STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN D. PHILLIPS,

Defendant-Appellant.

UNPUBLISHED
February 28, 1997

No. 184933
Oakland Circuit Court
LC No. 93-128635

Before: Young, P.J., and Markey and D.A. Teeple,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of felonious assault, MCL 750.82; MSA 28.277.[1] Defendant was sentenced to three years' probation, the first year to be served in jail with the possibility of authorized work release. Because defendant subsequently pleaded guilty to being an habitual offender, second offense, MCL 769.10; MSA 28.1082, the court vacated that sentence and instead sentenced defendant on the habitual offender conviction to the same term. We affirm one conviction, but vacate the second conviction.

I.

Defendant raises three issues on appeal. First, he argues that the trial court abused its discretion in allowing three types of hearsay to be introduced as evidence at trial. The first category consists of statements made by defendant's wife, who was the victim, and their nine-year-old daughter, that were admitted as substantive evidence through the testimony of police officers under the excited utterance hearsay exception, MRE 803(2). Both witnesses initially made verbal and written reports to the police that defendant pointed a gun at them and threatened to harm them, which constituted felonious assault, but they later recanted their stories. At trial, they denied the truth of their previous statements or indicated that they had no memory of the events that formed the basis of the charged offenses. Several police officers testified at trial regarding the victims' statements and other physical evidence that they

* Circuit judge, sitting on the Court of Appeals by assignment.

observed after arriving on the scene. Defendant contends that the prosecution improperly used the victims' out-of-court statements to prove the existence of the crimes. We disagree.

To admit into evidence an out-of-court statement under the excited utterance exception to the hearsay rule, MRE 803(2), the statement must meet three criteria: "(1) it must arise out of a startling occasion; (2) it must be made before there is time to contrive and misrepresent; and (3) it must relate to the circumstances of the startling occasion." *People v Houghteling*, 183 Mich App 805, 807; 455 NW2d 440 (1990). Before being properly admitted as excited utterances, hearsay statements must also satisfy the rule of *People v Burton*, 433 Mich 268, 271; 445 NW2d 133 (1989), in which the Michigan Supreme Court held that extrajudicial statements sought to be admitted into evidence under MRE 803(2) may not be admitted "when there is no independent evidence, direct or circumstantial, of the underlying startling event to which the statements relate." *Id.* Furthermore, "subsequent, unexcited hearsay statements by the same declarant [cannot] be used by the trial judge to provide the independent proof of the underlying startling event." *Id.* at 295.

We note that defendant objected at trial to his wife's hearsay statements admitted through the testimony of police officers but did not object when a neighbor testified to out-of-court statements that defendant's wife made when requesting the neighbor's assistance at 3:30 a.m. immediately after the alleged assault. Absent an objection, it is not error to allow the trier of fact to consider such hearsay testimony. See *Tucker v Sandlin*, 126 Mich App 701, 706; 337 NW2d 637 (1983).

Even were we to discount the excited utterance statements of defendant's wife and daughter and any subsequent hearsay statements made by them that were admitted at trial without defendant's objection, we find sufficient independent proof that defendant committed a felonious assault by pointing a gun at his wife, threatening to harm her, and placing her in reasonable fear or apprehension of an immediate battery. *People v Coddington*, 188 Mich App 584, 594; 470 NW2d 478 (1991). The evidence established that defendant's wife arrived at her neighbor's door at 3:30 a.m. dressed only in her nightclothes and screaming that her husband had a gun, was chasing her, and was going to kill her. She was crying and concerned about the safety of her daughter. Officer Stone testified that he observed a bruise above defendant's wife's left eye and discovered a shotgun and other weapons in defendant's home along with ammunition from the shotgun lying on the living room floor. Further; defendant admitted at trial that he may have dry racked the gun to scare his wife and that she ran out of the trailer just after he had done so. Defendant also initially refused to allow his daughter to leave the trailer or to turn himself in to the police. Moreover, the prosecution introduced evidence of defendant's conviction on a previous count of assault and battery to prove the element of intent. Accordingly, we find that there was sufficient independent evidence to prove that defendant committed a felonious assault upon his wife and that the wife's and daughter's excited utterances to the police were admissible under MRE 803(2). *Burton, supra*.

With respect to the second count of felonious assault, however, the only independent evidence that defendant struck his wife with the gun was Officer Stone's testimony that he observed bruising above defendant's wife's eye. We do not believe that this testimony, without more, "independently support[s] by a preponderance of evidence" a felonious assault, i.e., that defendant struck his wife with

the butt of a shotgun. *Burton, supra* at 298. Therefore, we vacate defendant's conviction regarding the second count of felonious assault.

