STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 18, 2012
v	No. 305730 Oakland Circuit Court
ALBERT TERRY BENNETT, Defendant-Appellant.	LC No. 2010-231279-FH

Before: STEPHENS, P.J., and OWENS and MURRAY, JJ.

PER CURIAM.

Defendant was convicted by a jury of domestic violence, third offense, MCL 750.81(4). He was sentenced, as a fourth habitual offender, MCL 769.12, to 2 to 15 years' imprisonment. Defendant appeals by right. We affirm defendant's conviction, but remand to the trial court for entry of an amended judgment of sentence.

This case arises from a domestic assault complaint made to the Pontiac Police Department on the evening of March 9, 2010. Defendant first argues that the trial court erred in admitting evidence of a 2004 domestic violence incident involving his ex-wife. We disagree.

"To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal." *People v Douglas*, 296 Mich App 186, 191; 817 NW2d 640 (2012). Defendant argues that trial counsel preserved the issue with an objection, citing to pages 10-13 of the trial transcript. In those pages, the trial court judge, the prosecutor, and defendant's trial counsel discuss the prosecution's Notice of Intent to Introduce Other Acts of Domestic Violence Pursuant to MCL 768.27b:

> *The Court*: What I have ruled on is that you can bring in the 2004 incident regarding Mr. Bennett's former wife, and you can bring in the fact that they had been married. . . .
>
> *Mr. Nael (attorney for the prosecution)*: May I—may I request, then instead of the—the fifth, request a stipulation that she had died of natural causes—may I request, at least, that they are no longer married? Because the first one says that Mr. Bennett and [d]efendant—or, that Mr. Bennett and his wife were married in 1984. The—the next stipulation would be as to the injuries, 44B [sic], and then I—if I may, close out saying they're no longer married?

The Court: That's fine.

Mr. Taylor (attorney for the defense): I don't have any objections to that.

The transcript indicates that defendant's trial counsel did not object when the court was discussing its ruling on the prosecution's Notice of Intent to Introduce Other Acts of Domestic Violence Pursuant to MCL 768.27b. Accordingly, the issue of the admission of defendant's 2004 domestic violence incident involving his ex-wife is not preserved for appellate review.

"This Court reviews for plain error unpreserved challenges regarding the admission of evidence that affected the defendant's substantial rights." *Douglas*, 296 Mich App at 191 (citations omitted). The defendant bears the burden to demonstrate the existence of plain error affecting his or her substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). If a defendant fails to establish plain error, the defendant forfeits the right to appellate review of the issue. *Id*. Moreover, even if the defendant establishes plain error, "a reviewing court will reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Douglas*, 296 Mich App at 191-192 (citations and quotations omitted).

Defendant has failed to establish that the admission of his prior domestic violence incident involving his ex-wife was plain error. "[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," so long as the evidence comports with MRE 403, which requires that all evidence be more probative than prejudicial. *People v Railer*, 288 Mich App 213, 219-220; 792 NW2d 776 (2010). At trial, the prosecution read a stipulation to the jury immediately before resting its case:

> [T]here was a stipulation by the parties previously agreed upon, and that is that—first that there is a Lois Edith Bennett and [d]efendant Albert Terry Bennett were married on June 12th, 1984. And that Ms. Lois Edith Bennett was Mr. Albert Terry Bennett's former wife. And that on or about September 15th, 2004, [d]efendant repeatedly struck Lois Bennett in the head, which caused Ms. Bennett to lose consciousness. As a result, Lois Bennett's injuries were treated at Pontiac Osteopathic Hospital. And that would be the stipulation by both parties to a minor matter.

Defendant focuses on two instances in the prosecutor's closing argument, neither of which was objected to at trial, in which the prosecutor alluded to the incident described in the stipulation:

> But *given his history*, given his past and the way he acts towards women and his anger issues, clearly, his possessive issues, she decided this was not the relationship for her.
>
> * * *
>
> And she's in a very dysfunctional relationship with that man, Mr. Bennett (indicating), and on March 9th, 2010, consistent with how he's acted with her in

> the past, and *consistent with how he's treated his wife in the past*, he became angry with Ms. [Yolanda] Ringstaff and he beat her up again. [Emphasis added.]

