THIRD DIVISION
June 20, 2012

No. 1-10-0379

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 5529
	)	
RAPHAEL LEVI,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE STEELE delivered the judgment of the court.
Justices Neville and Murphy concurred in the judgment.

O R D E R

¶ 1 *HELD*: The trial court did not abuse its discretion in admitting certain statements when those statements were admissible pursuant to the excited utterance exception to the hearsay rule and to explain defendant's course of conduct; mittimus corrected to reflect 10 additional days of presentence custody credit.

¶ 2 After a jury trial, defendant Raphael Levi was convicted of first degree murder during which he personally discharged a firearm and was sentenced to 60 years in prison. On appeal, defendant contends that he was denied a fair trial by the admission of certain hearsay testimony and other crimes evidence. Defendant further contends that his mittimus must be corrected to

reflect an additional 10 days of presentence custody credit.[1] We affirm and correct the mittimus.

¶ 3 Defendant, who was known by the nickname "Nudie Man," was charged via indictment with first degree murder after the victim Terrence Jackson was shot and killed in August 2007.

¶ 4 The State's theory at trial was that a minor dispute between defendant and the victim had escalated and ultimately culminated in the shooting death of the victim. The State attempted to establish this theory through, *inter alia,* the admission of a statement made by the victim to his wife Joyce Jackson three days before the shooting in which he told her to hurry up because defendant was going to "get him" with a baseball bat.

¶ 5 Prior to trial, the parties filed certain motions *in limine.* The State filed a motion seeking to admit, through the testimony of the victim's wife Joyce Jackson, a statement made by the victim three days before the shooting that defendant was going to get the victim with a bat.

¶ 6 The defense filed motions *in limine* to preclude Jackson's testimony and the admission of evidence relating to a prior altercation between defendant and Ebony Buckley through the testimony of Crystal Taylor. Although Taylor allegedly heard Buckley tell defendant that Buckley was going to turn his "ass in," the motion argued that this conversation had nothing to do with the victim's death and took place during a domestic dispute.

¶ 7 At the hearing on the motions in *limine,* the State argued that the victim's statement to his wife that "Nudie Man" was going to get him was an excited utterance. The State further argued that Jackson would testify that when she turned around after the victim's statement, she saw three people approaching with bats. The defense responded that because Jackson could not identify

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[1] Although defendant initially contends that he is entitled to an additional 11 days of presentence custody credit, in his reply brief he agrees that he is not entitled to credit for the day he entered the custody of the Department of Corrections. See *People v. Willis*, 409 Ill. App. 3d 804, 816 (2011).

those men, she could not corroborate that defendant was actually present.

¶ 8 The court next heard argument on the defense's motion to preclude Taylor's testimony that Buckley threatened to turn defendant over to the police. The State indicated that it wished to call Taylor to testify as to defendant's reaction or "non-reaction" to Buckley's threat. The defense then stated that its motion went to the altercation between Buckley and defendant. The State responded that it did not care about the domestic dispute and would "sanitize" that aspect of the altercation. Ultimately, the court ruled the State could bring in Taylor's statement that during an altercation between Buckley and defendant Buckley threatened to turn defendant's "ass in." The court subsequently ruled, over the defense's objection, that the victim's statement to his wife that "Nudie Man" was going to get him was admissible as a "spontaneous statement." The matter then proceeded to jury trial.

¶ 9 At trial, the victim's wife Joyce Jackson testified that she did not know defendant, who went by the nickname "Nudie Man," but had seen him around the neighborhood. On the morning of August 9, 2007, the victim's aunt called to tell her that the victim had been shot. Three days earlier, as Jackson waited at the victim's aunt's house to be picked up by the victim, he called and told her to hurry up. She complied and they drove away. At that time, she saw defendant and two other men standing across the street. Defendant was holding a bat in his hand. She did not contact the police about this incident because the victim was not actually hurt.

¶ 10 During cross-examination, Jackson testified that when she spoke to Detective Heffernan after the victim's death, she told Heffernan that the victim told her to hurry up because "Nudie Man" and "Nudie Man's" brother were trying to get him with a bat. She also told Heffernan that she saw defendant with a bat in his hand.

