

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTERIO RECORDO WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

May 15, 2008

No. 275477

Ingham Circuit Court

LC No. 06-000617-FH

Before: Owens, P.J., and Meter and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of domestic violence, third offense, MCL 750.81(4). The trial court sentenced defendant to a prison term of 36 to 180 months. We affirm.

Defendant argues that the trial court improperly relied on MCL 768.27b to admit other-acts evidence of prior acts of domestic violence allegedly committed by defendant, even though the admission of the evidence allegedly violated MRE 404(b). Defendant asserts that (1) MCL 768.27b is unconstitutional as a violation of the rulemaking power of the judiciary under Const 1963, art 6, § 5, in purporting to allow the admission of evidence barred by MRE 404(b) and (2) the application of MCL 768.27b to this case involving a crime allegedly committed before the statute's effective date constituted a violation of constitutional protections against ex post facto laws.

We reject defendant's arguments because, contrary to the premise of those arguments, the trial court did not admit the other-acts evidence at issue on a propensity theory contrary to MRE 404(b). Indeed, correctly or not, the trial court expressed the view that MCL 768.27b could not properly override MRE 404(b) so as to make propensity evidence admissible. The trial court then ruled that it believed the other-acts evidence in this case was admissible on two non-propensity theories, specifically to show defendant's intent and to explain the alleged victim's recantation. We note that it was reasonable for the trial court to view this evidence of a prior cycle of violence as relevant to explain why the alleged victim might have falsely recanted her initial description of defendant's having committed the charged acts of domestic violence in this

case.¹ Accordingly, contrary to defendant's position, there simply was no violation of MRE 404(b) in this case.²

Defendant, in his supplemental brief, also argues that both appellate and trial counsel were ineffective. Defendant argues that appellate counsel was ineffective for not raising the issue of ineffective assistance of trial counsel, and that trial counsel was ineffective for not raising the two issues at trial that were raised on appeal by appellate counsel.

To obtain relief with regard to an ineffective assistance of counsel claim, a defendant must show that counsel performed below an objectively reasonable standard and that that performance prejudiced the defendant. *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007).

"The test for ineffective assistance of appellate counsel is the same as that for trial counsel." *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002). Generally, appellate counsel is given discretion to "winnow out weaker arguments and focus on those more likely to prevail" *Id.* at 430 (internal citation and quotation marks omitted). Here, even assuming that defendant could prevail on the first prong of his ineffective assistance claim concerning his appellate counsel, he cannot show prejudice for the failure to argue ineffective assistance of counsel in this Court, because defendant himself was able to raise the issue, and "appellate counsel's failure to do so was insignificant." *Id.* at 430-431.

With regard to defendant's ineffective assistance of trial counsel claim, defendant argues that trial counsel should have argued in the trial court that the application of MCL 768.27b violated the separation of powers doctrine and the ban on ex post facto laws. However, as discussed above, both arguments are without merit under the circumstances of this case, in which the evidence was admitted consistently with MRE 404(b). "Trial counsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Defendant was not harmed by trial counsel's failure to raise two issues that were ultimately meritless, and he was not harmed by appellate counsel's failure to argue that trial counsel was ineffective.

¹ The prosecutor's expert witness on domestic violence testified to the effect that a "cycle of violence" involving violent incidents interspersed with other periods is common in relationships involving domestic violence and that battered women's syndrome can result "when a woman has been subjected to years of battery."

² Thus, we need not further consider the merits of defendant's constitutional attacks on the application of MCL 768.27b in this case because, in substance, the trial court did not rely on that statute in admitting the evidence at issue. Rather, the trial court effectively admitted the other-acts evidence at issue under the ordinary evidentiary rules as evidence not barred by MRE 404(b), without regard to any exception to those evidentiary rules that may be created by MCL 768.27b. It is apparent that if there was any error in this regard, the error worked to defendant's benefit by precluding the prosecutor from using the other-acts evidence as propensity evidence against him in circumstances in which MCL 768.27b arguably authorized this use of the evidence.

Affirmed.

/s/ Donald S. Owens

/s/ Patrick M. Meter

/s/ Bill Schuette