

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK R. BACKLUND,

Defendant-Appellant.

UNPUBLISHED

May 29, 2003

No. 240641

Delta Circuit Court

LC No. 01-006746-FH

Before: Smolenski, P.J., and Griffin and O’Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of aggravated domestic violence, MCL 750.81a(2), and sentenced to nine months in jail. Defendant appeals as of right. We affirm.

Defendant’s first issue on appeal is that the trial court abused its discretion when it admitted evidence of other alleged assaults under MRE 404(b). We disagree. The decision to admit evidence is within the trial court’s discretion and is reviewed for an abuse of that discretion. *People v Hackney*, 183 Mich App 516, 521; 455 NW2d 358 (1990). “An abuse of discretion will be found only when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made.” *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001).

“Relevant other acts evidence does not violate Rule 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith.” *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993), mod on other grounds 445 Mich 1205 (1994). “MRE 404(b) does not preclude the use of other acts evidence for other relevant purposes.” *People v Watson*, 245 Mich App 572, 576; 629 NW2d 411 (2001). To be admissible under MRE 404(b), evidence must be offered for a proper purpose under MRE 404(b) and be relevant under MRE 402. *VanderVliet, supra* at 55. Further, the probative value of the evidence must not be substantially outweighed by unfair prejudice. *Id.* The list of exceptions in MRE 404(b) is not exclusive. *People v Engelman*, 434 Mich 204, 212; 453 NW2d 656 (1990).

In this case, the evidence was offered to explain the victim’s behavior and to provide a foundation for the expert witness. The evidence was not offered to prove defendant’s character or to show he acted in conformity with his past actions. See MRE 404(b)(1); *People v Daoust*, 228 Mich App 1, 12-13; 577 NW2d 179 (1998). Additionally, while defendant alleges that notice was not given regarding the August 7, 2001, incident, a statement from the witness about

this incident was attached to the prosecutor's motion in limine, and the prosecutor sent defense counsel a letter on January 14, 2002, drawing his attention to the statement and notifying defense counsel of her intent to use the statement. This provided more than sufficient notice to defendant. See MRE 404(b)(2).

Defendant's second issue on appeal is that the trial court abused its discretion when it admitted statements the victim made to health care professionals identifying defendant as the cause of her injuries. We disagree. "[T]o be admitted under MRE 803(4), a statement must be made for purposes of medical treatment or diagnosis in connection with treatment, and must describe medical history, past or present symptoms, pain or sensations, or the inception or general character of the cause or external source of the injury." *People v Meeboer*, 439 Mich 310, 322; 484 NW2d 621 (1992). Whether a statement is admissible under MRE 803(4) is generally determined by applying a two-part test:

(1) the declarant's motive for making the statement must be consistent with the purpose of MRE 803(4), i.e., that of a patient seeking medical diagnosis or treatment, and (2) it must be reasonable for the care provider to rely on the information conveyed by the declarant in diagnosis and treatment. [*Hackney, supra* at 527.]

In *Meeboer, supra* at 322, in reference to a child's statement, our Supreme Court stated, "[W]e find that the identification of the assailant is necessary to adequate medical diagnosis and treatment." Other cases have also found a defendant's identity is relevant to medical treatment. See, e.g., *People v Wilkins*, 134 Mich App 39, 45; 349 NW2d 815 (1984); *People v Van Tassel*, 197 Mich App 653, 664; 496 NW2d 388 (1992). In this case, the victim was treated at a hospital for her injuries – how the injuries were caused and who caused them were critical to her medical treatment. As the doctor stated, it is very helpful to know how an injury occurred to determine what possible injuries might be underlying the superficial injuries; therefore, whether a person was battered relates to medical treatment and diagnosis. Moreover, the identity of a patient's assailant is linked with her medical care because of the possibility of future harm; therefore, this information is critical to medical treatment. See *Meeboer, supra* at 322; *Wilkins, supra* at 45.