¶ 11 Curtis Moore testified that at the time of the shooting, the victim and the victim's cousin Jeffrey Bloomingberg worked for him. He also knew defendant, and that defendant and the

victim were "not too friendly" the week before the shooting. That morning when the victim called to say that he had arrived at Moore's home, Moore told him to drive around to the back. When he later heard three gunshots, he immediately called the victim. The victim said "Man, this n*** just shot me." When Moore asked who, the victim said "Nudie Man."

¶ 12 During cross-examination, Moore testified that he could not recall speaking with officers later that day, but he did remember telling the police that the victim identified "Nudie Man" as the shooter. He denied waiting until 2009 to tell anyone that defendant shot the victim.

¶ 13 Jeffrey Bloomingberg, the victim's cousin, testified that he had previously been convicted of a drug offense and was on probation at the time of the shooting. While he and the victim waited in the alley behind Moore's house, the victim pointed to a passing car and stated that he was fighting with the person in that car. Bloomingberg described the car as burgundy or dark brown and "beat up."

¶ 14 Defendant subsequently came out of a gangway and walked around the front of the truck to the driver's side. Defendant had a gun and asked the victim why the victim had to bring defendant's mother into their dispute. Although the victim indicated that defendant's mother had called him, defendant was angry that she had gotten involved. Defendant then asked the victim whether the victim had any money. When the victim replied that he had seven dollars, defendant said that the victim had more, so the victim pulled out his wallet to show defendant. After the victim put his wallet down, defendant looked at the victim strangely and then shot at him. The first bullet missed. Defendant shot two more times and then walked away.

¶ 15 After defendant was gone, Bloomingberg told the victim to "go" and listened as the victim called Moore and stated that he had been shot by defendant. Bloomingberg could not remember how the victim identified defendant, only that a nickname was used. At the end of the alley, the men switched seats. Bloomingberg called his mother to tell her what had happened and

then drove the victim to the hospital. He later identified defendant from a photographic array and in a lineup as the shooter.

¶ 16 Crystal Taylor testified that her friend Ebony Buckley and defendant had a child together. In February 2008 during a visit to Buckley's home, Taylor overheard a fight between Buckley and defendant during which Buckley said defendant was wanted for murder. After the pair stopped fighting, defendant told Taylor that Buckley knew he was wanted for murder and used that against him; every time Buckley got mad at defendant, she threatened to call the police.

¶ 17 When Taylor asked defendant about the murder, defendant then told her that he had been shot twice in the past, that he and a "dude" got into it, and that he was not going to let that person kill him, so he killed that person first. Defendant also stated that he had been featured on the television program "America's Most Wanted." A few days later, defendant called Taylor and invited her to a motel. She declined. Ultimately, she called the police and alerted them as to defendant's location.

¶ 18 Detective Eileen Heffernan testified when she spoke to Moore, Moore did not tell her that the victim identified "Nudie Man" as the person who shot him. Heffernan also spoke to Jackson, who stated that several days before the shooting, men came toward her and the victim with bats. Jackson did not identify "Nudie Man" as one of these individuals.

¶ 19 Defendant's girlfriend, Talania Williams, testified when she got up between 3 and 4:30 a.m. on the morning of August 9, 2007, she saw defendant sleeping. She then went back to sleep. When the phone rang sometime after 8 a.m., defendant was still asleep. She later woke defendant up and told him to leave because "it was rumored that he had killed someone." During cross-examination, Williams admitted that defendant could have left the house while she was sleeping.

¶ 20 Rosie Swanigan, Williams's neighbor, testified that when she left for work that morning

between 8 and 8:30 a.m., she saw defendant's car, which she described as maroon and "really raggedy." She did not, however, see defendant.

¶ 21 Ultimately, the jury convicted defendant of first degree murder during which he personally discharged a firearm. The defendant then filed a motion for a new trial alleging, *inter alia*, that the court erred when it denied the defense's motions *in limine* to preclude testimony regarding the victim's conversation with Jackson and the conversation Taylor overheard between defendant and Buckley. The trial court denied the motion. Defendant was subsequently sentenced to 60 years in prison, consisting of 35 years for the murder conviction and an additional 25 years because he personally discharged a firearm which caused the victim's death.

