STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 22, 2002
v	No. 233786 Oakland Circuit Court
ARTHUR DWAYNE FOSTER, Defendant-Appellant.	LC No. 00-174154-FH

Before: Murray, P.J., and Cavanagh and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for felonious assault, MCL 750.82, aggravated assault, MCL 750.81a, and malicious destruction of a building, MCL 750.380(5). We affirm.

Defendant first argues that the trial court abused its discretion in admitting testimony, under MRE 404(b), that he had previously beaten one of the victims, his former wife. We disagree. We review the trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

Under MRE 404(b), evidence of other crimes, wrongs, or acts is admissible if it is (1) offered for a proper purpose, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice, pursuant to MRE 403. *People v Starr*, 457 Mich 490, 496-498; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 55, 63-64; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). It is a rule of inclusion that contains a nonexclusive list of "noncharacter" grounds on which evidence may be admitted. *Starr*, *supra* at 496.

Here, defendant complains that testimony from a police officer, Officer Williams, regarding defendant's previous assault on his former wife, a victim here, was improperly admitted. The trial court admitted the testimony as proper to establish a scheme, plan, or system. Officer Williams testified that in October 1998, defendant refused to leave his former wife's house, that an argument ensued, defendant pulled her inside the house by her hair, struck her on both sides of her face, bent her fingers backwards, pulled her into a bedroom, threw her down on a bed, grabbed her by the neck, and held her down on the bed. In this case, testimony indicated that defendant arrived at his former spouse's house uninvited, initiated an argument, and became

physically abusive to her, including that he threw her onto a bed, punched her in the head and face areas, grabbed her by the jaw, and choked her.

We agree with the trial court; the evidence was relevant to show that the charged act was committed because the charged and uncharged misconduct was sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system. One could infer from the evidence that defendant had a plan, scheme, or system of surprising his former spouse with his presence, at her house, starting an argument, and assaulting, including choking, her in an isolated area of her house. See *People v Hine*, 467 Mich 242, 252-253; 650 NW2d 659 (2002); *People v Sabin (After Remand)*, 463 Mich 43, 62-63; 614 NW2d 888 (2000). Further, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. MRE 403; *People v Mills*, 450 Mich 61, 75; 537 NW2d 909, modified 450 Mich 1212 (1995). Finally, the trial court gave the jury a limiting instruction. However, even if the trial court erred in admitting this evidence, reversal would not be warranted because, considering all of the evidence, any such error was not outcome determinative. See *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Next, defendant argues that the trial court abused its discretion when it admitted, as excited utterances, hearsay statements made by one of the victims to an investigating officer. We disagree. We review the trial court's admission of hearsay testimony under the excited utterance exception for an abuse of discretion. *People v Kowalak (On Remand)*, 215 Mich App 554, 558; 546 NW2d 681 (1996).

An exception to the rule prohibiting the admission of hearsay testimony at trial is the excited utterance exception which permits testimony "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). An excited utterance, therefore, must (1) arise out of a startling event, and (2) be made while the declarant was under the excitement caused by that event. See *People v Layher*, 238 Mich App 573, 582; 607 NW2d 91 (1999), citing *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). In determining whether the statement was made while under the excitement of the event, the question is not strictly one of time, but of the possibility of conscious reflection. *Id*. at 551.

Here, defendant claims that too much time had passed between the time of the incident and when the statements were made. The evidence illustrates, however, that the victim's statements were made after a startling event, and the victim was still under the excitement caused by the event. The victim was scared, shaking, shivering, and crying. When the police officer first saw her, the victim was crying, upset, and seemed very disarrayed. The victim remained very upset the entire time she talked to the officer. Even though forty-five minutes passed before the police arrived, the victim was still under the excitement caused by the event. Therefore, the trial court did not abuse its discretion in admitting the victim's statements pursuant to MRE 803(2).

Defendant also argues that the trial court abused its discretion by admitting, as an excited utterance, a statement made by the victim to a police officer after the prior assault discussed above. We disagree. Again, although forty-five minutes had passed between the contested statement and the startling event, the evidence shows that the victim was still under the stress of the event when the statement was made, she was in pain from the assault, and was physically

upset. See *Smith*, *supra*. Therefore, the trial court did not abuse its discretion because the victim was still excited from the event when she talked to the officer.

Next, defendant argues that he was denied a fair trial because the court gave an instruction on flight. This Court reviews jury instructions as a whole to determine if the trial court made an error requiring reversal. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Even if somewhat imperfect, jury instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights. *Id*. Evidence of flight is admissible where it is relevant and material. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Such evidence is probative because it may indicate consciousness of guilt, and can lead to an inference of guilt. *Id*.; *People v Kyles*, 40 Mich App 357, 360; 198 NW2d 732 (1972).

In this case, the trial court did not err in giving the jury an instruction on flight. The trial court instructed the jury that the flight evidence did not prove guilt, that it was for the jury to decide whether the evidence was true, and if it showed defendant had a guilty state of mind. The instruction was supported by the evidence. Defendant had prevented one of the witnesses from calling the police and, then, after somebody left to call the police, defendant left the premises. Therefore, the jury instructions fairly presented the issues for trial and sufficiently protected defendant's rights.

Finally, defendant argues that the trial court erred in failing to instruct the jury on the lesser offense of aggravated assault. In *People v Cornell*, 466 Mich 335, 354-355; 646 NW2d 127 (2002), our Supreme Court held that MCL 768.32(1) only permits instructions on necessarily included lesser offenses, not cognate lesser included offenses. Aggravated assault and felonious assault are cognate lesser included offenses. See *People v Brown*, 87 Mich App 612, 615-616; 274 NW2d 854 (1978). Therefore, based on *Cornell*, we conclude that the trial court did not err in refusing to give an instruction on aggravated assault. See *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002).

Affirmed.

/s/ Christopher M. Murray
/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra