STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 17, 2008
v	No. 277788 Oakland Circuit Court
GARON KEILAN PLUMP, Defendant-Appellant.	LC No. 2007-212616-FH

Before: Fitzgerald, P.J., and Talbot and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree home invasion, MCL 750.110a(2), interference with electronic communications causing injury or death, MCL 750.540, and domestic violence, MCL 750.81(2). The trial court sentenced defendant as a second habitual offender, MCL 769.10, to 6 to 30 years in prison for the home invasion conviction, two to six years in prison for the interference with electronic communications conviction, and 85 days in jail for the domestic violence conviction. This case arises out of an argument and violent altercation between defendant and his ex-girlfriend, Dorothy King. Because the trial court did not err when it declined to declare a mistrial, admitted certain testimony and witness statements, and properly sentenced defendant; and, because MCL 768.27b does not violate the Supreme Court's power to regulate practice and procedure, we affirm.

Defendant first argues that the trial court should have declared a mistrial after Sergeant Matthew Baldes made reference to defendant's criminal record. Because defendant did not request a mistrial at the time of the alleged error, this issue is unpreserved and we review it for plain error affecting substantial rights. *People v Nash*, 244 Mich App 93, 96; 625 NW2d 87 (2000). Reversal is warranted when plain, forfeited error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence. *Id*. A mistrial should be granted only where an irregularity during trial impairs the defendant's ability to receive a fair trial. *People v Bauder*, 269 Mich App 174, 195; 712 NW2d 506 (2005). Improper mention of a defendant's prior bad acts may constitute such an irregularity. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999), overruled in part on other grounds *People v Thompson*, 477 Mich 146 (2007). An unsolicited answer by a witness, however, must be "so egregious that the prejudicial effect cannot be cured" in order to warrant a new trial. *Bauder*, *supra* at 195.

In response to the prosecutor's question, "What did you submit to the prosecutor's office with regard to the charging request," Baldes responded, "I submitted the original police report, my supplemental interviews with both [defendant] and [another witness], and a criminal history of [defendant], which is a standard . . . ." The prosecutor cut Baldes off and, after a sidebar conference, the trial court issued a curative instruction to the jury indicating that it should ignore any reference to defendant's criminal history.

Baldes's answer was brief, nonresponsive, and did not suggest any details about defendant's prior criminal history. There was no mention of any specific prior acts. The trial court instructed the jury to ignore it. Moreover, the prosecutor's question did not appear to elicit this portion of Baldes's response. See *Griffin*, *supra* at 36 (no reversal required where prosecutor's question was legitimate). The possible prejudicial effect was minor given the brief and nonspecific answer. There is no evidence that the trial court's curative instruction failed to cure any minor prejudicial effect. It was not plain error for the trial court to continue defendant's trial after Baldes's testimony.

Defendant next argues that the trial court should not have admitted testimony by defendant's former girlfriend, Francescia Korany, under MCL 768.27b because its probative value was substantially outweighed by the danger of unfair prejudice. A trial court's decision to admit or deny evidence is reviewed for an abuse of discretion. *People v Pattison*, 276 Mich App 613, 615; 741 NW2d 558 (2007). Nevertheless, an erroneous evidentiary ruling does not require reversal unless it "affirmatively appear[s] that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999); MCL 769.26; MCR 2.613(A); MRE 103. Preliminary questions of law are reviewed de novo. *Id*. at 488.

MCL 768.27b(1) states, in relevant part:

> Except as provided in subsection (4), in a criminal 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.

Thus, MCL 768.27b(1) expressly allows for the admission of evidence for any relevant purpose so long as the testimony does not violate MRE 403. This would permit admission of some prior bad acts testimony – related to prior acts of domestic violence – that may have been previously inadmissible under MRE 404(b). MRE 403, however, excludes relevant evidence if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Unfair prejudice exists where there is a "tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence." *People v Taylor*, 252 Mich App 519, 521-522; 652 NW2d 526 (2002).

