

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DWIGHT BERNARD SCOTT,

Defendant-Appellant.

---

UNPUBLISHED  
September 4, 2003

No. 239729  
Oakland Circuit Court  
LC No. 2001-179094-FH

Before: Markey, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of first-degree home invasion, MCL 750.110a(2), and domestic assault, second offense, MCL 750.81(3), entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Complainant testified that she and defendant had had an on-and-off relationship for ten years and were the parents of two children. She testified that defendant came to her home, where he did not reside, began pounding and kicking on the door, and demanded entrance. Complainant did not admit defendant to the residence, and asked a person to whom she was speaking on the telephone to contact the police. Defendant gained entry to the home, confronted complainant in her bedroom, and struck her with his fists. Defendant told complainant to call the police and tell them that they were not needed at the residence, but she refused to do so. Defendant threatened complainant with a pencil, which she managed to break. Complainant followed defendant as he left the residence and told the apartment manager that the police were enroute to the residence.

Christine Michael, complainant's neighbor, testified that she saw defendant rip a screen on a first-floor window and climb inside complainant's residence. Michael called the police.

Over defendant's objection, the police officer who responded to complainant's residence testified that complainant told him that defendant pounded on her door and demanded entrance, and then after gaining entrance to the house struck her with his fists and threatened to kill her. The officer indicated that complainant was extremely upset when she spoke with him.

Over defense objection, Ana Ortiz testified that in 1995 defendant, her former boyfriend, jumped into her car when she was stopped at a traffic light, displayed a weapon, and told her to drive her passenger home. Ortiz stated that defendant threatened to beat her if she continued to

ignore his pages. She acknowledged that defendant did not strike her that day. Lilly Contreras, Ortiz's passenger, testified that Ortiz drove her home on defendant's order. She stated that she did not see defendant strike Ortiz.<sup>1</sup>

Over defendant's objection, the trial court read CJI2d 4.4, the flight instruction, to the jury. In addition, the trial court instructed the jury that it could consider the other acts evidence only for the purpose of determining whether it showed that defendant intended to assault complainant pursuant to a plan or scheme he had used on a previous occasion. Immediately thereafter, the trial court instructed the jury on the elements of the charged offenses.

The jury found defendant guilty as charged. The trial court sentenced defendant as a fourth habitual offender to concurrent terms of six to twenty years for home invasion, and 234 days for domestic assault, with credit for 234 days served. The minimum term for the conviction of home invasion was within the applicable statutory sentencing guidelines.

Evidence of other crimes, wrongs, or acts is inadmissible to prove the character of a person in order to show that he acted in conformity with it, but may be admissible for other purposes, such as to show proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident. The other crimes, wrongs, or acts may be contemporaneous with or prior to or subsequent to the conduct at issue. MRE 404(b)(1). To be admissible, other acts evidence must be offered for a proper purpose, must be relevant, and its probative value must not be substantially outweighed by its potential for unfair prejudice. A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998).

Evidence of misconduct similar to that charged is logically relevant to show that the charged acts occurred if the charged acts and the other acts are sufficiently similar to support an inference that they are the manifestations of a common plan, scheme, or design. The charged acts and the other acts need not be parts of a single continuing plot. General similarity between the charged acts and the other acts does not, in and of itself, establish a plan, scheme, or design. There must be such a concurrence of common features that the charged acts and the other acts are logically seen as part of a general plan, scheme, or design. *People v Sabin (After Remand)*, 463 Mich 43, 63-66; 614 NW2d 888 (2000).

The admissibility of other acts evidence is within the discretion of the trial court. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). A preserved nonconstitutional error is presumed to be harmless. The defendant bears the burden of showing that the error resulted in a miscarriage of justice. The error justifies reversal if it is more probable than not that it affected the outcome of the case. *People v Lukity*, 460 Mich 484, 493-496; 596 NW2d 607 (1999); *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001).

---

<sup>1</sup> Previously, the trial court ruled that this testimony was admissible under MRE 404(b), but that consideration of the evidence would be limited to the charge of domestic assault only.

A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault, is guilty of home invasion in the first degree if, at any time while the person is entering, present in, or exiting the dwelling, either the person is armed with a dangerous weapon or another person is lawfully present in the dwelling. MCL 750.110a(2). First-degree home invasion is a specific intent crime. Specific intent may be express, or it may be inferred from the facts and circumstances. *People v Beaudin*, 417 Mich 570, 575; 339 NW2d 461 (1983).

Domestic assault is a specific intent crime which is proved by establishing that: (1) the defendant and the victim were associated in a way described by the statute;<sup>2</sup> and (2) the defendant either intended to batter the victim or the defendant's unlawful act placed the victim in reasonable apprehension of being battered. MCL 750.81(3).

