

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

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES LOU BYRNES,

Defendant-Appellant.

---

UNPUBLISHED

July 30, 2002

No. 231205

Oakland Circuit Court

LC No. 00-173423-FH

Before: Murray, P.J., and Sawyer and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of domestic violence, MCL 750.81(2), for which the trial court sentenced him as a habitual offender, third offense, MCL 769.11, to two to four years in prison. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The complainant, Sara Hall, testified that defendant arrived at her apartment three hours late to return their son after his visitation with him. Hall suspected defendant was drunk. An argument ensued after Hall confronted defendant with her suspicions, and Hall threatened to call the police. Defendant grabbed her and punched her in the back while she was calling the police. Defendant left before the police arrived.

Hall testified that a week later, defendant came to her apartment with a false statement he had prepared regarding the previous incident. He demanded that she copy the statement in her handwriting and deliver it to the police. Defendant threatened Hall if she did not comply with his demand. She complied, and they drove to the police station. Although the station was closed when they delivered the statement, Hall put it under the locked door.

In another week, defendant called Hall on the telephone, threatening to kill her if she had contact with the police. Hall testified that she was concerned about the threat because defendant had hurt her before. At some point, Hall went home and discovered that the headboard of her bed had been broken, her jewelry box was shattered, her leather coat was cut to pieces and the cords to her telephone and answering machine had been cut. Hall went to her sister's house and contacted police. She told the police that she had dropped off a false statement.

On cross-examination, defense counsel asked questions to challenge Hall's credibility. The inquiry brought out some questions regarding, for example, Hall's testimony about her call

to defendant's brother just before calling 9-1-1 on the date of the assault and why she did not contact police when defendant made her draft and deliver the alleged false statements. The prosecution moved to admit other acts evidence pursuant to MRE 404(b), noting that the cross-examination testimony raised questions regarding Hall's memory and suggested that the incident had not occurred. Defendant did not object to the motion. The trial court granted the motion, and the prosecution introduced evidence of three prior assaults on Hall by defendant.

The jury convicted defendant of domestic violence. Defendant now appeals as of right. He argues that trial counsel was ineffective for failing to object to the introduction of the bad acts evidence. We disagree.

Because defendant did not move for a new trial or an evidentiary hearing on the basis of ineffective assistance of counsel, his claim is precluded unless the record supports his assertions. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). The trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001). Because defendant failed to object to the introduction of the evidence, this Court's review is for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

MRE 404(b) provides that "evidence of other crimes, wrongs or acts of an individual is inadmissible to prove propensity to commit such acts." *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). To admit other acts evidence under MRE 404(b), the following test must be applied: (1) the evidence must be offered for a proper purpose under MRE 404(b); (2) the evidence must be relevant under MRE 402 as enforced through MRE 104(b); (3) the probative value of the evidence must not be substantially outweighed by unfair prejudice; and (4) upon request, the trial court may provide a limiting instruction to the jury. *Crawford, supra* 458 Mich 395, citing *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993). The prosecution bears the burden of demonstrating the relevance of the evidence to prove a fact within an exception to the exclusionary purpose of 404(b). *Id.* The evidence must be excluded if its only relevance is to the defendant's character or his propensity to commit the offense. *Id.* If the prosecution can show that the evidence proves a fact other than character, the admissibility of that evidence depends on whether its probative value outweighs its prejudicial effect, considering the effectiveness of a limiting instruction in deterring the prejudicial effect of the evidence. *Id.*

Defendant argues that trial counsel should have objected to the admission of the evidence because its probative value was substantially outweighed by the danger of unfair prejudice. Our Supreme Court has said that "'Rule 403 determinations are best left to a contemporaneous assessment of the presentation, credibility, and effect of testimony' by the trial judge." *People v Bahoda*, 448 Mich 261, 291; 531 NW2d 659 (1995), quoting *People v VanderVliet*, 444 Mich 52, 81; 508 NW2d 114 (1993).

The evidence must be examined in light of defense counsel's attack on the truthfulness of Hall's testimony and suggestion that she fabricated the offense. The evidence is probative to show that it is unlikely that the offense is the product of Hall's fabrication. It tended to show that Hall made complaints in the past and, as here, recanted them because of defendant's threats. It also showed that, consistent with defendant's theory, the parties argued over defendant's intoxication, but also showed that these arguments rose to a physical confrontation. The evidence served to contradict defendant's theory of the case. Clearly, defendant was prejudiced

by the evidence, but defendant has not shown that the probative value of the evidence was outweighed by the danger of *unfair* prejudice.

Affirmed.

/s/ Christopher M. Murray

/s/ David H. Sawyer

/s/ Brian K. Zahra