¶ 22 On appeal, defendant contends that he was denied a fair trial by the trial court's rulings on certain motions *in limine* relating to hearsay evidence. Specifically, he contends that the trial court erred when it permitted Taylor to testify that Buckley threatened to turn defendant in and determined that the victim's statement to Jackson was an excited utterance. In the alternative, defendant contends that the victim's statement to Jackson that "Nudie Man" was going to get him was improperly admitted "other crimes" evidence.

¶ 23 Although defendant contends that the applicable standard of review is *de novo*, a trial court's ruling on a motion *in limine* is a matter within the court's discretion; this determination will not be reversed absent an abuse of that discretion. *People v. Nelson*, 235 Ill. 2d 386, 420 (2009).

¶ 24 Before reaching the merits of defendant's contentions, this court must address the State's claims that defendant failed to properly preserve these issues for appeal. See, *e.g., People v. Enoch*, 122 Ill. 2d 176, 186 (1988). The State further argues that defendant has waived these claims on appeal because defendant acquiesced to Taylor's testimony and elicited Jackson's testimony regarding the victim's statement.

¶ 25 Defendant responds that these issues are preserved for the purposes of appeal because trial counsel filed motions *in limine* seeking to exclude the victim's statement that defendant was going to get him with a bat and the admission of evidence relating to a domestic altercation between defendant and Buckley, and included both issues in a posttrial motion.

¶ 26 Here, the record reveals that at the hearing on defendant's motion *in limine* to bar the admission of evidence relating to the altercation between Buckley and defendant, the State indicated that it intended to bring in evidence of the altercation through the testimony of Buckley, would present Taylor to testify about defendant's reaction or lack thereof, and would sanitize the domestic aspects of the dispute. This court rejects the State's argument that the defendant acquiesced to the admission of Taylor's testimony when, although the defense argued that its motion went to the altercation itself, the defense did not withdraw its motion upon the offer of the State's limitation and the trial court ultimately denied the motion.

¶ 27 While it is certainly true that defense counsel questioned Jackson regarding what the victim said, counsel used that statement, which the trial court had determined was admissible as an exited utterance, in order to impeach Jackson. In other words, after Jackson testified on cross-examination that she told Detective Heffernan that the victim told her to hurry up because defendant and defendant's brother were trying to get the victim with a bat, the defense then examined Detective Heffernan, who testified that Jackson did not identify "Nudie Man" as one of the individuals coming toward her and the victim. We do not believe defense counsel waived the issue simply because he conformed his trial strategy to the trial court's rulings on the motions *in limine*. Ultimately, however, as the trial court properly admitted these statements, our holding would be the same regardless of whether we accept or reject the State's forfeiture argument.

¶ 28 Defendant first contends that Taylor's testimony that she overheard Buckley say defendant

was wanted for murder was inadmissible hearsay. We disagree.

¶ 29 Hearsay is an out-of-court statement offered to prove the truth of the matter asserted and is generally inadmissible due to its lack of reliability. *People v. Caffey,* 205 Ill. 2d 52, 88 (2001). "However, testimony about an out-of-court statement which is used for a purpose other than to prove the truth of the matter asserted in the statement is not 'hearsay.' " *People v. Williams,* 181 Ill. 2d 297, 313 (1998); *People v. Kliner,* 185 Ill. 2d 81, 150 (1998) (an out-of-court statement offered into evidence for a purpose other than to prove the truth of the matter asserted is not hearsay). An out-of-court statement offered to prove its effect on a listener's mind or to show why she subsequently acted as she did is not hearsay and is admissible. *People v. Sorrels,* 389 Ill. App. 3d 547, 553 (2009).

