STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 22, 2013
v	No. 307209 Calhoun Circuit Court
EDWARD JOSEPH ZIELINSKI, Defendant-Appellant.	LC No. 2011-001529-FC

Before: OWENS, P.J., and FITZGERALD and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to commit murder, MCL 750.83; and first-degree home invasion, MCL 750.110a(2). Defendant was sentenced as a second habitual offender, MCL 769.10, to 37 to 75 years for assault with intent to commit murder and 15 to 30 years for first-degree home invasion. We affirm.

I. FACTUAL BACKGROUND

The victim and defendant dated briefly for a couple of weeks before the victim ended the relationship. During their relationship, defendant gave the victim a television and laptop. Despite the end of their brief relationship, defendant began to incessantly contact the victim and threaten to kill himself. The victim came home to her apartment one day to find defendant inside. She noticed that her underwear drawer had been opened and when she saw defendant, she began to scream and told him to leave. The victim called her uncle for help, and defendant began to walk toward her with a smile on his face. Defendant knocked the victim onto her bed and then strangled her until she lost consciousness. The victim remembered gurgling up blood. A physician assistant testified that for a person to lose consciousness from strangulation, the strangulation would have to last for 30 to 90 seconds.

The police tracked defendant's cell phone to Illinois where they attempted to take him into custody. A 15 hour standoff resulted, with the police using non-lethal measures such as stun grenades and tear gas in an attempt to extract defendant. Defendant eventually surrendered himself to the police. At trial, defendant admitted that he went over to the victim's apartment but claimed that she allowed him into her apartment. He claimed that he spoke with the victim and requested that she return the computer and television that he had given her. He testified that after

the victim made a phone call, he decided to just take the computer, and when the victim stepped in front of him to prevent this, he grabbed her by the neck. Defendant admitted that they fell onto the bed and he "choked her." Defendant did not know why he behaved like that or how long he choked her. He claimed that the victim was hitting him and struggling to breathe, and then went limp.

Two women who had briefly dated defendant, Amy Beam and Katherine To, testified about their experiences with defendant. Both women detailed defendant's escalating behavior in persistently contacting them and displaying violent tendencies. Defendant's brother testified that defendant called him on the day of the victim's attack and was speaking of suicide. Defendant's brother claimed that defendant did not mention harming the victim in this conversation. Defendant's mother, however, testified that she received a phone call from defendant's two brothers and they indicated that defendant confessed that he may have killed the victim. A police officer present for the phone call testified that one of defendant's brothers said that defendant thought he killed the victim. Defendant now appeals.

II. EVIDENTIARY ISSUES

A. Standard of Review

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). An abuse of discretion occurs when the trial's decision falls outside the range of reasonable and probable outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). "Evidentiary error does not require reversal unless after an examination of the entire cause, it appears more probable than not that the error affected the outcome of the trial in light of the weight and strength of the properly admitted evidence." *People v Benton*, 294 Mich App 191, 199; 817 NW2d 599, 605 (2011). When an evidentiary question involves a preliminary question of law, our review is de novo. *People v Dobek*, 274 Mich App 58, 85; 732 NW2d 546 (2007).

B. Impeachment Evidence

Defendant first argues that the trial court erred in admitting evidence impeaching defendant's brother. Extrinsic evidence of a prior inconsistent statement is admissible to impeach a witness under MRE 613(b). MRE 613(b) provides that: "[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require." Generally, a prior inconsistent statement may be used to impeach a witness even though the statement directly inculpates the defendant. *People v Kilbourn*, 454 Mich 677, 682; 563 NW2d 669 (1997). However, "impeachment should be disallowed when (1) the substance of the statement purportedly used to impeach the credibility of the witness is relevant to the central issue of the case, and (2) there is no other testimony from the witness for which his credibility was relevant to the case." *Id.* at 683.

Here, the prosecutor elicited testimony from defendant's brother that on the day of the attack he received a telephone call from defendant, wherein defendant spoke of suicide.

However, defendant's brother testified that defendant did not make any statement about hurting the victim. The prosecutor then called defendant's mother and a police officer to the stand to verify that defendant's brother previously told her that defendant said he thought he killed the victim.

Defendant argues that this impeachment evidence was relevant to a central issue of the case because it went toward defendant's intent to kill, an element of the crime. See *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999) (an element of assault with intent to commit murder is the actual intent to kill). However, whether defendant thought he may have killed the victim did not illuminate whether defendant *intended* to kill the victim. Defendant admitted at trial that he choked the victim, she struggled, she went limp, and she coughed. Thus, defendant's statement that he may have killed the victim only revealed that he caused the victim significant harm, a fact he did not dispute at trial. Furthermore, defendant has failed to establish the second prong of the test, namely, that defendant's brother provided no other evidence pertinent to his credibility. See *Kilbourn*, 454 Mich at 683. Defendant's brother testified that defendant said he was suicidal, which was relevant to defendant's state of mind. The jury could have found that defendant's suicidal state of mind implied that he was behaving irrationally and did not have the intent to kill the victim, an element of the crime.[1] Therefore, this was "other testimony" for which the brother's credibility was relevant. The trial court also made it clear in its instructions that the purpose of the prior inconsistent statement was to assess the witness's truthfulness, not to prove that the earlier statement was true. Accordingly, we find no error in the trial court's decision to admit evidence of a prior inconsistent statement to impeach defendant's brother. See *Kilbourn*, 454 Mich at 682.[2]

C. Prior Domestic Violence Evidence

Defendant also argues that the trial court erred in admitting evidence of his past abusive relationships because it was irrelevant and unfairly prejudicial. Pursuant to MRE 404(b):

> [e]vidence 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

[1] While defendant argues that this suicidal statement was only relevant to his behavior after the crime, defendant's brother did specify the time frame in which defendant had these suicidal thoughts.

