STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 20, 2010
v	No. 289066 Wayne Circuit Court
RAYMOND JASON JOHNSON, Defendant-Appellant.	LC No. 08-007568-FC

Before: KELLY, P.J. and TALBOT and WILDER, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750227b. He was sentenced to life imprisonment for the murder conviction and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arise from the June 2005 shooting death of Marion Jackson, which occurred while they were both attending a barbeque at the house of Kimberly Hanson in Detroit. Witnesses testified that during the evening, defendant displayed a handgun and waived it around. Later in the evening, defendant began arguing with Jackson and Hanson saw defendant punch Jackson, who was in a chair on the front porch. Defendant then stood over the victim and pointed a gun at him. Hanson, who was inside the house, yelled at defendant to stop and picked up a telephone to call the police. Defendant told Hanson to put the telephone down or he would kill the victim. Hanson dropped the telephone and kicked it into a hallway. She then walked to the hallway and picked up the telephone and began to dial 911. Hanson then heard a shot, followed by a second shot, after which she hid in her bedroom. Hanson admitted that she did not actually see defendant shoot Jackson.

Jackson died from a single gunshot wound to his head. A warrant was issued for defendant's arrest, but he was not apprehended until more than two years later in Milwaukee, Wisconsin. Evidence was presented that when defendant was arrested in Milwaukee, he attempted to flee from the police and, at one point during a foot chase, pointed a gun at a police officer before he tripped and fell. The police recovered a .40-caliber handgun from defendant's possession, but the gun did not match a shell casing that was recovered at the scene of Jackson's shooting.

Defendant first argues that the trial court erred in admitting the evidence that, during his arrest in Milwaukee, he was in possession of a gun and pointed it at a police officer. A trial court's decision to admit or exclude evidence is generally reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). There is no abuse of discretion where the evidentiary question is a close one. *Id.*

Defendant argues that the evidence of the circumstances surrounding his arrest in Milwaukee was not admissible under MRE 404(b)(1). We disagree.

MRE 404(b)(1) prohibits evidence of "other crimes, wrongs, or acts to prove the character of a person in order to show action in conformity therewith," but allows such evidence to be admitted for other, noncharacter purposes. In deciding whether to admit evidence of other bad acts, a trial court must decide: (1) whether the evidence is being offered for a proper purpose, i.e., one other than to show the defendant's propensity to act in conformance with a given character trait; (2) whether the evidence is relevant to an issue of fact of consequence at trial; (3) whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice in light of the availability of other means of proof; and (4) whether a cautionary instruction is appropriate. *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000); *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994).

The prosecution offered the evidence to show system, lack of mistake, or accident. The trial court also found that the evidence was relevant as part of the res gestae of defendant's flight, to show consciousness of guilt. Defendant's theory of the case was that the prosecutor could not prove beyond a reasonable doubt that he was the person who shot the victim. Even if reasonable persons could disagree concerning whether the Milwaukee incident was sufficiently similar to the charged offense to show that defendant had a system of pointing a weapon at people who angered him, see *Sabin*, 463 Mich at 62-64, there is no abuse of discretion where an evidentiary question is a close one. *Id.* at 67-68. Regardless, we agree with the trial court that the evidence was admissible to show consciousness of guilt. *People v McGhee*, 268 Mich App 600, 613; 709 NW2d 595 (2005).

Evidence of flight may be used to show consciousness of guilt. *Id.* Flight includes evidence that the defendant left the jurisdiction, and "MRE 404(b) does not preclude evidence of criminal actions accompanying an escape because these actions are part of the res gestae of the incident." *Id.*; see also *People v Coleman*, 210 Mich App 1, 5; 532 NW2d 885 (1995). In *McGhee*, the defendant was charged with various drug offenses arising from a 1998 raid, and this Court held that "the circumstances surrounding defendant's 2001 apprehension in Georgia, including his change of identity and the gun and ammunition found in his car, indicated his intent to avoid capture and were probative to negate innocent intent." *McGhee*, 268 Mich App at 613.

In the present case, evidence of defendant's flight to Milwaukee and the circumstances of his arrest, including his conduct in pointing a gun at a police officer, were part of the res gestae of defendant's flight and attempt to avoid capture. Further, the evidence was material to negate innocent intent, which was a material issue in the case in light of the defense theory that the prosecution could not prove beyond a reasonable doubt that defendant shot the victim. Any

prejudice was also alleviated by the trial court's cautionary instruction that the evidence could be considered only for certain permissible purposes, and not to show that defendant is a bad person, is likely to commit crimes, or because he may be guilty of other bad conduct. Therefore, the probative value of the evidence was not substantially outweighed by any prejudicial effect. Accordingly, the trial court did not abuse its discretion in allowing this evidence.

Defendant next argues that the trial court erred in admitting Hanson's statement to a police officer that defendant shot Jackson. Defendant argues that, contrary to the trial court's ruling, the statement was not admissible under the excited utterance exception to the hearsay rule, MRE 803(2), because Hanson had time to contrive and fabricate the statement before making it. We disagree.

An excited utterance is "[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). Thus, the primary requirements of an excited utterance are "1) that there be a startling event, and 2) that the resulting statement be made while under the excitement caused by the event." *Smith*, 456 Mich at 550. Contrary to what defendant argues, there is no separate requirement that the statement be made before there was time to contrive and misrepresent. In *Smith*, *id.* at 550, the Supreme Court explained that its prior decision in *People v Straight*, 430 Mich 418, 424; 424 NW2d 257 (1988), in turn "clarified *People v Gee*, 406 Mich 279, 282[;] 278 NW2d 304 (1979), which had split the second requirement into two inquiries: whether the statement was made before there was time to contrive and misrepresent, and whether it related to the circumstances of the startling occasion." The *Smith* Court stated:

> Properly understood, [the] requirement that the statement must "be made before there has been time to contrive and misrepresent" is simply a reformulation of the inquiry as to whether the statement was made when the witness was still under the influence of an overwhelming emotional condition. [*Smith*, 456 Mich at 551, quoting *Straight*, 430 Mich at 425.]

Thus, "it is the lack of capacity to fabricate, not the lack of time to fabricate, that is the focus of the excited utterance rule." *Smith*, 456 Mich at 551. "The question is not strictly one of time, but of the possibility for conscious reflection." *Id.*

In this case, Hanson admitted that she had calmed down a little bit after the shooting, and Officer Thomas agreed that she sounded calm, and was not yelling or screaming. However, Officer Thomas also stated that Hanson seemed scared and was crying, and she asked Officer Thomas to hurry over. Hanson told Officer Thomas that defendant had shot the victim. The testimony sufficiently demonstrates that when Hanson spoke to Officer Thomas, she was still under the influence of an overwhelming emotional event, and that the challenged statement was made under circumstances suggesting the lack of a capacity to fabricate.

Even if the trial court abused its discretion in admitting the statement, however, we are convinced that the error was harmless. The statement was cumulative of Hanson's own testimony, and Hanson admitted that she did not actually see the shooting. Rather, she heard the shots and deduced that defendant shot the victim. In light of Hanson's clarifying testimony, it is not more probable than not that any error in admitting Hanson's out-of-court statement affected

the outcome of defendant's trial. *People v Lukity*, 460 Mich 484, 494-495; 596 NW2d 607 (1999).

Affirmed.

/s/ Michael J. Kelly
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder