

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH EARLAND SOULE,

Defendant-Appellant.

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UNPUBLISHED

May 25, 2006

No. 255583

Monroe Circuit Court

LC No. 03-032768-FH

Before: Cooper, P.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree murder, MCL 750.316, assault with intent to murder, MCL 750.83, and possession of a firearm while committing a felony, MCL 750.227b. Defendant appeals as of right, and we affirm.<sup>1</sup>

Defendant first alleges that the trial court erred when it admitted evidence of other bad acts by defendant. We disagree. A trial court's decision whether to admit evidence of bad acts is reviewed for an abuse of discretion. *People v Johnigan*, 265 Mich App 463, 465; 696 NW2d 724 (2005). An abuse of discretion will be found only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *People v Watson*, 245 Mich App 572, 575; 629 NW2d 411 (2001).

All relevant evidence is generally admissible. MRE 402. However, MRE 404(b)(1) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other

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<sup>1</sup> Defendant was sentenced as a habitual offender, fourth offense, MCL 769.12 to life imprisonment for the first-degree murder conviction, forty-six to sixty-nine years' imprisonment for the assault with intent to murder conviction, and two years' imprisonment for the felony-firearm conviction.

crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

This rule is intended to exclude character evidence, or evidence that would lead the jury to convict a defendant on the basis of past conduct rather than on evidence of conduct associated with the charged offense. *People v Werner*, 254 Mich App 528, 539; 659 NW2d 688 (2002).

To be admissible under MRE 404(b), other acts evidence generally must satisfy four requirements: (1) the prosecutor must offer the other acts evidence for a permissible purpose, something other than to show character or propensity; (2) the evidence must be relevant to an issue or fact of consequence at trial, MRE 402; (3) the probative value of the evidence must not be substantially outweighed by unfair prejudice, MRE 403; and (4) the trial court, upon request, may provide a limiting instruction, MRE 105. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004), citing *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993).

Here, the evidence of defendant's threats against the victim-spouse satisfied the four requirements of admissibility. Evidence of marital discord, such as threats against a victim-spouse, may be offered to show motive, premeditation and deliberation. *People v Fisher*, 449 Mich 441, 453; 537 NW2d 577 (1995). Here, the evidence was offered to demonstrate that the shooting was not accidental, contrary to defendant's theory, and was relevant to an issue at trial. The probative value of the evidence was not substantially outweighed by unfair prejudice in light of the fact that the trial court limited the admissibility of incidents to those that occurred within five years of the shooting, and the trial court instructed the jury regarding the proper purpose of the evidence. Thus, the trial court's admission of evidence was not an abuse of discretion. *Johnigan, supra*.

Defendant next asserts that the trial court erred when it admitted several statements that he contends were inadmissible hearsay. We disagree. Appellate courts review a trial court's decision to admit evidence for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). Preliminary questions of law, such as whether a rule of evidence precludes admission, are reviewed de novo. *Id.*

Hearsay is "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). MRE 803(3) provides an exception to the exclusion of hearsay evidence for statements concerning a declarant's state of mind:

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

On appeal, defendant challenges four categories of statements: (1) the victim's statements regarding the October 17, 2001, hostage-taking incident; (2) her statements regarding her fear of defendant and desire to get away from him; (3) defendant's threats to kill the victim; and (4) the victim's statements about her belief that defendant was going to kill her.

First, the victim's statements to witnesses about being taken hostage by defendant were clearly admissible as excited utterances. An excited utterance is an exception to the hearsay rule that allows the introduction into evidence, regardless of the declarant's availability to testify, of "[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). The two primary requirements for 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. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). Here, the startling event was that defendant had held the victim hostage at gunpoint. She was still under the excitement caused by the event when she made the statements to witnesses. Therefore, the statement was properly admitted as an excited utterance. In any case, these statements would be admissible evidence of marital discord. *Fisher, supra* at 453.

The second category of statements, the victim's statements to a number of witnesses that she was afraid of defendant and wanted to get away, were admissible based on MRE 803(3). These statements were her then existing state of mind and intent. Because defendant claimed he accidentally shot the victim, her fear of defendant and desire to leave him were relevant to show motive, intent, premeditation and absence of accident. *Fisher, supra* at 453. Third, defendant's threats to kill the victim were admissible evidence of marital discord to show absence of accident, intent, motive and premeditation. *Id.* Finally, the victim's statements about her *belief* that defendant would kill her at some future time were admissible to show marital discord. *Fisher, supra* at 453. The statements were not admitted for the truth of the matter asserted, that the defendant was going to kill the victim, but to demonstrate marital discord. Evidence of marital discord was highly probative to show lack of accident, motive and intent, and its probative value was not outweighed by unfair prejudice. See *id.* at 451.<sup>2</sup>

