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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOEY CICI LAMARQUE,

Defendant-Appellant.

UNPUBLISHED
December 16, 2021

No. 351588
Macomb Circuit Court
LC No. 2018-001967-FC

Before: CAVANAGH, P.J., and SHAPIRO and GADOLA, JJ.

SHAPIRO, J. (*concurring*).

I concur in the majority opinion and write separately only as to whether MCL 768.27b is constitutional. In *People v Watkins*, 491 Mich 450; 818 NW2d 296 (2012), the Supreme Court upheld MCL 768.27a against the same challenge. Accordingly, I agree with the majority that, absent a Supreme Court ruling to the contrary or a clear basis for distinction, we must conclude that MCL 768.27b is also constitutional. I suggest, however, that this issue may merit further review by that Court. *Watkins* placed emphasis on the fact that despite MCL 768.27a, a defendant was still shielded from overly prejudicial evidence by MRE 403. However, my research does not reveal a single case of record in which a defendant's prior acts of domestic violence has been excluded pursuant to MRE 403 since *Watkins* was decided in 2012.[1] The likely reason is that the fundamental prejudice arising from such evidence is that it constitutes propensity evidence, but per *Watkins*, "when applying MRE 403 to evidence admissible under MCL 768.27a, courts must weigh the propensity inference in favor of the evidence's probative value rather than its prejudicial

[1] By contrast, this Court has reversed a trial court ruling's excluding such evidence under MRE 403. See *People v Tackett*, unpublished per curiam opinion of the Court of Appeals, issued January 28, 2020 (Docket No. 350497).

effect." *Id*. at 487. Thus, while MRE 403 remains available in theory, it is clear from its application since 2012 that it has little or no practical effect in such cases.[2]

/s/ Douglas B. Shapiro

[2] The three-Justice dissent in *Watkins*, citing Const 1963, art 6, § 5, would have held that "MCL 768.27a is an unconstitutional legislative intrusion into the power of the judiciary to establish, modify, amend and simplify the practice and procedure in all courts of this state," *Watkins*, 491 Mich at 496 (KELLY, J., dissenting) (quotation marks and citation omitted), a conclusion that would apply equally to MCL 768.27b. However, the *Watkins* majority rejected that view. See also *McDougall v Schanz*, 461 Mich 15; 597 NW2d 148 (1999).