosed in an envelope bearing postage fully prepaid on AUGUST 22, 2007, plainly addressed as follows:

WILLIAM J. VAILLIENCOURT, JR.
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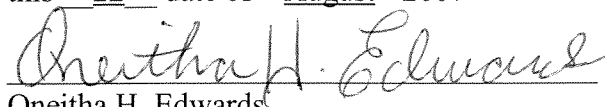
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Said pleading was filed in the Court of Appeals, by PERSONAL SERVICE at the following address:

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Subscribed and sworn to before me
this 22 date of August - 2007


Oneitha H. Edwards

Notary Public, Wayne County, Michigan
My commission expires on 01/23/09