¶ 30 At trial, Taylor's testimony that she overheard a fight between Buckley and defendant during which Buckley said defendant was wanted for murder was not offered for the truth of the matter asserted. Rather, it was offered to explain the subsequent discussion between Taylor and defendant and why Taylor asked defendant about the murder. It was during this discussion that defendant admitted that he was wanted for murder and explained the circumstances surrounding the shooting. See *People v. Aguilar,* 265 Ill. App. 3d 105, 110 (1994) (when a defendant's own statements are offered against him, they are considered to be admissions and are not excluded as hearsay). As Taylor's testimony regarding what she heard Buckley say was not offered for the truth of the matter asserted (*Williams,* 181 Ill. 2d at 313), but, rather to explain her subsequent actions, it was not hearsay, and therefore, was admissible. See *Sorrels,* 389 Ill. App. 3d at 553.

¶ 31 Defendant next contends that the trial court erred when it permitted Jackson to testify that the victim told her that "Nudie Man," *i.e.,* defendant, was coming after him with a bat because it was not an exited utterance. In the alternative, defendant argues that this testimony was improperly admitted other crimes evidence.

¶ 32 For a hearsay statement to be admissible under the excited utterance or spontaneous declaration exception, "there must be an occurrence sufficiently startling to produce a spontaneous and unreflecting statement, there must be an absence of time for the declarant to fabricate the statement, and the statement must relate to the circumstances of the occurrence." *People v. Sutton*, 233 Ill. 2d 89, 107 (2009). When determining whether a hearsay statement falls under the excited-utterance exception to the rule, a court considers the totality of the circumstances, including the time, the mental and physical condition of the declarant, the nature of the event, and the presence or absence of self-interest. *Sutton*, 233 Ill. 2d at 107. "While the amount of time necessary for fabrication may vary greatly, the critical inquiry with regard to time is whether the statement was made while the declarant was still affected by the excitement of the event." *People v. Connolly*, 406 Ill. App. 3d 1022, 1025 (2011) (an event can be found sufficiently startling to a declarant even in the absence of a physical injury). A trial court's evidentiary rulings on hearsay testimony and any applicable exceptions to the hearsay rule are reviewed for an abuse of discretion. *Caffey*, 205 Ill. 2d at 89.

¶ 33 At trial, Jackson testified that the victim called her and told her to hurry up because defendant and defendant's brother were trying to get him with a bat. When the witness got into the victim's car, she also saw defendant holding a bat while accompanied by two other men. This was an event sufficiently startling as to produce a spontaneous statement. *Sutton*, 233 Ill. 2d at 107. The victim was clearly affected by the excitement of the event (*Connolly*, 406 Ill. App. 3d at 1025), as he made the statement to Jackson as it was happening, that is, from the location where he saw defendant with a bat. See *People v. Gwinn*, 366 Ill. App. 3d 501, 518 (2006) (finding a statement made to police 15 minutes after the incident was admissible as an exited utterance when the victim was still under the shock of the event). There is an absence of self-

interest in the victim's statement, as it was made to his wife and there is no indication that the police were contacted at that time. See *Sutton*, 223 Ill. 2d at 107. Based upon the totality of the circumstances in this case, the trial court did not abuse its discretion in finding the victim's statement fell within the excited-utterance exception to the hearsay rule. *Sutton*, 223 Ill. 2d at 107.

¶ 34 In the alternative, defendant contends that Jackson's testimony that the victim said "Nudie Man" was going to get him with a bat was inadmissible "other crimes" evidence.

¶ 35 It is "well settled" that evidence of other crimes is admissible if relevant for any purpose other than to show a defendant's propensity to commit crimes. *People v. Chapman*, 2012 IL 111896, ¶ 19. These purposes include, *inter alia*, motive, intent, identity, and lack of mistake. *Chapman*, 2012 IL 111896, ¶ 19. However, when the alleged "other crimes" evidence is part and parcel of the charged offense, the admission of evidence that includes proof of other crimes is analyzed pursuant to ordinary relevancy principles. *People v. Morales*, 2012 IL App (1st) 101911, ¶ 24 (quoting *People v. Manuel*, 294 Ill. App. 3d 113, 124 (1997) (when the evidence is intrinsic to the charged offense or concerns a " 'a necessary preliminary' " to the charged offense then it is admissible under the principles of ordinary relevance)); see also *People v. Rutledge*, 409 Ill. App. 3d 22, 25 (2011) (when the evidence of other crimes and the evidence of the crime charged "are inextricably intertwined" the rule regarding other crimes evidence is not implicated). In other words, if the previous act is part of a course of conduct leading up to the charged crime, then it is "intrinsic evidence of the charged offense" and the rules relating to the admission of "other crimes" evidence are not implicated. *Morales*, 2012 IL App (1st) 101911, ¶ 25.

