STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 19, 2012
v	No. 303451 Kent Circuit Court
NATHANIEL JOSEPH DYKSTRA, Defendant-Appellant.	LC No. 10-004339-FH

Before: METER, P.J., and SERVITTO and STEPHENS, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree home invasion, MCL 750.110a(3); felonious assault, MCL 750.82(1); assaulting, resisting, or obstructing a police officer, MCL 750.81d; and trespass, MCL 750.552. He was sentenced to 5 years and 6 months to 15 years' imprisonment for home invasion, two to four years' imprisonment for felonious assault, one year to two years' imprisonment for assaulting, resisting, or obstructing a police officer, and 30 days in jail for trespass. Defendant appeals as of right. We affirm.

Defendant claims that the trial court erred in admitting the victim's testimony concerning three prior incidents of domestic violence under MRE 404(b). Defendant did not object to the victim's testimony concerning the prior incidents at trial and thus, the issue is unpreserved. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). An unpreserved claim is reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). Despite defendant's argument, plaintiff correctly notes that the prior incidents were not admitted under MRE 404(b) but under MCL 768.27b. While the trial court did not explicitly state that the prior incidents were admitted under MCL 768.27b, the court gave the jury an instruction consistent with CJI2d 4.11a, which concerns evidence of other acts of domestic violence. The instruction is given where a trial court admits evidence under MCL 768.27b. Therefore, it is clear the trial court admitted the prior incidents under MCL 768.27b. Thus, defendant's reliance on 404(b) is misplaced.

MCL 768.27b(1) provides in relevant part:

> 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.

The act defines domestic violence to include causing physical or mental harm to an individual with whom the assailant has had a "dating relationship." The victim accused defendant of accosting her with a knife in the April 12, 2010 incident that gave rise to this case. Additionally, both the victim and defendant testified that they had, at one point, a frequent, intimate association. Thus, MCL 768.27b applied to this case because it concerned an offense involving domestic violence. The prior incidents to which the victim testified at trial also involved acts of domestic violence. The victim testified to three prior incidents at trial: a March 9, 2010, incident where defendant grabbed the victim's arm, threw her cellular telephone against a wall, and pushed her down on a couch; an encounter at the end of March or the beginning of April, 2010, where defendant placed a gun to the victim's chest and head; and an incident where defendant confronted the victim in the apartment's parking lot and started pounding on the victim's window and trying to open her car door. All three of the prior incidents would cause a reasonable person to feel intimidated and threatened and the incident where defendant placed a gun to the victim's head would certainly place the victim in fear of physical harm.

Although defendant couches his claim of unfair prejudice in the context of MRE 404 (b), MCL 768.27b provides its own test for admission of prior acts of domestic violence. The statute provides:

> Except as provided in subsection (4), in a criminal action in which the defendant is accused of an offense of domestic violence, evidence of 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. [MCL 769.27b(1).]

Felonious assault requires proof of specific intent. The defense theory of the case was that the victim was intoxicated and that he had neither inflicted any harm nor intended to cause the victim to fear physical injury. All three incidents are probative of defendant's intent to assault the victim. Also, MCL 768.27b permits evidence of prior domestic violence to show a defendant's propensity. *People v Railer*, 288 Mich App 213, 219-220; 792 NW2d 776 (2010). Like evidence admitted pursuant to MRE 404(b), evidence of prior acts of domestic violence is also subject to a MRE 403 analysis. The defense claims that the nature of the prior incidents was highly inflammatory and could not pass the balancing test under MRE 403 because one incident involved a firearm. The evidence regarding the domestic violence in this case came almost entirely from the victim and defendant. A neighbor of the victim also testified about sounds of an apparent altercation that she heard on the night of the incident giving rise to this case. The parties offered diametrically opposed versions of the events of April 12, 2010, leaving the jury to resolve the case based upon the credibility of the victim and defendant. Under such a circumstance, the prejudicial value of the evidence is tremendous. However, we cannot say that the failure of the trial court to exclude the evidence was clear error. It is possible that an argument could be effectively made that while the prejudicial value of the prior incidents was tremendous, it did not substantially outweigh the probative value, even regarding the singular firearm incident. The trial court's admission of the prior incidents does not rise to the level of plain error. *Carines*, 460 Mich at 763.

In the alternative, defendant argues that his trial counsel was ineffective for failing to object to the prior acts evidence both due its unfair prejudice and the failure to provide notice as

required by the statute. Because the issue was not raised before the trial court, our review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To establish ineffective assistance of counsel, a defendant must "show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000), citing *Strickland v Washington*, 466 US 668, 675; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To show prejudice, a defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Toma*, 462 Mich at 302-303, quoting *People v Mitchell*, 454 Mich 145, 158; 560 NW2d 600 (1997).

Defendant claims that defense counsel was ineffective for failing to object to the lack of notice of the admission of the prior incidents. On appeal, defendant makes this claim in the context of evidence admitted under MRE 404(b), which, like MCL 768.27b, requires the prosecution to provide notice. MCL 768.27b requires that the prosecution disclose the evidence 15 days before trial. MCL 768.27b(2). Defendant argues that since all three incidents should have been excluded under a MRE 403 analysis and because the testimony regarding the other incidents bolstered the victim's account, the failure to object to the lack of notice was outcome determinative. The lower court file does not contain any record of a notice being filed. The defense, rather than offer an affidavit in support of its claim, merely argues that the lack of records is proof that the notice was not given. The prosecution makes no affirmative statement that notice was given but asserts that the notice requirement is "informal," and points to the failure of defendant to allege a discovery violation. Defendant has the burden to prove both that there was a lack of notice and the error was outcome determinative. Defendant has failed to prove that notice was not given through discovery and therefore cannot prevail on a claim for ineffective assistance of counsel due to a lack of proper disclosure. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant also claims that defense counsel was ineffective for failing to request a jury instruction that would reduce the possibility that the jury would use the prior incidents as propensity evidence or as evidence of defendant's bad character. MCL 768.27b permits evidence of prior domestic violence in order to show a defendant's propensity, *Railer*, 288 Mich App at 219-220, and a defendant's character, *Pattison*, 276 Mich App at 615. Counsel is not required to make frivolous or meritless objections. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Defendant has not shown prejudice from defense counsel's failure to request a limiting instruction. *Toma*, 462 Mich at 302-303.

Affirmed.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Cynthia Diane Stephens