

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER S. GALLAGHER, SR.,

Defendant-Appellant.

UNPUBLISHED

May 9, 1997

No. 188028

Oakland Circuit Court

LC No. 94-136625-FH

Before: Holbrook, Jr., P.J., and Fitzgerald and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, for the December 8, 1994, assault of his wife, Nancy Gallagher. Defendant subsequently pleaded guilty of being an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, and was sentenced to a prison term of five to twenty years. He now appeals as of right, and we affirm.

Defendant first argues that the trial court abused its discretion by admitting evidence of other wrongful acts. A trial court's decision regarding the admission of other acts evidence is reviewed for an abuse of discretion. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

Other acts evidence is admissible if (1) the evidence is offered for a proper purpose, MRE 404(b), (2) the evidence is relevant, MRE 402, (3) the probative value of the evidence is not substantially outweighed by unfair prejudice, MRE 403, and (4) the trial court provides a limiting instruction upon request, MRE 105. *People v VanderVliet*, 444 Mich 52, 55, 75-75; 508 NW2d 114 (1993). Here, the trial court admitted evidence that, on April 20, 1993, and May 17, 1994, Nancy was similarly assaulted by defendant. Defendant argues that the trial court abused its discretion by admitting the other acts evidence because: (1) the evidence was offered for an improper purpose, i.e., to show defendant's propensity for violence, and (2) the prosecutor failed to prove by way of substantial evidence that defendant committed the prior assaults. Because it is no longer necessary that there be "substantial evidence" that the defendant committed the other act(s) sought to be introduced,

VanderVliet, *supra* at 68, we limit our review to whether the evidence was offered for a proper purpose.

Although evidence of other acts is not admissible to prove the character of a person in order to show action in conformity therewith, it may be admissible to show “motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when material.” MRE 404(b); *Ullah*, *supra* at 674. Here, the record reveals that the prosecutor offered the other acts evidence to show defendant’s intent to injure Nancy, as well as his pattern of abuse and control over her. Moreover, the trial court directed the jury to consider the other acts evidence for the limited purpose of determining whether defendant intended his conduct. Because the evidence was offered, and admitted, to serve a proper purpose, we find no abuse of discretion in admission of the evidence.

Defendant next argues that the trial court abused its discretion by admitting expert testimony concerning the battered woman syndrome. A trial court’s decision to admit expert testimony is reviewed for an abuse of discretion. *People v Christel*, 449 Mich 578, 587; 537 NW2d 194 (1995).

Our Supreme Court has held that expert testimony concerning the battered woman syndrome is admissible to assist the jury in evaluating a complainant’s credibility. *Christel*, *supra* at 579-580. Here, the prosecution offered the battered woman syndrome testimony to help the jury understand Nancy’s behavior, particularly her repeated denials and recantations of defendant’s involvement.¹ Because the expert testimony was helpful in assessing Nancy’s credibility, we find that the trial court did not abuse its discretion by admitting it.

Defendant also challenges the admissibility of several extra-judicial statements. Because defendant only objected at trial to Nancy’s extra-judicial statements to Deborah Mondon, we limit our review to the admissibility of Mondon’s testimony. MRE 103(a)(1); *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1989). We review a trial court’s decision regarding the admission of evidence for an abuse of discretion. *Ullah*, *supra* at 673.

Although hearsay is generally not admissible, there is an exception for statements made for purposes of medical treatment or medical diagnosis in connection with treatment. MRE 803(4); *People v McElhaney*, 215 Mich App 269, 280; 545 NW2d 18 (1996). Here, Mondon, a registered nurse at Pontiac Osteopathic Hospital, testified that on December 9, 1994, one day after the assault, Nancy sounded her call light, seeking assistance to the bathroom. Mondon responded. As Mondon helped Nancy to the bathroom, Nancy told Mondon, “He just went berserk, he beat me and beat me and beat me.”

In order to be admitted under MRE 803(4), a statement must be made for purposes of medical treatment or diagnosis in connection with treatment, and it must describe medical history, past or present symptoms, pain or sensations, or the inception or general character of the cause or external source of injury. *People v Meeboer (After Remand)*, 439 Mich 310, 322; 484 NW2d 621 (1992); *People v Creith*, 151 Mich App 217, 226; 390 NW2d 234 (1986). Although Nancy’s statement to Mondon

described the inception of the injuries, the statement was not made for purposes of medical treatment or diagnosis in connection with treatment. Consequently, the statement was not admissible under MRE 803(4).

We conclude, however, that the admission of the statement constituted harmless error. An error in the admission of evidence may require reversal of a conviction where, after considering the nature of the error and assessing its effect in light of the weight and strength of the properly admitted evidence, *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996), refusal to vacate the judgment would be “inconsistent with substantial justice.” MCR 2.613(A). Here, the statement was cumulative evidence; the victim had made similar statements to other witnesses whose testimony was properly admitted at trial.

Defendant also argues that he was deprived of his right to the effective assistance of counsel by trial counsel’s repeated failure to object to hearsay statements. We disagree. Because the statements were either not hearsay or would have been admissible for impeachment purposes, trial counsel’s failure to object could not have affected defendant’s chances for acquittal and, therefore, defendant’s claim of ineffective assistance of counsel on this ground is without merit. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995); *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991).

Lastly, defendant argues that the prosecutor engaged in improper conduct by impeaching its own witness. We disagree. The rule governing impeachment provides:

The credibility of a witness may be attacked by any party, including the party calling the witness. [MRE 607; see also *People v Jenkins*, 450 Mich 249, 255 n 11; 537 NW2d 828 (1995).]

Moreover, under MRE 613, a party may examine a witness regarding a prior inconsistent statement in order to impeach the witness’ credibility. *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994); *People v Williams*, 191 Mich App 269, 274-275; 477 NW2d 877 (1991). In light of MRE 607 and MRE 613, we conclude that the prosecutor acted properly and, therefore, defendant’s claim is without merit.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ E. Thomas Fitzgerald
/s/ Michael R. Smolenski

¹ Prior to trial, Nancy told several family members and friends that defendant perpetrated the December 8th assault against her. At trial, however, Nancy denied defendant’s involvement and attributed the sum of her injuries to a grand mal seizure.