

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
August 7, 2012

v

ESAU BURIEL,

No. 304873
Saginaw Circuit Court
LC No. 09-033284-FC

Defendant-Appellant.

Before: GLEICHER, P.J., and SAAD and BECKERING, JJ.

PER CURIAM.

A jury convicted defendant of first-degree premeditated murder, MCL 750.316, and carrying a weapon with unlawful intent, MCL 750.226. The trial court sentenced defendant as a habitual offender, fourth offense, MCL 769.12, to prison terms of life for first-degree murder, and life with the possibility of parole for carrying a weapon with unlawful intent. Defendant appeals and, for the reasons set forth below, we affirm.

I. DUE PROCESS

The jury convicted defendant for the 1989 murder of his girlfriend, Kimberly Currington. Defendant claims his due process rights were violated because of a 20-year delay between the murder and defendant's arrest and trial. He argues that the extended delay prevented him from presenting a meaningful defense. This Court reviews a trial court's decision whether to dismiss charges because of prearrest delay for an abuse of discretion. *People v Tanner*, 255 Mich App 369, 413; 660 NW2d 746, rev'd on other grounds 469 Mich 437 (2003), citing *People v Herndon*, 246 Mich App 371, 389; 633 NW2d 376 (2001). The trial court does not abuse its discretion when it makes a decision within the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). This Court reviews de novo claims regarding constitutional due process violations. *Tanner*, 255 Mich App at 413.

The right to a speedy trial does not apply to delay occurring before an arrest or initiation of a formal criminal charge. *Id.* at 414. However, the Due Process Clause¹ does play a limited

¹ US Const, Am XIV, § 1.

role in preventing unjustified preindictment or prearrest delay. *People v White*, 208 Mich App 126, 134; 527 NW2d 34 (1994), citing *United States v Marion*, 404 US 307, 324-326; 92 S Ct 455; 30 L Ed 2d 468 (1971) and *United States v Lovasco*, 431 US 783, 789; 97 S Ct 2044; 52 L Ed 2d 752 (1977). To warrant dismissal of charges due to a prearrest delay, defendant must show substantial prejudice to his right to a fair trial and intent by the prosecution to gain a tactical advantage. *Id.* at 134.

In deciding this issue, we balance the actual prejudice to the defendant against the state's reasons for the delay. Defendant bears the initial burden to demonstrate that prejudice resulted from the delay, and the burden then shifts to the prosecutor to explain the delay. *Tanner*, 255 Mich App at 414, citing *Lovasco*, 431 US at 790. If a defendant has demonstrated prejudice, the prosecution must show that the reason for the delay was sufficient to justify the prejudice. *People v Adams*, 232 Mich App 128, 140; 591 NW2d 44 (1998). A balancing test is applied because the state may have an interest in delaying a prosecution that conflicts with defendant's interest in a prompt adjudication of the case. *People v Cain*, 238 Mich App 95, 108-109; 605 NW2d 28 (1999).

Defendant must demonstrate actual and substantial prejudice that impairs his right to a fair trial. Substantial prejudice is an impairment of defendant's ability to defend against the charges to the extent that it likely affected the outcome of the trial. *Tanner*, 255 Mich App at 414. Defendant argued in the trial court that, because of the delay, he would have difficulty locating witnesses and obtaining therapy records. The trial court granted several adjournments and authorized \$1,500 to assist defendant in preparing for trial. Defendant says he did not present any witnesses because of the 20-year delay, yet defendant failed to identify any witness that he would have called or was prevented from calling because of the delay. Further, defendant cites no particular evidence that was lost or that he was not able to present. Prejudice is not established by general allegations or speculative claims of missing witnesses or other lost evidence. *Tanner*, 255 Mich App at 414, citing *Cain*, 238 Mich App 109-110. Clearly, defendant failed to establish any prejudice and therefore the prosecution is not required to proffer an explanation for the delay. Nonetheless, because the prosecutor addressed the reasons for the delay, we will review this issue.

When looking to the prosecution's explanation for the delay, a court should consider whether the delay was deliberate and whether undue prejudice resulted. *People v Herndon*, 246 Mich App at 390. Plaintiff explained that a reason for delay in bringing charges was that critical witnesses, the children of the victim, were unable to testify after the murder of their mother and the case detective retired in 1991 due to poor health. Defendant notes that two of the children told a family member in 1989 that they viewed defendant assault Currington. However, there is evidence of record that the children, who were nine, seven, and five years old at the time of the crime, were too terrified and traumatized to testify, and required time and counseling to recover. A prosecutor does not violate due process if an indictment is delayed until the prosecutor is satisfied that guilt beyond a reasonable doubt can be established. *McIntire*, 232 Mich App at 95-96; see also *Adams*, 232 Mich App at 140, citing *Lovasco*, 431 US at 795-796.

