

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NICHOLAS TAGEN THOMPSON,

Defendant-Appellant.

UNPUBLISHED

December 16, 2008

No. 278243

Bay Circuit Court

LC Nos. 06-011226-FH

06-011227-FH

Before: Saad, C.J., and Fitzgerald and Beckering, JJ.

PER CURIAM.

Defendant appeals as of right his convictions following a jury trial. In LC No. 06-011226-FH, defendant was convicted of first-degree home invasion, MCL 750.110a(2), and domestic violence, third offense, MCL 750.81(4). In LC No. 06-011227-FH, defendant was convicted of domestic violence, third offense, and interfering with a telephone communication, MCL 750.540. The trial court sentenced defendant as a third-offense habitual offender, MCL 769.11, to concurrent prison terms of 84 to 240 months for the home invasion conviction and 32 to 48 months for each of the other convictions. We affirm.

I

Defendant first argues that the trial court abused its discretion in admitting other-acts evidence pursuant to MCL 768.27b. A trial court's admission of evidence is reviewed for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). A court abuses its discretion when it chooses an outcome that lies outside the range of reasonable and principled outcomes. *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007). Reversal is required only when the defendant has been denied a fair trial. *People v Vettese*, 195 Mich App 235, 246; 489 NW2d 514 (1992).

We conclude that the trial court did not abuse its discretion in admitting evidence of defendant's prior acts of domestic violence under MCL 768.27b. According to MCL 768.27b(1), evidence of prior acts of domestic violence is admissible against a criminal defendant who is charged with a domestic violence crime for any relevant purpose, including proving character, provided that such evidence is not excluded under MRE 403. *People v Pattison*, 276 Mich App 613, 615; 741 NW2d 558 (2007). MRE 403 excludes evidence if its "probative value is substantially outweighed by the danger of unfair prejudice." "Evidence is

unfairly prejudicial where there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.” *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998).

MCL 768.27b(5)(a) defines domestic violence, in relevant part, as:

[A]n occurrence of 1 or more of the following acts by a person that is not an act of self-defense:

(i) Causing or attempting to cause physical or mental harm to a family or household member.

(ii) Placing a family or household member in fear of physical or mental harm.

* * *

(iv) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

Any person with whom a defendant “has or has had a dating relationship” is considered a family or household member. MCL 768.27b(5)(b)(iv).

Defendant argues that the trial court improperly admitted testimony from the victim and defendant’s former girlfriend about his prior acts of domestic violence. The victim testified that in March 2006, defendant grabbed her purse and ran into his apartment. After she went into the apartment to retrieve her purse, defendant threw it against the wall. When the victim bent down to pick up the purse, defendant picked her up and pushed her around. He subsequently pushed her into the hallway and into the door. The trial court did not abuse its discretion in admitting this evidence under MCL 768.27b. Defendant and the victim were in a dating relationship and according to her, she suffered physical harm from defendant’s actions. There is no indication that defendant caused the victim’s injuries in self-defense. Furthermore, part of defendant’s theory of the case was that the victim was a liar and had made up the whole story. This prior incident was probative of the victim’s credibility, which is always relevant. See *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995). The evidence was also relevant to establishing defendant’s violent and controlling nature and helped put the victim’s actions into context. Because this evidence was more than marginally probative, it was not unfairly prejudicial to admit it.

Defendant’s former girlfriend testified that in 1999, defendant pushed her into her car during an argument and would not let her out. In 2002, defendant came to her home uninvited and unannounced when she had male company. He crawled through her bedroom window and threatened to harm her male companion. When she tried to call the police, defendant knocked the phone from her hands, but the call went through to the police anyway. When the police arrived, defendant pushed her against the wall and held her down to try to prevent her from opening the door. But, she managed to escape and opened the door. A police officer who responded to the 2002 incident testified that as he was walking up the driveway of the

girlfriend's home, he heard a female screaming and a male voice saying something like, "I'll kill you or kill someone." Like the victim's testimony, this testimony falls squarely within MCL 768.27b. The evidence was relevant to show defendant's violent and controlling nature and was, therefore, highly probative. It was not an abuse of the trial court's discretion to admit the evidence.

II

In a related but separately stated question, defendant argues that the trial court abused its discretion in playing three tape-recorded phone conversations between defendant and the former girlfriend. As will be discussed below, defense counsel opened the door for the prosecution's use of the recordings on rebuttal. The contents of the recordings revealed that defendant was in jail charged with unlawful entry or home invasion, assault with a deadly weapon, and domestic violence, and that he faced up to ten years in prison. Defendant argues that pursuant to MRE 403, the court should have excluded the recordings, admitted only redacted versions of the recordings, or admitted only one of the recordings.

In *People v Oliphant*, 399 Mich 472, 490; 250 NW2d 443 (1976), our Supreme Court advised trial courts to use a balancing test in determining whether the probative value of evidence is substantially outweighed by its prejudicial effect:

[A] court must balance many factors including: the time necessary for presenting the evidence and the potential for delay; how directly it tends to prove the fact in support of which it is offered; whether it would be a needless presentation of cumulative evidence; how important or trivial the fact sought to be proved is; the potential for confusion of the issues or misleading the jury; and whether the fact sought to be proved can be proved in another way involving fewer harmful collateral effects.

