STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 20, 2012
v	No. 302231 Kent Circuit Court
BRIAN DOUGLAS CARPENTER, Defendant-Appellant.	LC No. 10-001917-FC

Before: RONAYNE KRAUSE, P.J., and DONOFRIO and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of assault with a dangerous weapon (felonious assault), MCL 750.82. Defendant was acquitted of one count of torture, MCL 750.85, and was sentenced to six months in jail with credit for two days served. We affirm.

Defendant and the victim were married in 1998.[1] According to their respective testimonies, defendant believed that their marriage was a healthy one, whereas by late 2009, the victim believed that the marriage was going poorly. The victim described an extensive pattern of abuse; including physical and emotional aggression directed at her; a web of rigid rules dictating, among other things, how much and what she could eat, where she shopped and how much she spent; and a variety of other threats and intimidation. Defendant denied most of the allegations, but explained that others were jokes and provided testimony asserting that there were genuine medical reasons why the victim should not eat certain foods. Defendant's prior wife provided testimony at trial generally tending to corroborate the victim's experiences.

Defendant contends that his former wife's testimony about his prior acts of domestic violence against her was inadmissible pursuant to MCL 768.27b. We review a trial court's decision whether to admit evidence for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). However, whether evidence is admissible under a statute involves a question of statutory interpretation which is reviewed de novo. *People v Smith*, 282 Mich App 191, 198; 772 NW2d 428 (2009). In relevant part, MCL 768.27b provides that "in a criminal action in which the defendant is accused of an offense involving domestic violence,

[1] At the time of trial, defendant and the victim were still legally married.

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 [MRE 403]." We note initially that MCL 768.27b does not violate the separation of powers clause of the constitution. *People v Schultz*, 278 Mich App 776, 779; 754 NW2d 925 (2008). Because *Schultz* is binding precedent, MCR 7.215(C)(2), MCR 7.215(J)(1), we will not consider defendant's argument to the contrary.

Defendant's former wife specifically testified that there were times during the marriage when defendant became angry and twisted her arm behind her back, pushed her against a wall, squeezed her knee or arm during arguments, and made comments about her weight and her diet. These acts would constitute "domestic violence" pursuant to 768.27b(5)(a), which includes, in relevant part:

> (*i*) Causing or attempting to cause physical or mental harm
>
> (*ii*) Placing a [spouse] in fear of physical or mental harm.
>
> * * *
>
> (*iv*) Engaging in activity toward a [spouse] that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

The behavior defendant engaged in toward his former wife did cause her harm and place her in fear of harm, and any reasonable person in her situation would feel "terrorized, frightened, intimidated, threatened, harassed, or molested." Defendant's daughter with his former wife testified that she often visited defendant during his marriage with the victim and observed similar controlling and aggressive behavior directed at the victim.

The evidence was clearly relevant to show defendant's propensity for using physical and emotional violence and controlling behaviors toward the victim, and, even more critically, relevant to the victim's credibility that defendant caused her physical wounds and tended to disprove the defense theory that she mutilated herself. See *People v Layher*, 238 Mich App 573, 578-580; 607 NW2d 91 (1999) (the credibility of witnesses is always at issue). The threshold for relevance is minimal. MRE 401; *People v Crawford*, 458 Mich 376, 390; 582 NW2d 785 (1998). This evidence was not, however, merely marginally probative; rather, evidence that defendant previously engaged in domestic violence directly increased the probability that he committed the assault in this case. It was especially relevant in response to the defense argument that the victim's wounds were a result of her own self-mutilation. Additionally, there was no danger that the jury gave the evidence undue or preemptive weight. Finally, the former wife's testimony was brief and the alleged prior acts were not graphic in nature. We do not find that there was any serious danger that the evidence would "be given undue or preemptive weight by the jury." *Crawford*, 458 Mich at 397-398; MRE 403.

Although the acts occurred more than ten years before the charged offense, the trial court did not abuse its discretion in determining that admission of the evidence was within the interest of justice. Under MCL 768.27b(4), "evidence of an act occurring more than 10 years before the charged offense is inadmissible . . . unless the court determines that admitting this evidence is in the interest of justice." Here, it was within the interest of justice to admit the evidence given that

it tended to show that defendant perpetrated similar conduct against his wives in an effort to control them and given that it was relevant to counter the defense's charge that the victim caused her own wounds.

Next, defendant contends that he was denied his constitutional right to present a defense and to a fair trial when the trial court refused to admit cellular telephone records that purportedly belonged to the victim. We disagree. Whether a defendant was denied his constitutional right to present a defense is reviewed de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). A criminal defendant has a right to present a defense. *People v Hayes*, 421 Mich 271, 278; 364 NW2d 635 (1984). However, that right is not absolute, and a defendant must comply with the applicable evidentiary rules. *Id*. at 279. The records were inadmissible hearsay because they were offered to prove the truth of the matter asserted, MRE 801(c), and were not properly offered under the business-records exception to the hearsay rule, MRE 803(6). Defendant failed to produce any witness from the telephone company to authenticate the records, MRE 901(b), or custodian to testify that they were kept in the ordinary course of business. MRE 803(6). Because the evidence was not admissible under the rules of evidence, the trial court did not deny defendant his right to present a defense by excluding the records.