¶ 36 Evidence is admissible if it is relevant and its probative value is not substantially outweighed by its unfair prejudice. *Morales*, 2012 IL App (1st) 101911,¶ 39. "Relevant"

evidence is "evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." *People v. Gonzalez,* 142 Ill. 2d 481, 487-88 (1991). It is within the discretion of the trial court to weigh the probative value of evidence against its risk of unfair prejudice; this court will not overturn a court's decision absent a clear abuse of its discretion. *Morales,* 2012 IL App (1st) 101911,¶ 39.

¶ 37 Here, the State's theory of the case was that the shooting death of the victim was the culmination of an ongoing dispute between the victim and defendant. The victim's statement to his wife three days before the shooting that defendant was going to get him with a bat showed defendant's course of conduct and provided context for the charged offense. *Morales,* 2012 IL App (1st) 101911, ¶¶ 25, 28; see also *People v. Forcum,* 344 Ill. App. 3d 427, 444 (2003) (evidence of prior threats by a defendant to do violence to the eventual victim are admissible to show malice and criminal intent). It was within the trial court's discretion to conclude that the incident with the baseball bat was relevant both as a precursor to the shooting and to explain why defendant would walk up to the victim's truck and shoot the victim. See *Manuel*, 294 Ill. App. 3d at 124 (the previous incidents provided an explanation for aspects of the charged crime that were not otherwise understandable).

¶ 38 *People v. Manuel*, 294 Ill. App. 3d 113 (1997), is instructive. In that case, the defendant was charged with a narcotics offense after he arranged a narcotics sale to an undercover police officer. Prior to trial, the court admitted, over the defendant's objection, evidence that the defendant had previously engaged in drug transactions with a police informant.

¶ 39 On appeal, the court determined that the complained-of evidence was not "other crimes" evidence because the prior drug sales provided context for the charged offense and were in fact a necessary preliminary to the offense at issue. *Manuel*, 294 Ill. App. 3d at 123-24. The court then

found, based upon ordinary relevancy principles, that the evidence of prior drug sales was relevant to show the defendant's course of conduct and his illicit relationship with the police informant. *Manuel*, 294 Ill. App. 3d at 124; see also *Rutledge*, 409 Ill. App. 3d at 25-26 (evidence that the defendant struck a woman who had refused his sexual advances and then fled was admissible in prosecution against him for striking a police officer when it was "inextricably intertwined" with the charged offense, established that he was angry and intoxicated, and explained the events leading up to the blow).

¶ 40 Here, as in *Manuel*, the victim's statement that "Nudie Man" and "Nudie Man's" brother were going to get him with a bat was relevant to show defendant's course of conduct and the ongoing dispute between the two men. Accordingly, the trial court did not abuse its discretion when it determined that this evidence was relevant and admitted it at trial. See *Gonzalez*, 142 Ill. 2d at 487-88.

¶ 41 Defendant finally contends, and the State concedes, that he is entitled to 10 additional days of presentence custody credit for a total of 702 days.

¶ 42 Pursuant to section 5-8-7(b) of the Unified Code of Corrections, a defendant shall receive credit for each day that he spends in custody prior to sentencing. 730 ILCS 5/5-8-7(b) (West 2008). Here, defendant was arrested on February 23, 2008, and transferred to the custody of the Department of Corrections on January 25, 2010. Thus, he was entitled to receive 702 days of presentence custody credit. Accordingly, pursuant to our authority under Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we order the clerk of the circuit court to correct the mittimus to reflect 702 days of presentence custody credit.

¶ 43 Pursuant to Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we order that defendant's mittimus be corrected to reflect 702 days of presentence custody credit. We affirm the judgment of the trial court in all other aspects.

¶ 44 Affirmed; mittimus corrected.