

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
October 11, 2012

v

FRANKLIN EUGENE ADAMS,  
Defendant-Appellant.

No. 305557  
Monroe Circuit Court  
LC No. 10-038691-FH

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Before: JANSEN, P.J., and FORT HOOD and SHAPIRO, JJ.

PER CURIAM.

Defendant was convicted by a jury of aggravated stalking.<sup>1</sup> The trial court sentenced defendant, as a fourth habitual offender,<sup>2</sup> to 96 to 360 months' imprisonment. Defendant appeals by right. We affirm.

**I. PRIOR ACTS EVIDENCE**

Defendant argues that that the trial court erred when it admitted into evidence testimony regarding defendant's "history of violent acts against other people." Specifically, defendant argues that the admission of this evidence violated MRE 404(b)'s prohibition of character or propensity evidence. We disagree.

This court reviews the trial court's decision to admit or exclude evidence for an abuse of discretion.<sup>3</sup> As the Supreme Court has noted:

The general rule [governing prior acts evidence] is more easily stated than applied: evidence of other crimes, wrongs, or acts of an individual is inadmissible to prove a propensity to commit such acts. . . .Underlying the rule is the fear that a

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<sup>1</sup> MCL 750.411i.

<sup>2</sup> MCL 769.12.

<sup>3</sup> *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

jury will convict the defendant inferentially on the basis of his bad character rather than because he is guilty beyond a reasonable doubt of the crime charged.<sup>[4]</sup>

The admissibility of prior acts evidence is governed by MRE 404(b)(1). MRE 404(B)(1) explains that

[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Accordingly, prior acts evidence is admissible only if “(1) the evidence [is] offered for a proper [that is, non-character or non-propensity] purpose; (2) the evidence [is] relevant; and (3) the probative value of the evidence [is] not [] substantially outweighed by unfair prejudice [under MRE 403].”<sup>5</sup>

Regarding whether prior acts evidence is offered for a proper purpose, the Supreme Court has explained that prior acts evidence is admissible even if it is incidentally probative of a defendant’s character, so long as it is also probative of a non-character purpose. Specifically, the Court explained: “[e]vidence relevant to a noncharacter purpose is *admissible* under MRE 404(b)(1) *even if* it also reflects on a defendant’s character. Evidence is *inadmissible* under this rule *only* if it is relevant *solely* to the defendant’s character or criminal propensity.”<sup>6</sup> In this case, the testimony was introduced for a proper purpose. Defendant was charged with aggravated stalking.<sup>7</sup> “Aggravated stalking consists of the crime of ‘stalking’ . . . and the presence of an aggravating circumstance . . . .”<sup>8</sup> To sustain its burden of proof, the prosecution was required to show, as essential elements of the offense, that the victim felt “terrorized, frightened, intimidated, threatened, harassed, or molested” and that defendant’s conduct “would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested.”<sup>9</sup> To establish that the victim was frightened by defendant’s conduct and that a reasonable person in the victim’s position would feel frightened, the trial court ruled admissible testimony indicating that defendant had a “history of violent acts against other people.” On appeal, defendant contends that the evidence was not offered for one of the non-character purposes

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<sup>4</sup> *People v Crawford*, 458 Mich 376, 383-384; 582 NW2d 785 (1998).

<sup>5</sup> *People v Kahley*, 277 Mich App 182, 184-85; 744 NW2d 194 (2007).

<sup>6</sup> *People v Mardlin*, 487 Mich 609, 615-16; 790 NW2d 607 (2010) (emphasis in original).

<sup>7</sup> MCL 750.411i.

<sup>8</sup> *People v Threatt*, 254 Mich App 504, 505; 657 NW2d 819 (2002).

