STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 9, 2002
v	No. 231395 Wayne Circuit Court
GREGORY RUSHING, Defendant-Appellant.	LC No. 99-008744

Before: Zahra, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of felony murder, MCL 750.316(1)(b). We affirm.

Defendant first argues that the trial court erred by admitting his codefendant's statement to police, pursuant to MRE 803(24), as substantive evidence of defendant's guilt. We disagree. We review a trial court's decision regarding the admission of evidence for an abuse of discretion. *People v Katt*, 248 Mich App 282, 289; 639 NW2d 815 (2001). An abuse of discretion exists if an unprejudiced person would find no justification for the ruling made. *Id*., quoting *People v Watson*, 245 Mich App 572, 575; 629 NW2d 411 (2001).

A hearsay statement that is inadmissible under one of the established exceptions to the hearsay rule may be admissible under MRE 803(24), even when the declarant is available as a witness. MRE 803(24) provides:

> A statement not specifically covered by any of the foregoing [hearsay] exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

To determine if a statement possesses the requisite indicia of reliability under MRE 803(24), the trial court must consider "the totality of the circumstances surrounding the making of the statement," and may include the following factors:

> (1) the spontaneity of the statements; (2) the consistency of the statements; (3) lack of motive to fabricate or lack of bias; (4) the reason the declarant cannot testify; (5) the voluntariness of the statements, i.e. whether they were made in response to leading questions or made under undue influence; (6) personal knowledge of the declarant about the matter on which he spoke; (7) to whom the statements were made, e.g. a police officer who was likely to investigate further and (8) the time frame within which the statements were made. The court may not consider whether evidence produced at trial corroborates the statement. [*Katt*, *supra* at 295, quoting *People v Lee*, 243 Mich App 163, 178; 622 NW2d 71 (2000).]

In this case, Williams' statement was not spontaneous; rather, it was made about eighteen hours after he was arrested. Williams' statement was relatively consistent with his trial testimony and the record demonstrated no motive for him to fabricate his statement, which was not self-serving, and no apparent bias against defendant. The trial court determined that Williams' statement was voluntary and nothing in the record indicates that the trial court's decision was incorrect. Williams had personal knowledge of the matters contained in his statement and he made the statement to a police officer, knowing the officer was likely to investigate further. Finally, the statement was made on August 12, 1999, three days after the incident occurred. Considering the totality of the circumstances, we conclude that Williams' statement had the requisite indicia of reliability necessary for admission under MRE 803(24).

Further, the other requirements of MRE 803(24) were also met. First, Williams' statement was offered as evidence of a material fact – whether and when defendant was present during the kidnapping, beating, strangulation, shooting, and killing of the victim. MRE 803(24)(A); see, also, *Lee*, *supra* at 179. Second, the statement was more probative on that issue than any other evidence the prosecutor could procure through reasonable efforts because there were very few witnesses to the murder. MRE 803(24)(B); see, also, *Lee*, *supra*. Finally, the general purposes of the hearsay exceptions, and the interest of justice, are served by admission of the statement into evidence. MRE 803(24)(C); see, also, *Lee*, *supra*. Therefore, we conclude that the trial court did not abuse its discretion when it admitted Williams' statement, pursuant to MRE 803(24), as substantive evidence of defendant's guilt.

Defendant also argues that the trial court reversibly erred when it refused to instruct the jury on felonious assault, MCL 750.82, as a cognate lesser included offense of felony murder. We disagree.

It is well established that a cognate lesser included offense is an offense that is related to a greater offense in that it shares some common elements with, and is of the same class or category as, the greater offense, but may have some additional elements not found in the greater offense. See *People v Hendricks*, 446 Mich 435, 443; 521 NW2d 546 (1994), citing *People v Ora Jones*, 395 Mich 379, 387; 236 NW2d 461 (1975). Accordingly, the first step in determining whether a proposed lesser offense is "cognate" to the greater offense, and thus the defendant's entitlement to a requested jury instruction, is to compare the elements of the two offenses. See *id*. at 389-390.

In this case, defendant was charged with felony murder. The elements of felony murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, i.e., malice, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316, including kidnapping. *People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999), quoting *People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1995), overruled in part on other grounds *People v Mass*, 464 Mich 615, 627-628; 628 NW2d 540 (2001). The elements of felonious assault are: (1) an assault, (2) with a dangerous weapon, (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery, but without intending to commit murder or inflict great bodily harm less than murder. See MCL 750.82; *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). In other words, a felonious assault is a simple assault aggravated by the use of a weapon, *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993), and a simple assault is "either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery." See *People v Joeseype Johnson*, 407 Mich 196, 210; 284 NW2d 718 (1979), quoting *People v Sanford*, 402 Mich 460, 479; 265 NW2d 1 (1978).

After review of the elements of felony murder and felonious assault, it is apparent that these offenses do not share any common elements; consequently, the offenses are not "cognate." See, e.g., *People v Harris*, 133 Mich App 646, 651; 350 NW2d 305 (1984); *People v Stubbs*, 110 Mich App 287, 290; 312 NW2d 232 (1981). Accordingly, defendant was not entitled to a jury instruction on felonious assault because, even if the prosecutor could have charged defendant with felonious assault, defendant did not have a right to amend the information. See *People v Perry*, 460 Mich 55, 63, n 19; 594 NW2d 477 (1999). Therefore, the trial court's denial of defendant's request for a felonious assault instruction was not an abuse of discretion. See *id*.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh