

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JERRELL KEMPLE MOORE,

Defendant-Appellee.

UNPUBLISHED
December 10, 2009

No. 286971
Wayne Circuit Court
LC No. 08-001760

Before: Servitto, P.J., and Fort Hood and Stephens, JJ.

PER CURIAM.

The prosecutor appeals by leave granted from a circuit court order denying the prosecutor's motion to admit evidence of flight. We reverse in part and remand for further proceedings.

Defendant was charged with first-degree felony murder, MCL 750.316(1)(b), first-degree premeditated murder, MCL 750.316(1)(a), felon in possession of a firearm, MCL 750.224f, felony-firearm, MCL 750.227b, and three counts of assault with intent to rob while armed, MCL 750.89, in connection with a fatal shooting at a residence in Detroit. The issue presented is whether the trial court properly excluded evidence involving defendant's flight from police officers after they observed him driving a stolen vehicle approximately 1-1/2 months after the charged shooting.

We review a trial court's decision regarding the admission of evidence for an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *People v Carnicom*, 272 Mich App 614, 617; 727 NW2d 399 (2006). This Court reviews de novo preliminary questions of law regarding the admission of evidence. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

Generally, all relevant evidence is admissible, and irrelevant evidence is inadmissible. MRE 402; *People v Coy*, 258 Mich App 1, 13; 669 NW2d 831 (2003). Relevant evidence is evidence that has "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." MRE 401. Even if relevant, evidence may be excluded under MRE 403 "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the

issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence.” *People v Taylor*, 252 Mich App 519, 521; 652 NW2d 526 (2002).

In Michigan, evidence of flight is admissible to support an inference of a defendant’s consciousness of guilt. *People v Unger*, 278 Mich App 210, 226; 749 NW2d 272 (2008). It is because flight evidence is probative of a defendant’s guilty state of mind that it is relevant. *People v McGhee*, 268 Mich App 600, 639; 709 NW2d 595 (2005). Although such evidence “may be as consistent with innocence as with guilt . . . it is always for the jury to say whether it is under such circumstances as to evidence guilt.” *People v Cutchall*, 200 Mich App 396, 398; 504 NW2d 666 (1993), overruled in part on other grounds *People v Edgett*, 220 Mich App 686; 560 NW2d 360 (1996), quoting *People v Cipriano*, 238 Mich 332, 336; 213 NW 104 (1927).

Here, the trial court improperly excluded the flight evidence on the basis that it was unclear whether it was probative of defendant’s consciousness of guilt regarding the November shooting offense or the stolen car. The fact that there may have existed a reason other than the November shooting offense for defendant’s flight pertains to the weight of the evidence rather than its admissibility. This Court has previously recognized that the remoteness of a defendant’s flight does not affect the admissibility of the evidence, but rather only the weight to be accorded such evidence. *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001). Similarly, the fact that a defendant may have fled for reasons other than consciousness of guilt regarding the offense for which he is standing trial affects only the weight to be accorded such evidence. It was for the jury to determine whether defendant’s flight was indicative of guilt for the November shooting offense or the stolen car, as defendant contends. See *Unger, supra* at 226.

The trial court also reasoned that the evidence was not admissible because the police officers did not recognize defendant as a murder suspect while they were pursuing him. The police officers’ state of mind is not relevant to the admissibility of the evidence. Evidence of a defendant’s flight is relevant to show the *defendant’s* consciousness of guilt. *McGhee, supra* at 639. What the police officers may or may not have known, and what motivated their efforts to apprehend defendant was irrelevant to defendant’s consciousness of guilt. The test focuses on the defendant’s state of mind, not that of the police officers.

The trial court also determined that the evidence was more prejudicial than probative. We partially agree with this determination. MRE 403 allows for the exclusion of relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice.” “Evidence 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). When considering whether to admit evidence of defendant’s flight, the trial court apparently viewed defendant’s flight as a singular transaction. However, a review of the facts of this case demonstrates that defendant’s flight involved several distinct acts. While in a stolen car, defendant fled from officers and ultimately entered a building. From this building, defendant fired shots at officers with two different firearms before being apprehended. The trial court determined that the probative value of the evidence of defendant’s flight was outweighed by the likelihood of prejudice. While we agree that the evidence of the possession and use of the two firearms was more prejudicial than probative, we conclude that the trial court had the discretion to allow the prosecution to present evidence of the other aspects of defendant’s flight.

We recognize that this Court has previously held that all of the elements of a defendant's flight can be admitted as part of the *res gestae* of the flight. *People v Coleman*, 210 Mich App 1, 5; 532 NW2d 885 (1995). However, this Court has never stated that a lower court is faced with an "all or nothing" proposition when determining the admissibility of evidence of flight. Rather, we must permit our trial courts the discretion to determine the admissibility of each of a defendant's acts. Otherwise, as in the present case, trial courts will be forced to issue unjustifiably broad rulings. Because there was no evidence connecting the firearms used during defendant's flight to the crime of which he was convicted, we find that the evidence of those firearms would only serve to create confusion and prejudice. However, defendant's conduct during the course of his flight is otherwise admissible, as its prejudicial effect does not substantially outweigh its probative value regarding defendant's consciousness of guilt. To hold that defendant's violent conduct during his flight rendered all evidence of his flight inadmissible would be to reward defendant for behaving violently.

Defendant argues that the evidence was not admissible under MRE 404(b)(1) because it is not sufficiently similar to any of the charged offenses and does not evidence a common plan or scheme. For the reasons previously discussed, however, the evidence is admissible for reasons independent of MRE 404(b)(1), and the prosecutor did not seek to admit the evidence under MRE 404(b)(1). Assuming that defendant correctly argues that the evidence is not admissible under MRE 404(b)(1), "the fact that evidence is admissible for one purpose, but not another, does not make it inadmissible." *McGhee, supra* at 639.

In summary, the trial court erroneously determined that there must be a direct connection between the flight evidence and the charges for which defendant is standing trial in order for the evidence to be relevant. The evidence is not inadmissible because the police officers did not recognize defendant as a murder suspect while they were pursuing him. Rather, it is for the jury to determine the weight to accord the evidence. See *Compeau, supra* at 598. Further, the trial court abused its discretion to the extent that it determined that no evidence of defendant's flight could be introduced because the danger of unfair prejudice substantially outweighed the probative value of the evidence. Rather, we find that while the highly prejudicial evidence of defendant's possession and use of firearms during his flight was properly excluded, the prosecution is permitted to introduce evidence of the other aspects of defendant's flight. We note that in introducing the evidence of flight, the prosecution must avoid any reference to the improper firearm evidence in order to avoid misconduct.

Reversed in part and remanded for further proceedings. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Karen M. Fort Hood
/s/ Cynthia Diane Stephens