

STATE OF MICHIGAN
IN THE SUPREME COURT

** Pros*

Appeal from the Court of Appeals
Servitto, P.J., Fitzgerald and Talbot, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellant,

v.

Supreme Court No. _____
Court of Appeals No. 261382 *Open 12-19-06*
Livingston County
Circuit Court Case No. 04-14530-AR *D. Sender*
District Court Case No. 04-5593-FY

DAVID CARL BARRETT,

Defendant/Appellee. *OK*

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PLAINTIFF/APPELLANT'S

APPLICATION FOR LEAVE TO APPEAL

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Exhibit F unpublished Court of Appeals Opinion dated December 19, 2006

Exhibit G *People v Hendrickson*, unpublished opinion of the Court of Appeals, issued August 8, 1997 (Docket No. 193713)

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STATEMENT IDENTIFYING JUDGMENT AND RELIEF SOUGHT

Pursuant to MCR 7.301(A)(2), the People are appealing from an unpublished opinion of the Court of Appeals dated December 19, 2006, in Case No. 261382, affirming a circuit court order affirming an order from the 53rd District Court holding that evidence of an excited utterance was inadmissible under this court's decision in *People v Burton*, 433 Mich 268; 445 NW2d 133 (1989). As a result, the court dismissed assault charges against Defendant. The relief sought by the People is reversal of the district court's opinion by overruling *Burton* and remanding to the district court for reinstatement of the charges and further proceedings.

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STATEMENT OF JURISDICTIONAL BASIS

This Court has jurisdiction over this application for leave to appeal pursuant to MCR 7.301(A)(2) and MCR 7.302(C)(2).

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STATEMENT OF QUESTION PRESENTED

Because the plain language of MRE 803(2) does not require independent proof of the startling event as a condition to admitting an excited utterance, should *People v Burton* be overruled where it imposed such a requirement?

The People answer: Yes

Defendant answers: No

The District Court was required to follow *Burton*.

The Circuit Court was required to follow *Burton*.

The Court of Appeals was required to follow *Burton*.

STATEMENT OF WHY REVIEW IS APPROPRIATE

This Court should exercise its discretion and grant this application. In *People v Burton*, 433 Mich 268; 445 NW2d 133 (1989), this Court construed MRE 803(2) to require that the People prove the existence of the underlying startling event by independent evidence despite the lack of such a requirement in the plain language of the rule. This application presents the opportunity to revisit *Burton* and to correct an erroneous decision which contravened the rules of statutory interpretation as applied to construing the rules of evidence. This application presents an issue of significant public interest involving the state as a party, as well as a legal issue of major significance to this state's jurisprudence. Accordingly, relief by this Court is appropriate. MCR 7.302(B)(2) and (3).

The impact of the erroneous decision in *Burton* has expanded beyond the law of excited utterances in MRE 803(2) to present sense impressions under MRE 803(1) as well. See *People v Hendrickson*, 459 Mich 229; 586 NW2d 906 (1998)(applying *Burton* to analysis of present sense impression exception). The practical effect of *Burton* has been to narrow the scope of admissible evidence in domestic violence prosecutions where a victim is reluctant, recanting, or absent. Its impact is found not in the pages of the Michigan Appellate Reports but in the assault charges that must be denied, pled away, or dismissed.

The analysis in *Burton* has been criticized by Chief Justice Taylor, Justice Weaver, and Justice Markman. This case presents the unique opportunity to revisit *Burton*.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Defendant was charged with one count of Felonious Assault and one count of Domestic Violence (Second Offense). The Complaint alleged that Defendant assaulted Suzann Barthel with a hatchet on May 17, 2004 in Livingston County. A preliminary examination on the felony charge was conducted on June 23, 2004 before the late Hon. Michael Hegarty in the 53rd District Court.

At the preliminary examination, Barthel did not testify. Instead, the People sought to introduce as excited utterances three groups of statements made by Barthel to a neighbor, the 911 operator, and a police officer who responded to the scene. The neighbor, Nellie Fortner, described the victim as being hysterical when she showed up banging on her door asking to call the police because "David was chasing her down with an axe."¹ The victim further described that Defendant was trying to kill her and was chasing her with an axe.² Fortner was present as the victim, still hysterical, called 911.³ The transcript of the 911 call reflects that the victim told the dispatcher that Defendant tried to strangle her and chased her with an axe. Howell Police Officer Steve Shaw testified that when he responded to the Fortner residence he observed the victim in a hysterical state.⁴ The victim described to him that Defendant chased her, choked her, punched a hole in a door, and threatened her with an axe.⁵ Shaw

¹June 23, 2004 Transcript at 5-7 (attached as Exhibit A).