[2] Furthermore, even if it could be construed that it was error to admit this evidence, we find its admission harmless. MCR 2.613. Not only did defendant admit that he strangled the victim, the victim testified about how defendant broke into her home, approached her with a smile on his face, and strangled her until she could no longer breathe. Medical testimony demonstrated how long defendant had to strangle the victim for her to lose consciousness, from which the jury could have concluded defendant had an intent to kill.

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

The testimony from Beam and To demonstrated that defendant acted with a common scheme, plan, or system.[3] Other act evidence and the charged crime must be "sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *People v Sabin*, 463 Mich 43, 63; 614 NW2d 888 (2000). "General similarity between the charged and uncharged acts does not, however, by itself, establish a plan, scheme, or system used to commit the acts." *Id.* at 64. Rather, there must be "'such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.'" *Id.* at 64-65, quoting 2 Wigmore Evidence (Chadbourn rev), § 304, p 249 (emphasis omitted).

Here, the evidence showed that defendant stalked Beam by repeatedly calling her, monitoring her house, and threatening her. Defendant also sent Beam a disturbing letter that falsely alleged they had sex. He also used his car to physically trap Beam in a parking lot when he saw her with another man, and would not let her leave until she gave him a kiss on the cheek. To testified that defendant stalked her by repeatedly calling her and monitoring her house for hours. To also stated that defendant repeatedly threatened to kill himself if she ended the relationship. Defendant used physical violence against To, shoving her against her car, locking her in her basement, forcibly entering her home, and physically restraining her. Beam and To's testimony demonstrated defendant's general plan to stalk, harass, and use physical violence against women with whom he perceived he had a relationship, including the victim. There was a concurrence of common features of escalating stalking and violence such that the various acts were naturally explained as a general plan. *Sabin*, 463 Mich at 64-65.

This prior acts evidence also was relevant to the allegations at issue. MRE 401 defines relevant evidence as "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Defendant displayed a pattern of abuse toward Beam, To, and the victim, all with women whom he at least perceived he was in a relationship and each of whom attempted to end their relationship with him. Defendant became increasingly violent with the women and would incessantly contact them especially after they attempted to end the relationship. This was relevant to a material fact at issue in the instant case because it negated defendant's claim that he only went to the victim's apartment to retrieve a television and the laptop and he only unexpectedly became angry when the victim would not immediately give them to him.

Lastly, this evidence did not produce any unfair prejudice. "Evidence is generally admissible if it is relevant and its probative value is not substantially outweighed by the danger of unfair prejudice." *People v Railer*, 288 Mich App 213, 219; 792 NW2d 776 (2010). "All evidence offered by the parties is prejudicial to some extent, but the fear of prejudice does not generally render the evidence inadmissible. It is only when the probative value is *substantially*

[3] We note that on appeal, defendant does not appear to be challenging that there was a proper purpose for this evidence under MRE 404(b).

outweighed by the danger of unfair prejudice that evidence is excluded." *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod on other grounds *People v Mills*, 450 Mich 1212 (1995) (citations omitted) (emphasis in original). Furthermore, "[e]vidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998).

The testimony from To and Beam was more than marginally probative, as it demonstrated defendant's common plan and scheme and negated his claim that he went to the victim's apartment simply to retrieve his belongings. There also is no evidence that the jury gave the prior victims' testimony undue or preemptive weight, especially in light of the trial court's multiple limiting instructions. Considering the relatively innocuous nature of the other acts evidence when compared to the acute violence against the victim, it cannot be said that the other acts evidence "stir[red] the jurors to 'such passion ... as to [be swept] beyond rational consideration of [the defendant's] guilt or innocence of the crime on trial.'" *People v Starr*, 457 Mich 490, 503; 577 NW2d 673 (1998), quoting McCormick, Evidence (2d ed), § 190, p 454. Accordingly, the relevance of Beam and To's testimony was not substantially outweighed by the danger of unfair prejudice and was admissible under MRE 404(b).[4]

D. Flight and Capture Evidence

Finally, defendant argues that the trial court erred in admitting evidence of defendant's flight and capture because the evidence was irrelevant and unfairly prejudicial. Contrary to defendant's assertion, his flight and efforts to avoid capture were circumstantial evidence of his guilty state of mind. See *People v Unger*, 278 Mich App 210, 226; 749 NW2d 272 (2008). This evidence was highly relevant because defendant's state of mind was at issue in this case, and, thus, this evidence was not merely "marginally probative[.]" *Crawford*, 458 Mich at 398. Also, any potential prejudicial effect was greatly reduced by the trial court's instruction to the jury that evidence of flight was not proof of defendant's guilt, but only relevant as it related to defendant's guilty state of mind. "Jurors are presumed to follow their instructions[.]" *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Thus, there is no evidence that the jury gave undue or preemptive weight to this evidence and defendant has failed to establish any error requiring reversal.

[4] We also note that any error in admitting this evidence does not warrant reversal, as it was not more probable than not that the error affected the outcome of the trial. *Benton*, 294 Mich App at 199.

III. CONCLUSION

The trial court did not err in admitting impeachment evidence of defendant's brother, other acts evidence from defendant's past girlfriends, or evidence of defendant's flight and capture. We affirm.

/s/ Donald S. Owens
/s/ E. Thomas Fitzgerald
/s/ Michael J. Riordan