Korany testified that defendant assaulted and threatened her numerous times during their relationship. Her testimony mirrored the allegations made by the victim in this case, King, regarding both a pattern of abusive behavior as well as the specific conduct underlying the

instant charges. Defendant was obsessive, controlling, jealous, and made serious threats of bodily harm to both Korany and King and their families. Korany never reported the abusive behavior to anyone, and defendant was never charged or tried for the alleged conduct. Defendant argues that this testimony would tempt the jury to conclude that defendant committed the charged conduct on the basis that it was in conformity with prior conduct. Propensity evidence, however, is not generally excluded for the reason that it lacks probative value. MRE 404(b) excludes evidence when its *only* relevance is to demonstrate a defendant's conduct in conformity with past conduct. *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993). MCL 768.27b, on the other hand, expressly allows "evidence of the commission of other acts of domestic violence . . . *for any purpose for which it is relevant*." MCL 768.27b(1) (emphasis added). Thus, this testimony may permissibly rely on its probative value as propensity evidence in the balance between probative value and prejudicial effect. The probative value is strong because the parallels between defendant's conduct permit a propensity inference based on an actual pattern of conduct rather than merely generic prior misconduct. Defendant has not demonstrated what unfair prejudice would overcome this high degree of probative value.

Defendant also argues that this testimony would tempt the jury to sympathize with the victim in this case and attempt to punish him for his past, unpunished, conduct. But the close parallels between the two situations outweigh the small possibility that the jury would be tempted to convict defendant based on improper motives. Thus, the probative value is sufficient to overcome this chance of undue prejudice.

Defendant next argues that MCL 768.27c creates an impermissible exception to the hearsay rules. Alternatively, defendant argues that the requirement for admission of hearsay under this statute, that the statement bear indicia of trustworthiness, was not met in this case. Defendant did not preserve the issue of whether the statute is an impermissible hearsay exception, so this issue is reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant did preserve the question of whether the trial court properly applied the statute so we review that question for an abuse of discretion. *Pattison*, *supra* at 615. But again, an erroneous evidentiary ruling does not require reversal unless it "affirmatively appear[s] that it is more probable than not that the error was outcome determinative." *Lukity*, *supra* at 495-496; MCL 769.26; MCR 2.613(A); MRE 103. Further, a question of statutory interpretation is a question of law, which is reviewed de novo. *People v Stead*, 270 Mich App 550, 551; 716 NW2d 324 (2006).

In this case, the trial court admitted written statements made to the police by King, and an eyewitness, Anthony Grubbs, under MCL 768.27c. MCL 768.27c states, in relevant part:

> (1) Evidence of a statement by a declarant is admissible if all of the following apply:
>
> > (a) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.
> >
> > (b) The action in which the evidence is offered under this section is an offense involving domestic violence.

> (c) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of a statement made more than 5 years before the filing of the current action or proceeding is inadmissible under this section.
>
> (d) The statement was made under circumstances that would indicate the statement's trustworthiness.
>
> (e) The statement was made to a law enforcement officer.
>
> (2) For the purpose of subsection (1)(d), circumstances relevant to the issue of trustworthiness include, but are not limited to, all of the following:
>
> (a) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested.
>
> (b) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive.
>
> (c) Whether the statement is corroborated by evidence other than statements that are admissible only under this section.

The Michigan Supreme Court has the sole authority to regulate the practice and procedure of the courts of our state. Const 1963, art 6, § 5; *McDougall v Schanz*, 461 Mich 15, 26; 597 NW2d 148 (1999). The Legislature, however, may make substantive rules and where there is a conflict between a statute and a court rule, the court rule should yield if the statute expresses a "legislatively declared principle of public policy, having as its basis something other than court administration." *People v Williams*, 475 Mich 245, 260; 716 NW2d 208 (2006).

Defendant argues that MCL 768.27c is an improper regulation of practice and procedure by the legislature. MCL 768.27c specifies that hearsay statements may be admissible at trial in some situations involving offenses of domestic violence, subject to a list of prerequisites. Under the Michigan Rules of Evidence, hearsay is generally inadmissible at trial unless it satisfies a specific exception found in the Rules. MRE 802. There is a clear conflict between these two mandates.

This Court has previously held that a similar statutory exception to the Rules of Evidence constitutes substantive legislative policy that trumps the Rules. MCL 768.27a permits the admission of some character evidence in cases involving sexual offenses against a minor. In *Pattison, supra* at 619-620, this Court held that this statute is substantive because it does not "principally regulate the operation or administration of the courts." Similar to MCL 768.27c, the statute does not speak to the "mechanism" for the introduction or admission of evidence. Cf. *People v Strong*, 213 Mich App 107, 113; 539 NW2d 736 (1995) (mechanism for withdrawal of plea constitutes practice and procedure). On the contrary, both statutes enlarge the evidentiary foundation that "juries should have the opportunity to weigh." *Pattison, supra* at 620. Thus, MCL 768.27c is a legitimate expression of public policy by the Legislature and supercedes MRE 802 to the extent that they conflict.

