

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD ALLEN LUND, II,

Defendant-Appellant.

UNPUBLISHED

May 15, 2008

No. 274892

Emmet Circuit Court

LC No. 06-002609-FH

Before: Wilder, P.J., and O’Connell and Whitbeck, JJ.

PER CURIAM.

Defendant appeals of right from his jury trial conviction of assault with intent to do great bodily harm, MCL 750.84. The trial court sentenced defendant to 16 months to 10 years imprisonment. Defendant presents three claims of constitutional error, and one statutory claim of error. Finding no merit to the claims, we affirm.

Defendant’s conviction arose out of an altercation with the victim who, at that time, was his significant other. During the altercation, defendant obtained the couple’s phone and the keys to the car they used. When the victim attempted to wrest these items from him, he seized her hair and smashed her face on his knee. She suffered a broken nose that required surgery, as well as multiple bruises.

Defendant first argues that the admission of evidence of his alcohol abuse and his prior acts of violence against the victim resulted in a deprivation of his liberty without due process of law, in violation of the state and federal constitutions, and denied him a fair trial. We review this unpreserved claim of error for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

The Fourteenth Amendment to the United States Constitution provides, in relevant part: “nor shall any State deprive any person of life, liberty, or property, without due process of law” US Const, Am XIV. Nearly identically, the Michigan Constitution provides, in relevant part: “No person shall . . . be deprived of life, liberty or property, without due process of law.” Const 1963, art I, § 17. Because defendant relies primarily upon federal law, and cites no authority that Michigan’s due process clause provides any greater protection than the federal clause, our analysis of this issue is not binary but unitary. See, e.g., *Dawson v Secretary of State*, 274 Mich App 723, 738; 739 NW2d 339 (2007). Since there is no question that the trial resulted

in a deprivation of defendant's liberty (incarceration), the question is whether the trial court conformed to due process of law and legal standards for a fair trial. We find that it did.

We find that the evidence of defendant's prior assaults on the victim was admissible under MCL 768.27b. That statute provides: "in an action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403."

Trial courts may "admit relevant evidence of other domestic assaults to prove any issue, even the character of the accused, if the evidence meets the standard of MRE 403." *People v Pattison*, 276 Mich App 613, 615; 741 NW2d 558 (2007). Here, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. MRE 403.

More, even if the evidence of prior violence had not been not admissible under MCL 768.27b, we conclude that the evidence of prior violence was admissible under MRE 404(b), as was the evidence of alcohol abuse. MRE 404(b) provides, in relevant part:

Other Crimes, Wrongs or Acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted 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, contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Here, the prosecutor introduced the evidence of defendant's past verbal and physical abuse of the victim in order to refute defendant's theory at trial that he had "reflexively" struck the victim, and therefore did not have the intent to commit great bodily harm. Thus, the evidence was introduced to show intent, a permissible use under MRE 404(b).

Moreover, here the prosecutor offered this evidence as part of the chronology of events leading to the charged incident. Evidence of chronologically-related events involving other wrongs is admissible, if the evidence is necessary to allow the jury to hear the "complete story" of the case. *People v Sholl*, 453 Mich 730, 742; 556 NW 2d 851 (1996) (internal quotation marks omitted). The challenged evidence served that function.

Defendant does not mount a constitutional challenge to the foregoing legal standards or rules and rules of evidence. We find that the trial court conformed to due process of law. Accordingly, the admission of evidence of defendant's prior abuse of the victim conformed to applicable rules of law, did not deprive him of a fair trial, and did not result in a deprivation of his liberty without due process of law.

Defendant next claims that his federal constitutional right to counsel was infringed, because his appointed counsel was ineffective for failing to object to the challenged evidence just discussed. Defendant did not present this issue to the trial court, so this Court's review is limited to mistakes that are apparent on the record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005).

To prevail on a constitutional claim of ineffective assistance of counsel, the defendant must show that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney guaranteed under the Sixth Amendment, *People v Harris*, 201 Mich App 147, 154; 505 NW2d 889 (1993), or under the Michigan Constitution. *People v Pickens*, 446 Mich 298, 318-319; 521 NW2d 797 (1994). In other words, the defendant must show that, but for an error by counsel, the result of the proceedings would have been different, and that the proceedings were fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). The defendant bears a “heavy burden” on these points. *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy. *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003). “This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel’s competence with the benefit of hindsight.” *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

Defendant argues that his counsel was ineffective for failing to object to testimony given by the victim’s father about how he reacted to hearing that his daughter had been injured. The father testified about receiving the news of the victim’s injuries, and about waiting in the emergency room without knowing the extent of the injuries. Contrary to defendant’s assertion, counsel did timely object to portions of the father’s testimony on the basis that they were simply an appeal for the jury to sympathize with the victim. Counsel did not object to the father’s statement that he and his wife were very scared as they traveled to the hospital. But this answer came in response to a question about what the witness did after receiving the call, not how he felt. Moreover, counsel’s decision not to seek to strike the father’s non-responsive answer was trial strategy that will not be second-guessed on appeal, *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996), particularly in light of counsel’s repeated efforts to keep such testimony from the jury.

We also conclude that defense trial counsel was not ineffective for failing to object to evidence of defendant’s prior assaults on the victim. As concluded above, such testimony was admissible. Defense counsel will not be faulted for failing to make futile or meritless objections. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

Regardless of the admissibility of the testimony at issue, we conclude that defendant has not demonstrated a reasonable probability that the outcome of the trial would have been different but-for the challenged testimony. *People v Lukity*, 460 Mich 484, 493-494; 596 NW2d 607 (1999). The victim’s testimony, as well as other evidence, including the properly-admitted other acts evidence, support the conclusion that any error was harmless. Further, the prosecutor did not reference the testimony in closing argument, and the trial court instructed the jury that it “must not let sympathy or prejudice influence [its] decision.” Jurors are presumed to follow instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant’s third argument is that, under *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), the trial court’s sentence infringed his federal constitutional right under the Sixth Amendment to a trial by a jury of his peers, because his sentence was enhanced on the basis of facts not found by the jury beyond a reasonable doubt, and that the trial court erred in failing to impose an intermediate sanction (such as probation or jail time of no more than

11 months). Our Supreme Court has rejected this argument. *People v McCuller*, 479 Mich 672, 677; 739 NW2d 563 (2007).

Lastly, defendant argues that he is entitled to resentencing, because the trial court erred in assessing points against him under offense variables (OV) 4 and 10, MCL 777.34 and 777.40. But we find that defendant waived any challenge to OV 4. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). As for OV 10, we review the trial court's decision for abuse of discretion, examining whether the record evidence adequately supports the OV score, *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003), and find no such abuse of discretion.

MCL 777.40 provides, in relevant part:

(1) Offense variable 10 is exploitation of a vulnerable victim. Score offense variable 10 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

* * *

(b) The offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status

The existence of these factors "does not automatically equate with victim vulnerability." MCL 777.40(2). Rather, "[v]ulnerability" means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." MCL 777.40(3)(c). Also, "[e]xploit" means to manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(b). Accordingly, to assess points under OV 10 in this case, the trial court had to find, by a preponderance of evidence, that the victim was susceptible to injury, physical restraint, persuasion or temptation, and that defendant manipulated her for selfish or unethical purposes.

The record supports the trial court's determination that the victim was vulnerable as a result of defendant's prior assaults against her, and as a result of defendant's retention of the phone and the car keys. The record also abundantly supports the trial court's conclusion that defendant exploited the victim's vulnerability for selfish or unethical purposes.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Peter D. O'Connell
/s/ William C. Whitbeck