Defendant next contends that the prosecution did not present sufficient evidence to support his conviction of first-degree premeditated murder. We disagree. In reviewing a claim of insufficient evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a reasonable juror could find that the prosecution proved the

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<sup>2</sup> The two briefs filed on behalf of defendant do not challenge the hearsay statements based on the most recent case law addressing excited utterances. Furthermore, the Michigan Supreme Court has held a decision in abeyance regarding excited utterances by victims of domestic violence pending resolution of the issue by the United States Supreme Court. See *People v Walker*, \_\_\_ Mich \_\_\_; 705 NW2d 687 (2005). However, subsequent Michigan case law has drawn a distinction involving admission of hearsay statements where the defendant killed the victim. In *People v Bauder*, 269 Mich App 174, 176-177; \_\_\_ NW2d \_\_\_ (2005), the defendant was convicted of felony-murder, MCL 750.316(1)(b). The defendant alleged that he was denied his right of confrontation, US Const, Am VII, based on the admission of numerous statements the victim made in the weeks before her death. This Court concluded that the issue was forfeited because the witness was not produced because of the wrongdoing by the defendant. *Id.* at 185-187. Similarly, in the present case, it was undisputed that the victim was unavailable because of the wrongdoing by defendant who acknowledged when police arrived that he shot the victim. Alternatively, the challenge to the hearsay statements was forfeited by defendant's wrongdoing.

essential elements of the crime beyond a reasonable doubt. *People v Gonzalez*, 468 Mich 636, 640; 664 NW2d 159 (2003).

To support a conviction of first-degree murder, the prosecution must prove beyond a reasonable doubt: (1) the defendant killed the victim and (2) the killing was willful, deliberate, and premeditated or committed in the course of an enumerated felony. MCL 750.316; *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002). Defendant was convicted under the theory that the murder was premeditated and deliberate. Premeditation and deliberation require “some time span between [the] initial homicidal intent and ultimate action” that “should be long enough to afford a reasonable person time to take a ‘second look.’” *Gonzalez, supra* at 641. Deliberation may be inferred from the circumstances. *Id.*

The evidence in this case, viewed in a light most favorable to the prosecution, was sufficient to support the determination that the essential elements of first-degree murder were proven beyond a reasonable doubt. First, there was overwhelming evidence supporting an inference that defendant killed the victim. Joseph Soule, Jr., heard a bang after defendant came into the house, and, shortly after that, he saw a gun in defendant’s hand. Defendant stated several times to the police that he had shot victim. She was shot with a lead ball consistent with the projectiles in defendant’s gun. Second, there was sufficient evidence that defendant deliberated before shooting the victim. The night before the shooting, defendant threatened to kill the victim, and on the night of the shooting, the victim called her son and told him that defendant had just threatened to kill her. After threatening the victim, defendant left her house, went to his home, retrieved his gun and loaded it with six bullets. Loading the gun required carefully packing gun powder, wadding and lead balls into each chamber. Defendant returned to the victim’s house and shot her. In order for the gun to fire, the hammer first had to be pulled back and then the trigger pulled, in separate motions. A reasonable jury could infer premeditation and deliberation from the facts presented at trial.

Defendant’s remaining arguments raised in his standard 11 brief are simply without merit. A sentence of life without parole is not a violation of Const 1963, art 4, § 45. *Snider, supra* at 426. The Michigan Constitution does not preclude defendant’s sentence of life for his first-degree murder conviction. The trial court did not err when it sentenced defendant to life in prison. Lastly, defendant’s challenge to the sentence for assault with intent to murder conviction does not provide him any relief. The imposition of a mandatory life sentence for one conviction effectively nullifies the significance of any sentences for any companion convictions. *People v Watkins*, 209 Mich App 1, 5; 530 NW2d 111 (1995). Because the trial court properly sentenced defendant to a mandatory life sentence without parole for his first-degree murder conviction, the significance of defendant’s sentence for his assault with intent to murder conviction was nullified.

Defendant waived his challenge to any alleged error with regard to the issue of the reasonable doubt instruction read to the jury. When a party expresses satisfaction with the jury instruction, that party waives review of any issue pertaining to those instructions. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Nonetheless, the reasonable doubt instruction read to the jury was acceptable. In *People v Snider*, 239 Mich App 393, 420-421; 608 NW2d 502 (2000), this Court held that it is not error to use CJI2d 3.2 when instructing the jury even though the instruction does not contain language requiring proof of guilt to a moral

certainty. The issue of the standard jury instruction to define reasonable doubt was not erroneous.

Affirmed.

/s/ Jessica R. Cooper  
/s/ Karen M. Fort Hood  
/s/ Stephen L. Borrello