

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
November 29, 2012

v

LEONARD MARCUS HORTON,
Defendant-Appellant.

No. 307573
Ingham Circuit Court
LC No. 11-000460-FH

Before: CAVANAGH, P.J., and HOEKSTRA and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of assault and battery, MCL 750.81, and two counts of interfering with electronic communications, MCL 750.5405A. We affirm.

Defendant's convictions arise from his violent behavior against his then-girlfriend with whom he lived. During the trial, the prosecutor admitted evidence related to defendant's previous domestic violence conviction. The evidence was admitted pursuant to MCL 768.27b which specifically allows, in domestic violence cases, evidence of the defendant's commission of other acts of domestic violence.

On appeal, defendant argues that MCL 768.27b conflicts with MRE 404(b) and "impermissibly usurps the Michigan Supreme Court's power to establish, modify, amend and simplify the practice and procedure in this state's courts." We disagree.

Defendant admits that this issue was not raised in the trial court and, thus, is not preserved for appeal. Therefore, our review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999).

MRE 404(b) prohibits the admission of evidence regarding a defendant's other crimes, wrongs, or acts for the purpose of showing the defendant's propensity to commit a crime. *People v Railer*, 288 Mich App 213, 219; 792 NW2d 776 (2010). MCL 768.27b, however, permits the admission of evidence regarding a defendant's prior acts of domestic violence for the purpose of showing the defendant's propensity to commit acts of domestic violence. *People v Schultz*, 278 Mich App 776, 778; 754 NW2d 925 (2008). Defendant argues that the rule of evidence should prevail over this conflicting statute because the statute unconstitutionally infringes on our Supreme Court's authority under Const 1963, art VI, § 5. See *People v Watkins*, 491 Mich 450, 472; 818 NW2d 296 (2012). That is, the statute violates the separation of powers

between the legislative and judicial branches of government. See *McDougall v Schanz*, 461 Mich 15, 23-24; 597 NW2d 148 (1999).

In *Schultz*, 278 Mich App at 776, this Court considered and rejected defendant's argument, holding:

[T]he Legislature passed MCL 768.27b in reaction to the judicially created standards in MRE 404(b). It does not impose upon the administration of the courts; rather, it reflects a 'policy decision that, in certain cases, juries should have 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.' Therefore, in keeping with the analysis in *McDougall* [461 Mich at 31-32; 36-37], the statute is a substantive rule engendered by a policy choice, and it does not interfere with our Supreme Court's constitutional authority to make rules that govern the administration of the judiciary and its process. [*Id.* at 779 (citations omitted).]

Further, in *Watkins*, 491 Mich at 450, our Supreme Court recently considered, and rejected, the very similar argument that MCL 768.27a conflicts with MRE 404(b) and infringes on the Supreme Court's constitutional authority. Generally, that statute permits the admission of evidence of a defendant's uncharged sexual offenses against minors for the purpose of showing a defendant's propensity to commit such acts. The *Watkins* Court held the statute "is a valid enactment of substantive law to which MRE 404(b) must yield" because it "is based on policy considerations over and beyond the orderly dispatch of judicial business." *Id.* at 475. Thus, the statute did not "run afoul" of the Supreme Court's constitutional authority. *Id.* at 476-477. Accordingly, defendant's claim of constitutional error affecting his substantial rights premised on this argument is without merit.

Next, defendant argues that the probative value of the evidence related to his prior domestic violence conviction was substantially outweighed by the threat of unfair prejudice; thus, it should have been excluded. After review of this preserved evidentiary issue for an abuse of discretion, we disagree. See *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

"Relevant evidence may be excluded under MRE 403 if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *People v Meissner*, 294 Mich App 438, 451; 812 NW2d 37 (2011), quoting MRE 403. Unfair prejudice "refers to the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock." *People v Cameron*, 291 Mich App 599, 611; 806 NW2d 371 (2011) (citation omitted). Furthermore, the "exclusion of the evidence is appropriate only when unfair prejudice outweighs the probative value of the evidence, meaning 'there is a danger that the evidence will be given undue or preemptive weight by the jury' or 'it would be inequitable to allow use of the evidence.'" *Meissner*, 294 Mich App at 451, quoting *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008). The outcome of the balancing test determines whether the trial court abused its discretion in allowing defendant's prior acts of domestic violence into evidence. See *Cameron*, 291 Mich App at 611.

Defendant claims that the probative value of his former girlfriend's testimony with regard to his prior domestic violence conviction "was negligible and substantially outweighed by the threat of unfair prejudice to the defense." He argues that "[w]hatever happened between [him] and [his former girlfriend], it had nothing to do with the allegations made by [this complainant]." The disputed testimony of defendant's former girlfriend, who he had lived with, included that, about two years before: (1) defendant made accusations against her about other men, (2) a verbal argument became physical, with objects being used during the fight that caused the victim injuries, (3) when she tried to call police, defendant took her cell and home telephones, as well as her car keys, and (4) he removed the battery from the cell phone, hid the phones, and prevented her from seeking emergency assistance.

The allegations in this case are strikingly similar and include that: (1) defendant made accusations against the victim, with whom he lived, about other men, (2) he yelled at the victim, called her names, and threatened her before the argument became physical, (3) defendant grabbed the victim's laptop computer and threw it, (4) when the victim attempted to call 911 on her cell phone, defendant "ripped it right out of" her hand and threw it across the room, causing it to break, and (5) when the victim attempted to call 911 from her house phone, defendant grabbed the victim and was "throwing [her] around," but eventually took the phone from the victim and struck her twice in the face with it, knocking out three of her teeth, and prevented the victim from seeking emergency assistance.

Contrary to defendant's claim, the disputed testimony is highly probative of defendant's propensity for committing violence against women with whom he lived. That is, the testimony of defendant's former girlfriend provided a more complete picture of defendant's history, shedding light on the likelihood that the crime was committed. See *Cameron*, 291 Mich App at 610. Both cases, which occurred within two years of each other, included an altercation with a girlfriend with whom defendant lived, and clearly involved violent acts that were very similar to those he was accused of committing. Further, the testimony was not graphic or shocking, and it was brief; therefore, the testimony did not divert the jury from rationally considering defendant's case. Although the disputed testimony was somewhat prejudicial to defendant, it was not fairly prejudicial because it did not have "an undue tendency to move the tribunal to decide on an improper basis." *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995). Accordingly, defendant has failed to demonstrate that the probative value of the disputed evidence was substantially outweighed by the danger of undue prejudice. Therefore, the trial court did not abuse its discretion by admitting the evidence under MCL 768.27b.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Douglas B. Shapiro