We detect no error in these statements. They were permissible editorial references to the earlier domestic violence incident, evidence of which was properly admitted under MCL 768.27b. Defendant argues that the probative value of evidence of the 2004 incident violated MRE 403 because "it was used as classic propensity evidence" and it implied that defendant "is a bad person who has a propensity to assault significant others." However, "classic propensity evidence" is a permissible, indeed an intended, use of evidence admitted under MCL 768.27b. See *Railer*, 288 Mich App at 219-220. Further, the trial court specifically instructed the jury to use the earlier domestic violence incident only to consider whether defendant acted purposely when he assaulted the victim in the present case:

> If you believe this evidence, you must be very careful only to consider it for certain purposes, and then only think about whether this evidence tends to show that the [d]efendant had a reason to commit the crime—that the [d]efendant specifically meant to assault and batter [the victim], the [d]efendant acted purposely; that is, not by accident or mistake or because he misjudged the situation . . . .
>
> You must not consider this evidence for any other purpose. For example, you must not decide that it showed that the [d]efendant is a bad person or that he was likely to commit crimes. . . . All the evidence must convince you beyond a reasonable doubt that the [d]efendant committed the alleged crime, or you must find him not guilty.

"Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Moreover, this Court has acknowledged that "the Michigan Legislature intended to allow juries the opportunity to weigh a defendant's behavioral history and view the case's facts in the larger context that the defendant's background affords," and concluded that "prior-bad-acts evidence of domestic violence can be admitted at trial because a full and complete picture of a defendant's history tends to shed light on the likelihood that a given crime was committed." *People v Cameron*, 291 Mich App 599, 609-610; 806 NW2d 371 (2011).

With regard to whether defendant's 2004 incident of domestic violence was substantially more prejudicial than probative under MRE 403:

> All relevant evidence is prejudicial; only *unfairly* prejudicial evidence may be excluded [under MRE 403]. Unfair prejudice exists when there is a tendency that evidence with little probative value will be given too much weight by the jury. Unfair prejudice may arise where considerations extraneous to the merits of the case, such as jury bias, sympathy, anger, or shock, are injected. [*People v Danto*, 294 Mich App 596, 600; ___ NW2d ___ (2011) (citations and quotations omitted).]

Here, the evidence of defendant's prior instance of domestic violence had significant probative value: it was expressly admissible under MCL 768.27b. There was little chance of the jury giving undue weight to the evidence: as noted, the trial court gave a limiting instruction regarding how the jury should consider the prior incident. Finally, there is no evidence that the evidence was used for reasons "extraneous to the merits of the case." *Danto*, 294 Mich App at 600. Accordingly, we conclude that the evidence of defendant's prior incident of domestic violence was admissible under MRE 403.

In short, defendant has failed to establish that the admission of evidence regarding his prior incident of domestic violence amounted to plain error affecting his substantial rights. Accordingly, he has forfeited his right to appellate review of this issue.

Defendant next argues that the Judgment of Sentence erroneously lists "MCL 750.814," and that because there is no such statute, the Judgment of Sentence should be corrected to list the offense of which defendant was convicted, MCL 750.81(4). We agree.

The Prosecuting Attorneys Coordinating Council (PACC) code for domestic violence, third offense, was entered into the "MCL citation" box on the Judgment of Sentence. We remand to the trial court for the limited purpose of amending the Judgment of Sentence to either reflect the correct statutory citation in the "MCL citation" box or movement of the PACC code to the "PACC code" box.

We affirm defendant's conviction and sentence, but remand the case to the trial court with instructions to enter an amended Judgment of Sentence as noted above. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Donald S. Owens
/s/ Christopher M. Murray