<sup>9</sup> MCL 750.411i(1)(e).

specifically mentioned in MRE 404(b), and argues that the testimony was therefore not admitted for a proper purpose. However, the non-character purposes enumerated in MRE 404(b) do not constitute an exhaustive list of proper purposes.<sup>10</sup> Indeed, even though not specifically enumerated as a basis of admissibility in MRE 404(b)(1), this court has held that the admission into evidence of a defendant's prior acts to establish an essential element of the crime at issue constituted a proper non-character purpose.<sup>11</sup> Accordingly, because the testimony in this case was not "relevant *solely* to the defendant's character or criminal propensity,"<sup>12</sup> but was also relevant to establish that the prosecution had met its burden of proof, we conclude that it was offered for a proper purpose under MRE 404(b)(1).

The evidence of defendant's prior acts of violence was also relevant. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."<sup>13</sup> A not guilty plea places all elements of a criminal offense at issue.<sup>14</sup> In this case, the elements of aggravated stalking, including the victim's fear and whether a reasonable person in her position would feel frightened, were at issue. The victim's awareness of defendant's violent past would tend to make it more likely that his stalking conduct caused the victim to feel frightened and would cause a reasonable person in her position to feel frightened. Accordingly, testimony regarding his violent past was relevant.<sup>15</sup>

Finally, the probative value of the testimony was not outweighed by unfair prejudice under MRE 403. "Unfair prejudice may exist where there is a danger that the evidence will be given undue or preemptive weight by the jury, or where it would be inequitable to allow the use of the evidence."<sup>16</sup> In this case, as discussed, the evidence of defendant's history of violence was probative to an element of the offense. By contrast, the prejudicial effect was minimal. The prosecution took pains to provide the jury with minimal information about defendant's history so as to minimize the prejudicial effect. The prosecution asked the victim (defendant's therapist) if she was "aware that he had a past history of violent acts against other people" and the victim responded, "Yes I did." Later, the prosecution elicited from a police officer who investigated the

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<sup>10</sup> *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000) ("The second sentence of MRE 404(b)(1) . . . emphasizes that [the rule's] prohibition [on propensity evidence] does not preclude using the evidence for other relevant purposes. MRE 404(b)(1) lists some of the permissible uses. The list is not, however, exhaustive. MRE 404(b)(1) thus reiterates that, under MRE 402, all relevant evidence *is* admissible, except as otherwise provided by the United States and Michigan Constitutions and other rules.").

<sup>11</sup> *People v Aguwa*, 245 Mich App 1, 7-8; 626 NW2d 176 (2001).

<sup>12</sup> *Mardlin*, 487 Mich at 615-16 (emphasis in original).

<sup>13</sup> MRE 401.

<sup>14</sup> *Crawford*, 458 Mich at 389.

<sup>15</sup> *Id.* at 389-390.

<sup>16</sup> *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008) (citations omitted).

case that he brought another officer during the investigation “due to [defendant’s] past history.” The comments elicited by the prosecution provided the minimum amount of detail possible to convey the fact that the victim (and a reasonable person in her position) had reason to feel frightened as a result of defendant’s repeated threats. Based on the sparse details provided, there was no danger defendant’s violent history would be given undue weight with the jury.<sup>17</sup> There was no argument advanced by the prosecution that defendant was a bad person or that he was more likely to have committed the offense because of his history. Accordingly, we conclude that the probative value of the evidence outweighed any unfair prejudice to defendant and the evidence was properly admitted.

In making his MRE 404(b) argument, defendant also argues that the victim improperly testified that she knew defendant “had been released from prison approximately six years before he came to see me.” Contrary to defendant’s argument, this testimony does not constitute the impermissible introduction of character or propensity evidence. Rather, this testimony was offered by the victim in response to questions from defense counsel. In the context of questions about the timeframe of his violent “history,” it was responsive for the victim to reply that he was released for these acts as recently as six years ago. Having invited this allegedly improper testimony, defendant cannot assert a claim of error on appeal.<sup>18</sup>

## II. INEFFECTIVE ASSISTANCE OF COUNSEL

“Whether a defendant received ineffective assistance of trial counsel presents a mixed question of fact and constitutional law.”<sup>19</sup> “The trial court must first find the facts and then decide whether those facts constitute a violation of the defendant’s constitutional right to effective assistance of counsel. The trial court’s factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo.”<sup>20</sup> Where, as here, claims of ineffective assistance of counsel have not been preserved, this Court’s review is limited to errors apparent on the record.<sup>21</sup>