²June 23, 2004 Transcript at 9.

³June 23, 2004 Transcript at 9-12.

⁴June 23, 2004 Transcript at 14-15.

⁵June 23, 2004 Transcript at 15-16.

subsequently went into Defendant's residence where he saw a hole in a door and recovered a hatchet.⁶

Defendant objected to admission of the statements to Fortner, 911, and Shaw, on two grounds: that their admission violated Defendant's right to confrontation as articulated by the U.S. Supreme Court in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004) and that the People had been unable to establish by independent evidence that a startling event occurred as required by MRE 803(2) and *People v Burton*, 433 Mich 268; 445 NW2d 133 (1989). The District Court agreed with the People that *Crawford* did not bar admissibility of the statements, but ruled that the People did not prove with independent evidence that a startling event had occurred. Accordingly, the District Court denied admission of the statements. See District Court Order and Opinion dated July 21, 2004 (Exhibit D).

Without the statements, the district court was unable to find probable cause to bind Defendant over for trial and thus dismissed the charges on August 11, 2004. See District Court Order dated August 11, 2004 (Exhibit E). The People filed a claim of appeal and the Livingston County Circuit Court affirmed the District Court on February 25, 2005.⁷

From the district court's determination that the statements were not admissible, the People appealed. At each level of appeal, the People acknowledged that the lower courts were bound by *Burton* and were required to affirm the district court as only this Court could

⁶June 23, 2004 Transcript at 17-18.

⁷Defendant did not cross-appeal the determination that *Crawford* precluded the admission of any of these statements. Accordingly, that question is not before the Court.

overrule its own precedent.⁸ The circuit court agreed and affirmed on February 25, 2005. Despite being bound by *Burton*, the Court of Appeals granted the People's application for leave to appeal. The Court of Appeals ultimately affirmed by opinion dated December 19, 2006. This appeal presents a straightforward question of law regarding the foundational requisites for an excited utterance under MRE 803(2). *Burton* was wrongly decided by this Court and should be overruled.

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⁸*Boyd v WG Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993).

ARGUMENT

Because the plain language of MRE 803(2) does not require independent proof of the startling event as a condition to admitting an excited utterance, *People v Burton* should be overruled to the extent it imposed such a requirement.

Standard of Review and Issue Preservation

The admissibility of evidence is normally reviewed for an abuse of discretion. However, where admissibility turns on the construction of a rule of evidence, the interpretation of the evidence rule is a question of law governed by the same principles that govern statutory interpretation and is reviewed *de novo*. See *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003)(construction of rule of evidence); *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003)(construction of court rule); *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999)(construction of rules of evidence). The rules of statutory interpretation have been consistently stated:

The goal of judicial interpretation of a statute is to ascertain and give effect to the intent of the Legislature. . . . To accomplish this objective, we begin by examining the language of the statute. If the language is clear and unambiguous, “no further construction is necessary or allowed to expand what the Legislature clearly intended to cover.” Stated another way, “a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.”

People v Davis, 468 Mich 77, 79; 658 NW2d 800 (2003)(internal citations omitted). The issue was preserved by the People’s attempt to introduce the statements into evidence.

Discussion

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 text of the rule is clear and unambiguous. It requires the following: (1) a statement;⁹ (2) relating to a startling event or condition; (3) made while the declarant was under the stress of excitement caused by the event or condition.¹⁰ The text of the rule does not contain any other threshold for admissibility or specify *how* such a preliminary showing of the foundational requirements must be made. But in *People v Burton*, this Court construed the rule and required for a foundation the introduction of independent proof not only of a startling event, but the precise nature of the startling event.

In *Burton*, a police officer observed the complainant running down the street at 5:30 a.m. wearing only a dress and no shoes, looking over her shoulder as if someone might be pursuing her. She tried getting into the police car before it was unlocked, and once inside, continued to cry and told the officer that she had been sexually assaulted. *Burton, supra* at 272, 278-279. As the *Burton* court explained on the facts of that case, because the evidence

⁹MRE 801(a) defines a “statement” as “(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.”