Defendant's third issue on appeal is that the trial court abused its discretion when it admitted statements the victim made as excited utterances. We disagree. MRE 803(2) describes an excited utterance as "[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." Three criteria must be met before a statement can be admitted as an excited utterance: "(1) the statement must arise from a startling event; (2) it must be made before there has been time for contrivance or misrepresentation; and (3) it must relate to the circumstances of the startling event." *People v DeWitt*, 173 Mich App 261, 267; 433 NW2d 325 (1988). There also must be independent evidence that the startling event took place. *People v Kowalak*, 215 Mich App 554, 559; 546 NW2d 681 (1996).

We hold that the victim's statements in this case were excited utterances. A neighbor stated the victim sounded hysterical, upset, and irrational after she had just been violently beaten, and while the victim made some of her comments in response to questions, this does not preclude classifying the statements as excited utterances. *Hackney, supra* at 516. Moreover,

physical factors including shock or pain may prolong the period in which the risk of fabrication is reduced. *People v Smith*, 456 Mich 543, 551; 581 NW2d 654 (1998). In this case, the victim was found crouched in the woods, bloody and topless. Thus, the circumstances indicate that she was still under the stress of the beating when she made the statements. See *id.*

Defendant's fourth issue on appeal is that the trial court abused its discretion when it admitted evidence of battered woman syndrome through an expert witness. We disagree. Expert witness testimony is admissible if the court determines it will assist the jury to understand the evidence or determine a fact at issue. MRE 702. However, a witness must first have the qualifications to be classified as an expert, *People v Beckley*, 434 Mich 691, 711; 456 NW2d 391 (1990), and may be qualified as an expert by knowledge, skill, experience, training, or education. MRE 702. Expert witness testimony regarding battered woman syndrome "is admissible only when it is relevant and helpful to the jury in evaluating a complainant's credibility and the expert witness is properly qualified." *People v Christel*, 449 Mich 578, 580; 537 NW2d 194 (1995).

Generally, battered woman syndrome testimony is relevant and helpful when needed to explain a complainant's actions, such as prolonged endurance of physical abuse accompanied by attempts at hiding or minimizing the abuse, delays in reporting the abuse, or recanting allegations of abuse. If relevant and helpful, testimony regarding specific behavior is permissible. However, the expert may not opine whether the complainant is a battered woman, may not testify that defendant was a batterer or guilty of the instant charge, and may not comment on the complainant's truthfulness. [*Id.*]

"Generally, expert testimony is needed when a witness' actions or responses are incomprehensible to average people." *Id.* at 592. An expert witness was needed in this case to explain the victim's actions. The victim was found hiding in the woods "full of blood," both of her eyes were already black, and one was almost swollen completely shut; yet, the victim alleged that she injured herself in a fantastic series of events instigated in part by the death of a spider. The victim also implicated defendant, then recanted and blamed herself. In this case, the expert witness' training, experience, and knowledge qualified her as an expert in domestic violence and battered woman syndrome, see MRE 702, and her testimony was proper in light of the evidence presented.

Defendant's fifth issue on appeal is that the trial court abused its discretion when it excluded statements that showed the victim's state of mind. We disagree. Generally, "statements indicative of the declarant's state of mind are admissible when state of mind is an issue in the case." *DeWitt, supra* at 268. MRE 803(3) does not apply to statements recalling or relating an incident that occurred in the past. *People v DeRushia*, 109 Mich App 419, 425; 311 NW2d 374 (1981). The statements at issue do not fall within the hearsay exception because they were not indicative of the victim's then-existing state of mind. The disputed statements were about the assault – an event that occurred in the past – and were more akin to statements of memory and belief that are inadmissible.

Defendant's final issue on appeal is that the trial court abused its discretion when it admitted evidence of defendant's previous conviction for domestic violence. We disagree. While defendant is correct that his domestic violence and drunk driving convictions were not

admissible under MRE 609, this did not preclude their admissibility for other purposes. See *People v Sabin*, 463 Mich 43, 56; 614 NW2d 888 (2000). Evidence of defendant's previous domestic violence conviction was properly admitted. Importantly, the prosecutor only sought admissibility of defendant's domestic violence conviction – evidence of defendant's drunk driving conviction was provided by defendant himself when he testified.

Affirmed.

/s/ Michael R. Smolenski

/s/ Richard Allen Griffin

/s/ Peter D. O'Connell