“To prove a claim of ineffective assistance of counsel, a defendant must establish [first] that counsel’s performance fell below objective standards of reasonableness and [second] that, but for counsel’s error, there is a reasonable probability that the result of the proceedings would have been different.”<sup>22</sup> “The defendant must overcome a strong presumption that counsel’s

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<sup>17</sup> *Id.*

<sup>18</sup> *People v McPherson*, 263 Mich App 124, 139; 687 NW2d 370 (2004) (“Under the doctrine of invited error, a party waives the right to seek appellate review when the party’s own conduct directly causes the error.” (citation omitted)).

<sup>19</sup> *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011) (citations omitted).

<sup>20</sup> *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004) (citations omitted).

<sup>21</sup> *People v Lockett*, 295 Mich App 165, 186; 814 NW2d 295 (2012).

<sup>22</sup> *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010).

performance constituted sound trial strategy.”<sup>23</sup> With respect to what constitutes sound trial strategy, this Court has noted that “defense counsel is not required to make frivolous or meritless motions . . . .”<sup>24</sup>

Here, defendant argues that his counsel should have moved for a mistrial on the basis of the victim’s statement (that defendant was released from incarceration six years before beginning treatment) and the police officer’s comment about defendant’s “past history” of violence. We disagree. Any motion defendant’s trial counsel would have made for a mistrial based on these comments would have been meritless. In particular, “[a] mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant, and impairs his ability to get a fair trial.”<sup>25</sup> “[T]he trial court must exercise the power to declare a mistrial with great caution and employ less drastic alternatives which would be revealed by the ‘scrupulous exercise’ of judicial discretion.”<sup>26</sup>

With regard to the victim’s answer to defense counsel’s question, there is nothing “irregular” in defendant receiving a responsive answer to a question posed by his own counsel. With regard to the police officer’s comment, the vague phrase “due to past history” was not sufficiently prejudicial to defendant’s rights to warrant a mistrial even if we concluded the statement was improperly admitted. Assuming the comment supported the proposition that defendant had some sort of history of violence, the information provided no details not already before the jury as a result of the victim’s proper MRE 404(b) evidence relating to defendant’s past history of violence against others. Accordingly, there would be no grounds for a mistrial and counsel was not ineffective for failing to make such a futile motion.

We also note that defendant has failed to demonstrate the prejudice necessary to maintain an ineffective assistance of counsel claim. As explained above, evidence that defendant had a history of violence was properly before the jury under MRE 404(b); accordingly, any added details that may have improperly come before the jury were not so prejudicial that this Court could conclude there was a reasonable probability that they altered the outcome of the proceedings. Additionally, the evidence of defendant’s guilt (including 27 violations of a personal protective order (PPO) and numerous threats to end the victim’s life) was overwhelming; accordingly, references to defendant’s time in jail and some sort of “past history” were immaterial to his conviction.

### III. SENTENCING GUIDELINES

Lastly, defendant asserts that the trial court clearly erred in finding substantial and compelling reason for departing from the recommended minimum sentencing range. To support

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<sup>23</sup> *Matuszak*, 263 Mich App at 58.

<sup>24</sup> *People v Knapp*, 244 Mich App 361, 386; 624 NW2d 227 (2001).

<sup>25</sup> *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

<sup>26</sup> *People v Little*, 180 Mich App 19, 23; 446 NW2d 566 (1989).

a sentence more severe than the recommended minimum sentence range under the legislative guidelines, a trial court must find the existence of an objective and verifiable factor which provides a substantial and compelling reason for departure.<sup>27</sup> This Court reviews the existence of such a factor for clear error.<sup>28</sup> Whether such a factor is objective and verifiable is a question this Court reviews de novo.<sup>29</sup> Whether such a factor constitutes substantial and compelling reason to depart from the sentencing guidelines is reviewed for an abuse of discretion.<sup>30</sup> Finally, the amount by which a trial court departs is also reviewed for an abuse of discretion.<sup>31</sup>

