

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KELLY JOE CLOVEN,

Defendant-Appellant.

UNPUBLISHED

April 15, 1997

No. 178561

Macomb Circuit Court

LC No. 93-002784

Before: Reilly, P.J., and Wahls and N.O. Holowka*, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of second-degree murder, MCL 750.317; MSA 28.549. Defendant was sentenced to serve thirty to sixty years' imprisonment. We affirm the conviction and sentence, but remand for completion of a guideline departure form.

Defendant argues that the trial court improperly admitted the testimony of prosecution witnesses Deborah Mordell and Roseville Police Officer Michael Maison. We disagree. At trial, Mordell and Maison testified that, on June 10, 1993, the victim appeared to each of them and claimed that defendant assaulted her. Defendant objected on the ground of hearsay. We review a trial court's decision regarding the admission of evidence for an abuse of discretion. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

The trial court admitted the testimony pursuant to the excited utterance exception to the hearsay rule. The excited utterance exception pertains to 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." MRE 803(2); *People v Hackney*, 183 Mich App 516, 521; 455 NW2d 358 (1990). The focus of MRE 803(2) "is whether the declarant spoke while still under the stress caused by the startling event." *People v Straight*, 430 Mich 418, 425; 424 NW2d 257 (1988). A two-step test governs the admissibility of a statement under the excited utterance exception to the hearsay rule. *People v Edwards*, 206 Mich App 694, 697; 522 NW2d 727 (1994). To determine whether the declarant had

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

time to contrive or misrepresent, the court must ask: (1) whether the interval between the event and the statement was long enough to make fabrication possible and (2) whether the declarant's emotional state at the time permitted it. *Id.* The Supreme Court has held that statements made more than three weeks after the alleged events were inadmissible under the excited utterance exception. *People v Morgan*, 418 Mich 916; 342 NW2d 523 (1984). In comparison, this Court has held that statements made by a victim three hours after she was brutally attacked were admissible. *People v Zysk*, 149 Mich App 452, 457; 386 NW2d 213 (1986). See also *People v Sommerville*, 100 Mich App 470, 489; 299 NW2d 387 (1980) (complainant's statements made less than half an hour after the startling event were admissible). Also, this Court has held that statements made by the victim's wife to an investigating officer "shortly after" the startling event were admissible as excited utterances. *People v Sullivan*, 97 Mich App 488, 494; 296 NW2d 81 (1980). Further, the fact that a statement was made in response to questioning does not in itself preclude it from being an excited utterance. *Hackney, supra*.

In the instant case, the prosecutor presented evidence that the victim remained in a highly excited state during the one-hour interval between the assault and the making of the statement, first to Mordell and later to Maison. Mordell testified that, around 2:00 p.m. on June 10, 1993, the victim "ran" into Mordell's backyard, crying and screaming. When the victim entered Mordell's backyard, Mordell noticed a "hard ball" on the victim's cheek. The victim was "hysterical." She told Mordell that defendant tried to kill her. Immediately, Mordell drove the victim to the police station in Roseville. Maison encountered the victim upon her arrival at 3:00 p.m. Maison noticed a welt under the victim's left eye, as well as dried tears on her face. Maison described her as "visibly upset." Maison asked the victim several background questions, then the victim told him that defendant struck her, held a knife to her throat, and threatened to kill her. Given the victim's physical and emotional state upon her arrival at Mordell's and later at the police station, as well as the brutal nature of the attack against her, we agree with the trial court's determination that the victim remained in an excited state for the interval preceding the making of the statement to Mordell and later to Maison. Furthermore, there was strong circumstantial evidence to establish that the startling event occurred. *People v Kowalak (On Remand)*, 215 Mich App 554, 557-560; 546 NW2d 684 (1996).

Defendant also contends that evidence of alleged prior domestic violence should have been excluded pursuant to MRE 404(b) and *People v VanderVliet*, 444 Mich 52; 508 NW2d 628 (1993). We disagree. Prior acts of marital violence were admissible to show defendant's motive and the relationship between defendant and the victim. *People v Fisher*, 193 Mich App 284, 290; 483 NW2d 452 (1992). Accordingly, we find no abuse of discretion.

Defendant also argues that he was denied a fair trial when the prosecutor improperly appealed to juror sympathy, shifted the burden of proof to defendant, and vouched for the credibility of certain prosecution witnesses, as well as when he made improper use of prior bad acts evidence during closing argument. We disagree. Prosecutorial misconduct issues are decided on a case by case basis. *People v LeGrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). We examine the allegedly improper conduct in context and determine whether the defendant was denied a fair and impartial trial. *Id.* at 82-83. Upon review of the challenged remarks in context, we conclude that defendant was not denied a

fair and impartial trial. Moreover, any prejudice caused by any arguably impermissible remarks could have been cured by defendant's request for a curative instruction.

Lastly, defendant argues that his thirty to sixty year sentence is disproportionate. We disagree. Appellate review of sentences is limited to determining whether an abuse of discretion has occurred. *People v Poppa*, 193 Mich App 184, 187; 483 NW2d 667 (1992). A sentencing court has abused its discretion when a sentence is not proportionate "to the seriousness of the circumstances surrounding the offense and the offender." *Id.*

Where a sentencing court departs from the sentencing guidelines, this Court must ask whether the case involves circumstances that are not adequately embodied within the analysis used to score the guidelines. *People v Phillips (On Reh)*, 203 Mich App 287, 290-291; 512 NW2d 62 (1994). Further, this Court must consider the extent of the departure (not simply the departure itself) in deciding whether a sentence is violative of the principle of proportionality. *Id.* Here, the trial judge based his upward departure from the recommended guidelines' range based upon the fact that defendant committed a particularly brutal crime and that, in committing the crime, defendant violated the sanctity of the victim's home by forcibly kicking down her apartment door. The record reveals that defendant stabbed the victim in excess of twenty-six times, leaving the murder weapon lodged in the victim's back. The wounds ranged in size from a quarter inch to three inches. The record also shows that in order to effectuate the crime defendant kicked in the door to the victim's apartment tearing the door jam away from its frame. Because these factors are not embodied within the variables used to score the guidelines for homicide, we conclude that the sentencing court sufficiently justified its departure and, therefore, find no abuse of discretion. See *People v Grady*, 204 Mich App 314, 316; 514 NW2d 541 (1994) (trial court's upward departure from the guidelines' range based upon the "grizzly" nature of the wounds inflicted upon the victim is not an abuse of discretion). Nevertheless, we remand this case to the trial court for completion of a guideline departure form, because such form was missing from the initial sentencing information report in the lower court file. See *People v Fleming*, 428 Mich 408, 428; 410 NW2d 266 (1987).

Affirmed, but remanded for further proceedings in accord with this opinion.

/s/ Maureen Pulte Reilly

/s/ Myron H. Wahls

/s/ Nick O. Holowka