II. ADMISSION OF EVIDENCE

Defendant argues that the trial court should not have admitted evidence of past incidents of his domestic violence under MCL 768.27b because the statute violates ex post facto protections. However, this Court has specifically held that MCL 768.27b, when applied to cases arising before 2007, does not violate ex post facto prohibitions because MCL 768.27b “did not change the burden of proof necessary to establish the crime, ease the presumption of innocence, or downgrade the type of evidence necessary to support a conviction.” *People v Schultz*, 278 Mich App 776, 778-779; 754 NW2d 925 (2008), citing *People v Pattison*, 276 Mich App 613, 619; 741 NW2d 558 (2007). MCL 768.27b applies to the admissibility of a type of evidence, and its enactment does not render an otherwise innocent behavior into a criminal act. *Id.* at 779, citing *People v Dolph–Hostetter*, 256 Mich App 587, 591-601; 664 NW2d 254 (2003).

Defendant also argues that MCL 768.27b impinges on the constitutional authority of the Supreme Court to establish the procedures of the court system because it allows evidence of past incidents of domestic violence to be admitted in cases involving domestic violence to demonstrate a defendant’s character, despite the prohibition against admission of other acts to demonstrate character in MRE 404(b)(1). This separation of powers argument has been rejected by our Supreme Court in the context of MCL 768.27a, but the principle and reasoning remains the same for MCL 768.27b. *People v Watkins*, 491 Mich 450; ___ NW2d ___ (Docket No. 142031, decided June 8, 2012), slip op pp 14-15, 22.

Defendant claims that the trial court erred by admitting evidence of defendant’s previous instances of domestic violence. MCL 768.27b provides that, if a defendant is accused of an offense involving domestic violence, evidence of his commission of other acts of domestic violence is admissible for any purpose for which it is relevant unless excluded by MRE 403. *Schultz*, 278 Mich App at 778. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403. Unfair prejudice does not mean damaging. *Lewis v Legrow*, 258 Mich App 175, 199; 670 NW2d 675 (2003). Rather, unfair prejudice exists when 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. *Taylor v Mobley*, 279 Mich App 309, 315; 760 NW2d 234 (2008). Evidence that is unfairly prejudicial goes beyond the merits of the case to inject issues broader than a defendant’s guilt or innocence. *People v McGhee*, 268 Mich App 600, 614; 709 NW2d 595 (2005).

“[I]n cases of domestic violence, MCL 768.27b permits evidence of prior domestic violence in order to show a defendant’s character or propensity to commit the same act.” *People v Railer*, 288 Mich App 213, 219-220; 792 NW2d 776 (2010). Thus, evidence of prior domestic assaults, the motivation for them, and the viciousness of the attacks is admissible here based on a theory of propensity. Further, the testimony is relevant to identify defendant as the murderer, and also demonstrated motive. Both other acts witnesses testified about defendant’s violent reaction to his jealousies in relationships.

Because propensity is a proper purpose for admission of the evidence, the possibility of the jury using it in such a fashion cannot be considered unfair prejudice. Further, the viciousness of the assaults described is not likely to lead the jury to decide the case based on emotional reactions in light of the documented violence of this murder. Therefore, the probative value of the testimony was not outweighed by unfair prejudice and the trial court did not abuse its discretion in admitting the testimony pursuant to MCL 768.27b.

Defendant further argues that evidence of his previous domestic violence was admitted contrary to MRE 404(b)(1). However, because the evidence was admissible under MCL 768.27b, it is not relevant if it would not have been admissible under the evidentiary rule. However, because the evidence was relevant to show identity and motive, it would also have been admissible under the evidentiary rule. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004); *People v Golochowicz*, 413 Mich 298, 310-311; 319 NW2d 518 (1982).

III. WEIGHT OF THE EVIDENCE

Finally, defendant argues that the trial court erred in denying defendant's motion for a new trial because the guilty verdict was against the great weight of the evidence. We disagree. A verdict is against the great weight of the evidence when the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001).

Defendant argues that he could not have murdered Currington because, although the crime scene was saturated with blood, police found no blood on him, his possessions, or the vehicle he used the day of the murder. However, two investigators and an expert in bloodstain pattern analysis testified that blood was pooled around Currington's head on the bed, and splattered away from her head mainly on the wall behind her, but also on the ceiling and walls to the left and right of her. Items in front of Currington had little or no blood on them. The bloodstain pattern expert believed that Currington was not in an upright position during most of the bloodshed because blood did not drip onto her clothes, and her position was relatively unchanged during the assault. Therefore, it was not against the great weight of the evidence to convict defendant, and the lack of blood evidence does not conflict with a finding that defendant was guilty. Also, as plaintiff argues, the testimony that defendant arrived late to work wearing clothing that smelled soiled could be interpreted as showing that he had taken time after the murder to change and dispose of his clothing, thereby destroying any physical evidence that might have been on the clothes.

Further, in examining the bite mark on Currington's body, an expert noted the arch of defendant's upper teeth fit the contour of the bite mark and defendant's main teeth followed exactly the pattern of the bite mark on the victim's arm. Defendant could not be excluded as the person that left the bite mark. Moreover, defendant was the last person seen with Currington. He was seen standing over her with a knife in his hand as she lay on a bed. Witnesses found Currington's body hours later in the same position on the bed.

Affirmed.

/s/ Elizabeth L. Gleicher

/s/ Henry William Saad

/s/ Jane M. Beckering