The Legislature intended the courts to find substantial and compelling reasons for departure only in “exceptional cases.”<sup>32</sup> Only factors that are “objective and verifiable” may be considered for purposes of departing from the guidelines.<sup>33</sup> Where the trial court finds substantial and compelling reasons to depart from the sentencing guidelines, the court must specify on the record both the reasons supporting departure and justification for the proportionality of the particular departure sentence imposed.<sup>34</sup>

In this case, defendant’s recommended minimum sentence range under the legislative guidelines was 24 to 76 months.<sup>35</sup> The trial court departed upward by 20 months and imposed a sentence of 96 to 360 months. The trial court offered a lengthy explanation of the departure and why it was proportionate. In particular, the trial court discussed that the nature of defendant’s threats to the victim was particularly disturbing and credible given that (1) defendant had a history of violence, (2) he threatened not only the victim, but her family members, including her son and parents, and (3) the threats were of a particularly callous and violent nature, including a statement that he would bet \$800 she would be dead before Christmas. The contents of the threats and defendant’s history of violence were objective and verifiable factors providing substantial and compelling reason for departure.<sup>36</sup>

In addition, the trial court appears to have concluded that defendant posed a continuing threat to the victim and her safety. “Anticipatory harm” based on an established pattern of behavior toward a specific victim is an objective and verifiable factor.<sup>37</sup> Here, the court

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<sup>27</sup> MCL 769.34(3).

<sup>28</sup> *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007).

<sup>29</sup> *Id.*

<sup>30</sup> *People v Lucey*, 287 Mich App 267, 270; 787 NW2d 133 (2010).

<sup>31</sup> *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003).

<sup>32</sup> *People v Babcock*, 469 Mich 247, 257; 666 NW2d 231 (2003).

<sup>33</sup> *Id.*

<sup>34</sup> *People v Smith*, 482 Mich 292, 313-314; 754 NW2d 284 (2008).

<sup>35</sup> MCL 777.66; MCL 777.21(3)(c).

<sup>36</sup> *Babcock*, 469 Mich at 255.

<sup>37</sup> *People v Horn*, 279 Mich App 31, 47-48; 755 NW2d 212 (2008).

recognized that defendant violated the PPO numerous times, as many as two dozen. He also had a history of violent behavior and the offense arose in the context of a therapeutic relationship, meaning that, rather than benefiting from therapy, defendant turned what should have been a positive relationship into an opportunity for threats and harassment. Recidivism and failed efforts at rehabilitation constitute acceptable justification for an upward departure.<sup>38</sup>

The trial court also spent some time discussing the emotional impact of defendant's conduct on the victim. Defendant argues the trial court's discussion of the victim's emotional response to defendant's crime constitutes the consideration of factors already accounted for by OV 4 in violation of MCL 769.34(3)(b). However, from a review of the trial court's reasoning we conclude the victim's emotional response was not a factor in the trial court's departure. Instead, the trial court offered its discussion of the victim's emotional sufferings merely to refute defendant's contention at sentencing that the victim held a "position of power" in the therapeutic relationship. Moreover, even assuming that the trial court relied on the victim's emotional suffering, which was already accounted for by OV 4, the trial court specified it intended "this sentence be sustained if an appellate court determines that any of my rationale for departure survives review." Because it is readily apparent the trial court would have imposed the same sentence based on any one of the factors discussed, remand is unnecessary.<sup>39</sup> Lastly, based on defendant's violent history, the serious and credible nature of the threats, and the potential that defendant would harm the victim in the future, the extent of the departure was not an abuse of discretion.

Affirmed.

/s/ Kathleen Jansen  
/s/ Karen M. Fort Hood  
/s/ Douglas B. Shapiro

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<sup>38</sup> *Id.* at 44-45.

<sup>39</sup> *People v Solmonson*, 261 Mich App 657, 670; 683 NW2d 761 (2004) ("This Court must remand the case to the trial court for resentencing or rearticulation of its substantial and compelling reasons to justify its departure only if this Court cannot make such a determination or if the Court determines that the trial court would not have departed to the same degree." (citations omitted)).