Defendant argues that the trial court abused its discretion by admitting other acts evidence in the form of testimony from Ortiz and Contreras, and erred by failing to clearly instruct the jury that it could consider the other acts evidence only in connection with the charge of domestic assault. We disagree. The charged acts and the other acts, while not identical, were similar in that they both featured defendant confronting a former girlfriend in a manner that made it difficult if not impossible for her to retreat safely, displaying a weapon, and threatening to do physical harm to the woman. The common features of the charged acts and the other acts supported an inference that defendant devised a plan or scheme for attempting to control women with whom he had had a relationship. The other acts evidence was properly admissible to show plan, scheme, or design. *Sabin, supra*, 63-64. No abuse of discretion occurred. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

Even if we were to assume that the trial court abused its discretion by admitting the other acts evidence or erred in instructing the jury regarding the limited consideration to be given to the other acts evidence, we would conclude that any error was harmless. Complainant testified that defendant gained entrance to her home, struck her with his fists, and threatened her with a pencil while he was in the home. Christine Michael testified that she saw defendant tear a screen on a window in complainant's home and enter the home via the window. This evidence, which the jury was entitled to accept, *People v Marji*, 180 Mich App 525, 542; 447 NW2d 835 (1989), was sufficient to support defendant's convictions of first-degree home invasion and domestic assault. MCL 750.110a(2); MCL 750.81(3). Defendant has not shown that any error that resulted from the admission of the other acts evidence or the instruction of the jury more probably than not affected the outcome of the case. *Lukity, supra*.

We review a trial court's determination of an evidentiary issue for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995).

---

<sup>2</sup> The defendant and the victim may be associated by being the parents of a child.

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). Three criteria must be met before a hearsay statement can be admitted as an excited utterance: (1) the statement must have resulted from a startling event; (2) the statement must have been made before the declarant had time to engage in contrivance or misrepresentation; and (3) the statement must relate to the circumstances of the startling event. *People v Straight*, 430 Mich 418, 424; 424 NW2d 257 (1988). An excited utterance is inadmissible absent independent proof, direct or circumstantial, that the underlying event took place. *People v Hendrickson*, 459 Mich 229, 238; 586 NW2d 906 (1998).

Defendant argues that the trial court abused its discretion by holding that complainant’s statement to the officer was admissible as an excited utterance. We disagree. The statement concerned defendant’s invasion of complainant’s home and the assault of her person, which would qualify as a startling event. The lapse of time between the event and the statement is relevant in determining whether the declarant was still under the stress of the event, but is not dispositive. Physical factors such as shock, unconsciousness, or pain may prolong the period in which the risk of fabrication is minimal and acceptable. *People v Smith*, 456 Mich 543, 553-554; 581 NW2d 654 (1998); *People v Kowalak (On Remand)*, 215 Mich App 554, 558-559; 546 NW2d 681 (1996).

Approximately twenty minutes passed between the time the event ended and complainant made a statement to the officer. The officer’s statement that complainant was extremely upset indicated that complainant was still under the stress of the startling event when she made the statement. *Smith, supra*. Complainant’s statement related to the circumstances of the startling event. Furthermore, independent evidence, i.e., testimony from complainant and Michael, existed to show the event took place. Complainant made the statement during a conversation in which the officer asked questions; however, the fact that a statement may have been made in response to an inquiry is a factor to be considered by the trial court in determining whether to admit the statement. See *People v Creith*, 151 Mich App 217, 224-225; 390 NW2d 234 (1986). Admission of complainant’s statement did not constitute an abuse of discretion. MRE 803(2); *Hendrickson, supra*; *Straight, supra*.

Even if we were to conclude that admission of the statement constituted error, we would find the error to be harmless. Complainant gave direct testimony regarding the event which the jury was entitled to accept as credible. *Marji, supra*. Admission of complainant’s statement as an excited utterance did not result in a miscarriage of justice. MCL 769.26; *Lukity, supra*.

We review a claim of instructional error de novo. *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002).

Defendant argues that the trial court erred by reading CJI2d 4.4, the flight instruction, to the jury. He asserts that there was insufficient evidence to show that he fled the scene to permit the jury to infer that he had a guilty conscience. We disagree. A defendant’s flight can result from consciousness of guilt or from factors unrelated to guilt. The defendant’s motive for leaving the scene is for the jury to determine. *People v Taylor*, 195 Mich App 57, 63; 489 NW2d 99 (1992). The evidence supported a finding that at the time defendant left complainant’s residence, he knew that the police had been summoned. He told complainant to call the police and tell them that their services were not needed; however, she refused to do so. Defendant told

the apartment manager that nothing had happened. Defendant was present when complainant told the apartment manager that the police had been summoned. Under the circumstances the trial court properly instructed the jury on flight and allowed the jury to determine defendant's motive in leaving the scene. *Id.*

Affirmed.

/s/ Jane E. Markey  
/s/ Mark J. Cavanagh  
/s/ Henry William Saad