The second and third categories of out-of-court statements admitted into evidence deserve much less attention on appeal. Defendant complains that his wife's and daughter's out-of-court statements were improperly admitted to impeach their trial testimony. This testimony was not hearsay, however, because it was admitted specifically for impeachment purposes and not to prove the truth of the matter asserted. "[E]vidence that is admissible for one purpose does not become inadmissible because its use for a different purpose would be precluded." *People v VanderVliet*, 444, Mich 52, 73; 508 NW2d 114 (1993).

Defendant's third category of improperly admitted evidence contains two statements. The first is a statement by defendant's wife that was admitted under the exception for the declarant's then-existing mental or emotional condition, MRE 803(3). Defendant argues that his wife's state of mind was not relevant. He is wrong. An element of felonious assault concerns the victim's "reasonable fear or apprehension of an immediate battery," which relates to a victim's state of mind. *Coddington, supra*. "It is well accepted that evidence that demonstrates an individual's state of mind will not be precluded by the hearsay rule." *People v Fisher,* 449 Mich 441, 449; 537 NW2d 577 (1995). Defendant also complains that the trial court allowed the police officers to testify that they had been dispatched to investigate "a felonious assault." The trial court correctly found, however, that this statement was not hearsay because it was not offered for the truth of the matter asserted. MRE 801(c).

II.

Defendant's second argument on appeal is that the trial court abused its discretion in allowing three incidents of other bad acts to be admitted into evidence. Evidence of other crimes or bad acts may be admitted if "(1) it is relevant to an issue other than character or propensity, (2) it is relevant to an issue or fact of consequence at trial, and (3) its probative value is not substantially outweighed by the danger of unfair prejudice." *People v Catanzarite,* 211 Mich App 573, 578-579; 536 NW2d 570 (1995), citing *VanderVliet, supra* at 74-75. The decision to admit evidence of other bad acts is within the discretion of the trial court and will not be overturned on appeal absent an abuse of discretion. *People v McMillan,* 213 Mich App 134, 137; 539 NW2d 553 (1995).

The trial court admitted evidence of defendant's prior conviction of assault and battery on his wife to demonstrate her state of mind and defendant's intent. The court also admitted evidence of defendant's statement to the police regarding a prior arrest, finding it relevant as a statement of defendant's guilty mind. The third piece of evidence was the presence of a .38 caliber revolver in defendant's home, which was admitted as evidence of the victim being placed in fright during the assault. Defendant contends that this evidence was not relevant because his intent was never at issue. We disagree. Again, intent to injure or place the victim in reasonable fear or apprehension of an immediate battery is an element of felonious assault. *Coddington, supra* at 594. The prosecution was thus required and properly permitted to bring forth evidence that went to defendant's intent. *Id.* We therefore find no abuse of discretion in the admission of this evidence. *McMillan, supra.*

III.

Defendant also contends that it was more prejudicial than probative to introduce evidence of his prior conviction. Although we agree that this is a close question, our review of a trial court's evidentiary decisions is limited to whether the decision was an abuse of discretion. "The decision upon a close evidentiary question by definition ordinarily cannot be an abuse of discretion." *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995), citing *People v Golochowicz*, 413 Mich 298, 322; 319 NW2d 518 (1982). We therefore find no abuse of discretion in the trial court's decision to admit evidence of defendant's other bad acts.

IV.

Finally, defendant argues that the trial court erred in allowing expert testimony concerning the behavior patterns of victims of domestic abuse. Before deciding whether an expert can testify, the trial court "must find that the evidence is from a recognized discipline, as well as relevant and helpful to the trier of fact, and presented by a witness qualified by 'knowledge, skill, experience, training, or education'." *People v Christel*, 449 Mich 578, 587; 537 NW2d 194 (1995); MRE 702. Our Supreme Court has found that an expert on the battered spouse syndrome can testify to "help evaluate the credibility of the complainant." *Id.* at 589. Typically, this includes an explanation of the complainant denying or minimizing the abuse, delays in reporting, or subsequently recanting the abuse. *Id.* In the case at bar, the expert was properly qualified and limited her testimony to a discussion that might help the jury understand the victim's recantations after her initial police report and her refusal to testify meaningfully at trial. Therefore, the trial court did not abuse its discretion in admitting the expert's testimony.

Accordingly, we affirm defendant's felonious assault conviction that was based upon defendant's action of pointing the shotgun at his wife. We vacate the felonious assault conviction that was based upon defendant's alleged striking of his wife with the gun. We further remand this case to the trial court so the court may determine whether defendant will receive the same sentence or whether a different sentence is warranted in light of our opinion.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Robert P. Young, Jr.
/s/ Jane E. Markey
/s/ Donald A. Teeple

[1] Defendant was originally charged with four counts of felonious assault, two against his wife and two against their nine-year-old daughter. The assault charges against the daughter were dropped after the preliminary examination. The first of the remaining charges was for pointing a shotgun at his wife and the second was for striking her with the butt of the gun.