

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DAVID CARL BARRETT,

Defendant-Appellee.

Supreme Court No. 133128

COA No. 261382

(On appeal from Circuit
Court for Livingston County;
File No. 04-14530-AR;
Hon. David J. Reader)

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DEFENDANT-APPELLEE'S SUPPLEMENTAL BRIEF IN OPPOSITION TO
PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

133128-
Suppl

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STATEMENT OF FACTS

In its order of June 1, 2007, this Court stated that the "parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers".

ARGUMENT

I. DID THIS COURT CLEARLY ERR IN ITS DECISION IN *PEOPLE V BURTON* BY HOLDING THAT INDEPENDENT PROOF OF A STARTLING EVENT WAS REQUIRED AS A FOUNDATION FOR THE ADMISSION OF AN EXCITED UTTERANCE CONCERNING SAID EVENT?

Two decisions from other jurisdictions also support this Court's holding in *Burton*.

In *State v Rowe*, 252 Kan 243; 843 P2d 714 (1992), the Kansas Supreme Court held inadmissible an unavailable declarant's statements concerning the identities of persons involved in tape-recorded conversations and the subject matters of those taped conversations:

Further, the tape recordings did not meet the requirements of K.S.A. 1991 Supp. 60-460(d)(1). As defense counsel points out, the state failed to lay the necessary foundation for their admission. In order to establish a present sense impression, the state must show:

"1. An event or condition occurred.

"2. The declarant perceived the event or condition.

"3. The declarant made the statement while perceiving the event or condition." (Emphasis added [by Court].) *Barbara, Kansas Evidence Objections with Evidentiary Foundations*, §7.6, p. 7-18 (1988).

The event or condition that the State is trying to establish occurred is that the defendants sold drugs to Boyce. However, none of the defendants are identified by Boyce on tape. Boyce does not state on the tapes that he is purchasing drugs. Boyce's statements on the tapes simply do not show that the event the State is trying to prove occurred. Furthermore, the State presented no other evidence establishing that the drug transactions occurred. The police were unable to identify the defendants, did not witness Boyce enter or leave the residences, and did not personally view the defendants or any drug transactions. The State did not meet its

foundational burden to admit the tapes under K.S.A. 1991 Supp. 60-460(d)(1).

The State next relies upon K.S.A. 1991 Supp. 60-460(d)(2), the "excited utterance" exception, as additional authority for admitting the taped statements. This exception to the hearsay rule requires the State to show:

- "1. An event or condition occurred.
- "2. It was startlingly sufficient to cause nervous excitement.
- "3. The declarant perceived it.
- "4. The declarant made the statement while under stress of nervous excitement." Barbara, Kansas Evidentiary Objections with Evidentiary Foundations, §7.6, p. 7-18 (1988).

The State claims that Boyce operated under a "nervous excitement" during the alleged drug buys, given the inherent dangers associated with acting as a drug informant. Once again, the State has failed to establish the first foundational element, that the event occurred.

Rowe, p 719

In *People v Leonard*, 83 Ill2d 411; 47 Ill Dec 353; 415 NE2d 358 (1980), the Illinois Supreme Court stated:

We initially address the State's argument related to Frieda Goldberg's testimony concerning her telephone conversation with decedent. The appellate court, finding no direct or circumstantial evidence of an occurrence sufficiently startling to produce a spontaneous and unreflecting statement other than decedent's statement itself, reasoned that the statement, "He's got a gun," was inadmissible hearsay. In the absence of Illinois authority on this point, the appellate court relied extensively on the reasoning of the Texas Supreme Court in *Truck Insurance Exchange v. Michling* (Tex. 1963), 364 S.W.2d 172, 175. In *Michling*, a statement by a deceased employee relating to the circumstances of an alleged injury at work was offered in a workmen's compensation action brought by the employee's widow. The statement was found not to be admissible as an excited utterance because there was absolutely no evidence to corroborate the existence of a sufficiently startling event.