Defendant argues, in the alternative, that because King and Grubbs gave the statements to law enforcement, they were made in anticipation of litigation and are, therefore, untrustworthy. Defendant further argues that because defendant and King had a prior relationship, and defendant ended the relationship, King was biased in her statement to the police, and because King and Grubbs have also occasionally been romantically involved, his statement was biased as well. In order to find that the trial court abused its discretion, this Court should conclude that the trial court's decision to admit the statements was outside the range of principled outcomes. *People v Piscopo*, 480 Mich 966, 971; 741 NW2d 826 (2007). The statutory factors to be considered with regard to trustworthiness are nonexclusive. MCL 768.27c(2). The mere application of one or more listed factors is not conclusive regarding whether the trial court abused its discretion in admitting the evidence.

King's written statement was made immediately after her first encounter with the police after she called 911. While the statement was given to law enforcement, the close proximity to the time of the assault, before defendant's apprehension, and King's ongoing fear of defendant indicate that the statement could reasonably be for the purpose of managing an ongoing emergency situation in addition to its use in anticipated future litigation. Further, the statute explicitly requires that the statement be made *to* law enforcement as a condition for its admission. MCL 768.27c(1)(e). Thus, in order to avoid reading the statute in conflict with itself, the mere fact of making the statement to law enforcement should not undermine its trustworthiness because of the anticipation of litigation. Further, defendant's contention that King's statements were biased because she bore an antipathy toward defendant for ending the relationship is not supported by the evidence. In fact, the victim testified that *she* ended the relationship and defendant presented no evidence to the contrary. There is nothing to indicate that the trial court's admission of King's statement was outside the range of principled outcomes.

Moreover, while the relationship between King and Grubbs does create some possibility for bias, Grubbs testified at trial giving defendant ample opportunity to explore this potential for bias in his statement and in his testimony. After reviewing the record we conclude that it was not an abuse of discretion for the trial court to admit this evidence under these circumstances.

Defendant also argues that MCL 768.27b is unconstitutional because it contravenes the Supreme Court's authority to regulate practice and procedure. This issue is unpreserved and, thus, reviewed for plain error affecting substantial rights. *Carines, supra*. As discussed in the context of MCL 768.27c, *supra*, the enlarging of the available evidence in a trial goes beyond mere "court administration." In fact, with regard to MCL 768.27b, specifically, this Court has already held that this statute is constitutionally sound as a substantive rule of evidence. *People v Schulz*, ___ Mich App ___; ___ NW2d ___ (Docket No. 272219, issued on May 8, 2008), slip op, p 2. We are bound by this prior decision and decline defendant's invitation to register a disagreement with it. MCR 7.215(J)(1).

Defendant finally argues that the trial court erred in scoring Offense Variable (OV) 8 and OV 19 at his sentencing. A trial court's scoring of the guidelines is reviewed to determine whether the court properly exercised its discretion and whether the evidence supports the scoring. *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004). Defendant's minimum guidelines range was calculated at sentencing to be 51 to 106 months, based on a Prior Record Variable (PRV) score of 20 and an OV score of 70. Defendant argues that he should not have been scored 15 points for OV 8. OV 8 pertains to victim asportation or captivity; 15 points

are scored when "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." MCL 777.38(1)(a). In this case, after the initial assault, defendant kept King in the back room of her house and continued to assault her. He threatened Grubbs in order to prevent him from leaving or making any phone calls. He further assaulted King when she tried to leave the house. There was more than sufficient evidence to support the trial court's scoring of OV 8. *Houston, supra* at 471.

Defendant next argues that he should not have been scored 15 points for OV 19. OV 19 is scored 15 points if the defendant uses "force or the threat of force against another person or the property of another person to interfere with, attempt to interfere with, or that results in the interference with the administration of justice or the rendering of emergency services." MCL 777.49(b). The record displays that defendant tore the telephone out of the wall when King attempted to call 911. Defendant argues that he did not knowingly interfere with the administration of justice or rendering of emergency services because he did not know whom King was trying to call when she picked up the phone. The scoring guidelines, however, expressly cover behavior that merely "results in" interference. MCL 777.49(b). Defendant need ot have had the intent to interfere with the attempt to call 911 because his use of force against the victim's property, the telephone, was sufficient to support the trial court's scoring of OV 19. *Houston, supra* at 471.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot
/s/ Pat M. Donofrio