¹⁰This Court has previously held that there are two primary requirements for excited utterances: (1) that there be a startling event, and (2) that the resulting statement must be made while under the excitement caused by the event. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998), *citing People v Straight*, 430 Mich 418, 424; 424 NW2d 257 (1988). Those cases arose out of the controversy over the amount of time between the event and the utterance. Neither of those cases dealt with the independent evidence required to establish the existence of the startling event.

without the excited utterance proved only a “stressful event with sexual overtones,” the evidence was insufficient to establish the existence of “a sexual assault.” *Id.* at 298-299. In other words, to satisfy *Burton* the People must be able to prove the precise circumstances of the startling event *without* the excited utterance. As Justice Boyle observed in dissent:

[B]ecause the majority proceeds on the erroneous assumption that the trial judge must determine whether the startling event occurred without considering the statement itself, it has converted the Rule 104 inquiry into a corpus delicti rule in which the trial judge must find “independent evidence” of the happening of the event in order to permit the jury to determine whether the event occurred.

Id. at 317. The practical import of this re-writing of the rule is to convert excited utterances from being evidence of independent significance to being for corroborative purposes only.

After *Burton*, MRE 803(2) now effectively reads:

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, upon independent proof of the startling event or condition.

In this case, the district court held that the independent evidence requirement of *Burton* was not satisfied and denied admission of the statements. The People do not claim on appeal that the district court committed clear error or abused its discretion in making that finding.¹¹ Rather, the People assert that the lower court, and this Court in *Burton*, committed an error of

¹¹In fact, the district court characterized the independent evidence of the startling event in this case as falling “on the borderline.” July 21, 2004 District Court Opinion and Order at 4. A “decision on a close evidentiary question ordinarily cannot be an abuse of discretion.” *Smith, supra* at 550 (affirming trial court’s decision on the admissibility of an excited utterance). An appellate court can reverse only on a showing of an abuse of discretion. *Id.* at 549-550.

law in the construction of MRE 803(2).¹² Nothing in the plain language of MRE 803(2) requires the introduction of independent evidence of the startling event as a foundation for admissibility. In fact, MRE 104(a) provides that in making a preliminary finding of fact as to the admissibility of evidence, the rules of evidence do not apply.¹³ Nothing in the plain language of MRE 803(2) contains the additional element that *independent* evidence must be introduced to prove the existence and nature of the startling event. To the contrary, the rules of evidence clearly specify when such additional proof is required. For example, MRE 801(d)(2)(E) contains an *explicit* independent proof requirement for admissibility of a co-conspirator's statement:

A statement is not hearsay if [t]he statement is offered against a party and is ... a statement by a coconspirator of a party during the course and in furtherance of the conspiracy *on independent proof of the conspiracy*.

(Emphasis added). No such language is contained in MRE 803(2). Although the *Burton* court acknowledged this textual distinction, rather than accept the logical implication of it that independent proof is a foundational requirement under MRE 801(d)(2)(E) and not MRE 803(2), it violated the canons of construction by *adding* the independent evidence requirement to MRE 803(2):

In our opinion, the independent proof requirement of MRE 801(d)(2)(E) militates in favor of *reading a similar requirement into the excited utterance rule* because it evidences our *disinclination* to allow the “bootstrapping” of hearsay evidence.

¹²The District Court was required by *Burton* to apply this construction of the rule.

¹³“Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the Rules of Evidence except those with respect to privileges.”

Burton, supra at 282 (Emphasis added). It thus appears that the primary reason the plain language of the rule was ignored and an independent evidence requirement was added was the “disinclination” of the majority to apply the rule as written.¹⁴

The *Burton* court’s error is illustrated by the subsequent analysis of this Court in *People v Lively*, 470 Mich 248; 680 NW2d 878 (2004). In *Lively*, this Court analyzed the perjury statutes to determine whether materiality is an element. In rejecting the claim that materiality is an element, the Court wrote:

Our Legislature has thus defined perjury as a willfully false statement regarding any matter or thing, if an oath is authorized or required. Noticeably absent from this definition is any reference to materiality. The Legislature could easily have used a phrase such as "in regard to any material matter or thing," or "in regard to any matter or thing material to the issue or cause before the court," but the Legislature did not use such language.