Next, defendant contends that the trial court erred in allowing prosecution expert Desirae Kelley-Kato to offer testimony regarding the "general dynamics of domestic abuse.[2]" We review a trial court's decision whether to admit or exclude expert witness testimony for an abuse of discretion. *People v Steele*, 283 Mich App 472, 480; 769 NW2d 256 (2009). Pursuant to MRE 702:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The trial court "must ensure that all expert opinion testimony, regardless of whether it is based on novel science, is reliable." *Steele*, 283 Mich App at 481.

Defendant contends that Kelley-Kato was not qualified to testify as an expert. We disagree. A trial court has "considerable discretion" in determining whether a witness is qualified as an expert and a proposed expert "should not be scrutinized by an overly narrow test

[2] Kelley-Kato did not attempt to render an opinion as to whether the victim in this case had actually been a victim of domestic abuse or whether defendant had actually engaged in any. Rather, she discussed characteristics commonly present in relationships involving domestic abuse, including emotional and verbal abuse, intimidation, and other techniques used to exert and maintain control over a victim; as well as the fact that victims generally delay reporting any abuse to their friends or to authorities.

of qualifications." *People v Whitfield*, 425 Mich 116, 123; 388 NW2d 206 (1986). Kelley-Kato had more than nine years of experience as the program director and advocate for an outreach program that provided assistance and support to victims of domestic violence. Her position entailed "extensive ongoing training," attendance at various workshops, keeping up to date with relevant literature on the topic, and facilitating training for others and testifying as an expert. We find no abuse of discretion in concluding that Kelley-Kato was qualified to testify in this case as an expert.

Defendant contends that Kelley-Kato's testimony was not based on proper methods, principles, and underlying facts, and was not helpful to the jury. We disagree. Although an expert cannot testify that a specific victim *is* a battered spouse or that a specific defendant *is* guilty of engaging in domestic violence, expert testimony is proper regarding the general characteristics of battered spouse syndrome and may be admissible to explain specific behavior by a victim that might be "incomprehensible to average people," such as "prolonged toleration of physical abuse … attempts to hide or minimize the effect of the abuse, delays reporting the abuse to authorities or friends, or [denying] or recant[ing] the claim of abuse." *People v Christel*, 449 Mich 578, 580, 591-592; 537 NW2d 194 (1995). Kelley-Kato relied on her own experience in the field to describe common characteristics that were generally accepted in the community and based on recognized training materials. Her testimony avoided any statement of opinion about what specifically happened in this case, but it was helpful to explain to the jury why victims often delay reporting and that abusers may use intimidation and abuse to exert control over their partners. This was proper testimony and relevant to the credibility of defendant and the victim.

Next, defendant contends that the prosecutor committed misconduct that denied him a fair trial. A claim of prosecutorial misconduct presents a constitutional issue that is reviewed de novo on appeal. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Where, as in this case, a defendant fails to raise a contemporaneous objection and request for a curative instruction, review is limited to plain error affecting defendant's substantial rights. *Id.*; *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). We will reverse only if a convicted defendant is actually innocent or if the plain error seriously affected the fairness, integrity, or public reputation of the proceedings. *Callon*, 256 Mich App at 329. Furthermore, where a curative instruction could have alleviated any prejudicial effect, this Court will not find error warranting reversal. *Id*. at 329-330.

During his closing argument, the prosecutor stated that, despite having failed to consider all of the relevant information, unlike an "honest" expert, defendant's expert refused to change his testimony because he had to "keep that check rolling" and had to "keep people happy with [him]." The prosecutor also implied that defense counsel hid relevant evidence from the expert in an effort to conceal the truth. The record does show that defendant's expert did not review the police report, some of the photographs of the victim, and other materials. However, we think that the prosecutor's manner of presenting those deficiencies in defendant's case to the jury went beyond the bounds of propriety. Nonetheless, this indiscretion was not sufficiently egregious, particularly in context, to warrant reversal. The statements were brief and isolated, they were not highly inflammatory, they were not entirely unsupported by the evidence, and this case did not turn on a "battle of the experts." Moreover, a curative instruction could have alleviated any prejudice. See *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). Defendant contends that he was denied effective assistance of counsel by his attorney's failure to object to

the prosecutor's statements, but we deem this argument waived for failure to provide any meaningful supporting analysis. See *People v Kelly*, 231 Mich App 627,640- 641; 588 NW2d 480 (1998). We therefore do not find that defendant was denied a fair trial and we do not find defendant entitled to reversal.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Pat M. Donofrio
/s/ Karen Fort Hood