The State contends that, in the present case, the

existence of a sufficiently startling underlying event was proved circumstantially. In support of this position, the State argues that the telephone conversation, which occurred at approximately 1 a.m., was immediately followed by a struggle with defendant over a gun, and that the struggle and its proximity in time to the telephone conversation were established by the undisputed testimony of three witnesses. In addition, directing our attention to what is characterized as a "modern trend", the State argues that the statement itself is sufficient proof of the existence of a startling underlying event. (See McCormick, Evidence sec. 297 (2d ed. 1972).) In the alternative, the State suggests that the statement is admissible as a present-sense impression. See Fed.R.Evid. 803(1).

In seeking to sustain the decision of the appellate court, defendant argues that his right of confrontation and cross-examination is violated where evidence of statements made by the deceased are admitted absent independent evidence of a sufficiently startling event. Defendant refers us to the decisions of other jurisdictions which have refused to admit the declaration under circumstances where it would appear unreliable and untrustworthy. See generally *state v. Ellis* (Me. 1972), 297 A.2d 91, 94 (refusing to admit decedent's statement, the only evidence of defendant's malice, where decedent refused an offer of help from the listener); *State v Gunthorpe* (1970), 81 N.M. 515, 520, 469 P.2d 160, 165 (refusing to admit decedent's identification of defendant, her former husband, where no evidence of a startling event was presented); *Chrysler Motors v. Davis* (1970), 226 Ga. 221, 224, 173 S.E.2d 691, 694 (refusing to admit decedent's statement on the issue of proximate cause due to its self-serving nature).

We initially note our agreement with defendant and the appellate court that, absent some evidence of the existence of an occurrence sufficiently startling to produce a spontaneous and unreflecting statement, the testimony relating the out-of-court statement should be excluded. (*People v Poland* (1961), 22 Ill.2d 175, 181, 174 N.E.2d 804.) We believe, however, that the appellate court's reliance upon *Truck Insurance Exchange v. Michling* (Tex. 1963), 364 S.W.2d 172, 175, is misplaced and that the testimony was properly admitted.

In *Michling*, the only evidence offered to prove that the deceased employee suffered an injury arising out of his employment was that given by his widow. Mrs. Michling testified that on the date in question her husband returned home from work and stated that he "had

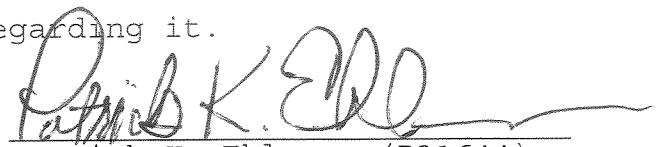
hit his head on the bulldozer, the iron bar across the seat." This was the only evidence introduced which tended to prove that decedent had been working. Other evidence introduced in the proceeding tended to establish that decedent did not work on the date in question; that none of the employer's bulldozers were operated on that date; that there was no bar across the seat of the bulldozer; and that decedent had died from a congenital disorder with no evidence of external injury. (364 S.W.2d 172, 174.) Not only was the statement the only evidence introduced which supported the claim, there was strong evidence to suggest its unreliability and absolutely no evidence to corroborate the existence of a sufficiently startling event, which was the injury sought to be proved.

In the present case, decedent's statement, "He's got a gun," was corroborated by the testimony of Robert Reinschreiber, Richard Frenzel, and Teri Moss, who witnessed the nearly contemporaneous struggle over this weapon. Given the nearly contemporaneous corroboration of the underlying event by these witnesses, and the statement made by defendant during the call, we find sufficient circumstantial evidence to corroborate the existence of an occurrence sufficiently startling to produce a spontaneous and unreflecting statement, and we therefore hold that the trial court did not abuse its discretion in admitting this testimony.

Leonard, pp 361-362

In both *Rowe* and *Leonard*, the Court recognized the wisdom of requiring a foundation showing the occurrence of an event before admitting out-of-court statements regarding it.

Date: 7/9/07


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