...

Reinforcing our conclusion that the Legislature's failure to include a materiality requirement in MCL 750.423 is dispositive is the fact that several perjury-related statutes not at issue here do require that the false matter or statement be material. See MCL 28.422a, 32.1131, 168.729, 257.254, 324.5531(2), 380.1003, 500.2014, 500.4509, 600.8813, 764.1e(2), and 765.25. These statutes demonstrate that the Legislature knows how to make materiality an element of a perjury-related offense. Thus, the failure to make materiality a requirement in the perjury statutes at issue here must be given meaning.

Id. at 253-254.

Just as in *Lively*, the distinction in the language of the rules of evidence is compelling and demonstrates that requiring independent proof of the startling event is *not* a foundational

¹⁴The *Burton* court relied on a second reason to reject this textual distinction; its unsupported belief that the use of excited utterances in an assault case were “extremely rare relative to those involving the admissibility of coconspirators’ statements.” *Id.* at 282. While it would be a practical impossibility to prove or disprove that belief, as a practical matter, conspiracies are the rare animal. A perusal of any district or circuit court docket of any court in this state would demonstrate a staggering number of domestic violence and sexual assault cases.

requirement under the plain language of MRE 803(2). Had the drafters of the rule wished to require an independent evidence foundational requirement, one could very easily been written, just as had been done for co-conspirator statements. To the extent *Burton* ignored the canons of construction and held otherwise, it was wrongly decided and should be overturned. See *Burton, supra* at 304-305, 316-327 (dissenting opinions of Chief Justice Riley and Justice Boyle); *People v Hendrickson*, 459 Mich 229, 240-249; 586 NW2d 906 (1998)(dissenting opinion of Justice Boyle, joined by Justices Weaver and Taylor, rejecting *Burton*)¹⁵; *People v Slattery*, 448 Mich 931; 531 NW2d 713 (1995)(statement by Justice Boyle, joined by Justice Weaver, calling for reconsideration of *Burton*).

Whether this Court should overrule its own precedent is a separate question. Although this Court has noted that overruling precedent is done with caution, it has equally observed that the doctrine of “stare decisis is not to be applied mechanically to forever prevent the Court from overruling earlier erroneous decisions.” *People v Petit*, 466 Mich 624, 633; 648 NW2d 193 (2002). Before overruling precedent, the court should be convinced not only that the prior decision was wrongly decided, “but also that less injury will result from overruling than from following it.” *Id.* at 634. See also *People v Davis*, 472 Mich 156, 168 n 19; 695 NW2d 45 (2005). To answer that inquiry involves an analysis of “whether the previous decision has become so embedded, so accepted, so fundamental, to everyone’s expectations that to change it would produce not just readjustments, but practical real-world dislocations.” *Petit, supra*

¹⁵In the Court of Appeals, then Judge Markman dissented in an opinion quoting extensively from Justice Boyle’s dissent in *Burton*. *People v Hendrickson*, unpublished opinion of the Court of Appeals, issued August 8, 1997 (Docket No. 193713), *dissenting opinion* at 3-5. A repudiation of *Burton* would necessarily call into question the continued viability of *Hendrickson*.

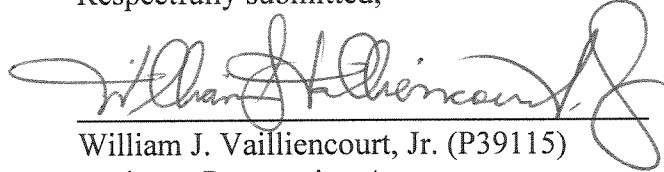
at 635. Overruling *Burton* would have no such effect. Just as this court observed in overruling a construction of the court rule governing a defendant's allocution at sentencing, there is nothing about this Court's decision in *Burton* that is so fundamental that it can "be said to have caused defendants to alter their conduct in any way. *Petit, supra*. Accordingly, if this Court concludes that *Burton* was wrongly decided, there is no impediment to this Court overruling it.

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RELIEF REQUESTED

FOR THE FOREGOING REASONS, the People request that the Court grant this Application or grant any other relief as may be appropriate, including reversing the district court and remanding for further proceedings.

Respectfully submitted,



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