In this case, the purpose of introducing the tape-recorded conversations was to rehabilitate the former girlfriend's credibility. On cross-examination, the former girlfriend's credibility was impeached when she admitted giving perjured testimony at a 2002 preliminary examination in another case involving defendant. On redirect and recross-examination, she explained that the only reason she perjured herself was because defendant told her to do so and she always did what he told her. The trial court admitted the recordings to support her testimony that defendant had procured the perjured testimony.

While the probative value of the recordings was high, so too was the danger of unfair prejudice. Nonetheless, the trial court gave a series of strongly worded limiting instructions to the jury as to the purpose of the recordings—instructions the jury is presumed to have followed. See *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003), citing *People v Graves*, 458 Mich 476, 482; 581 NW2d 229 (1998). The court specifically instructed the jury not to consider other matters mentioned in the recordings. Before the recordings were played, the court instructed the jury as follows:

You may hear mention of issues such as other crimes, probation, or bond; I anticipate you'll hear my name on the tape;^[1] and references to penalties for a crime. Do not consider this evidence for any other purpose other than judging whether or not it supports the credibility of [the former girlfriend]. That's the limited purpose for which this is offered.

Immediately after the recordings were played, the court instructed the jury as follows:

And, Jurors, again I'll repeat my caution to you, that the evidence you just heard is offered for the limited purpose of whether or not it supports the credibility of [the former girlfriend], and penalty for any offense or mention of other crimes or matters regarding probation or bond or my involvement have nothing to do with your consideration.

In light of the probative value of the evidence and the limiting instructions given, no abuse of discretion occurred. See *People v Meshell*, 265 Mich App 616, 637; 696 NW2d 754 (2005) ("A trial court's decision on a close evidentiary question generally cannot be an abuse of discretion.").

III

Defendant also argues that he was denied the effective assistance of counsel. Because this claim was not properly preserved, *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000), our review is limited to mistakes apparent on the record, *People v Armendarez*, 188 Mich App 61, 73-74; 468 NW2d 893 (1991).

The United States and Michigan Constitutions guarantee every criminal defendant the right to counsel. US Const, Am VI; Const 1963, art 1, § 20. This right guarantees that counsel's assistance will be effective. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Effective assistance is presumed, and a defendant bears a heavy burden to overcome that presumption. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). To prevail on an ineffective assistance of counsel claim, a defendant must show that counsel's performance fell below that of a reasonably competent attorney and that but for counsel's deficient performance, there is a reasonable probability that the outcome of the trial would have been different. *Snider, supra* at 423-424, citing *People v Pickens*, 446 Mich 298, 312; 521 NW2d 797 (1994).

According to defendant, his trial counsel made three mistakes that individually and cumulatively denied him of the effective assistance of counsel. "The cumulative effect of several minor errors can warrant reversal where the individual errors would not." *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003). First, defendant argues that his trial counsel's impeachment of his former girlfriend constituted ineffective assistance of counsel

¹ The trial judge had been the Bay County prosecutor.

because it opened the door for the admission of the tape-recorded phone conversations between defendant and the witness.

Next, defendant argues that his trial counsel was ineffective for eliciting a damaging propensity statement from the prosecution's domestic violence expert, Rene Jacobs. The following exchange occurred on recross-examination:

Q. In your experience, again this is all based on experience, there are those that have battered in their past, but don't continue to batter. Is that correct?

A. They usually batter in a different form.

Q. Okay. . . . [Y]ou're telling this jury that once a batterer, always a batterer and no matter what relationship you get into, you're going to continue to be a batterer. That's what you're telling 'em?

A. That—from my experience—that people are—if you're a batterer, you're never cured. Now, you will batter in a different form, you may be a physical batterer and learn that hey, there's a consequence to that and . . . I can't be that way anymore, and they turn into an emotional batterer, from my experience, yes.

Q. You're . . . aware of all the counseling programs that . . . go on, that we have for domestic batterers and stuff like that?

A. Mmhmm.

Q. And you're trying to tell us, and you're telling this jury that none of them are ever successful? Why do we send 'em?

[*Prosecutor*]: Your Honor, I'm going to object.

[*Defense Counsel*]: Why do we send 'em?

[*Prosecutor*]: Your Honor?

[*Defense Counsel*]: Why do we send 'em?

THE COURT: [Defense counsel], there's an objection, please. Counsel?

[*Prosecutor*]: The relevance to why we send someone to counseling or not. Send some to counseling.

THE COURT: I'll allow the question.

[*Prosecutor*]: Thank you.

[*Defense Counsel*]: I don't have anything for this witness, Judge.
I'm done.

Defense counsel subsequently moved for an adjournment to allow the defense to hire an expert to refute Jacobs' testimony or, in the alternative, to strike the testimony. The trial court denied the motions.

Finally, defendant argues that his trial counsel's failure to object to the playing of a tape-recorded phone conversation between defendant and the stepmother of his former girlfriend denied him of the effective assistance of counsel. On cross-examination, the prosecutor asked the witness whether she had any conversations with defendant about the domestic violence incident that occurred between defendant and her stepdaughter in 2002. Because the witness could not specifically recall, the prosecutor sought to refresh her memory with the recording. The entire recording was played for the jury without objection from defense counsel. The contents of the recording revealed that defendant was in jail charged with home invasion, that bond was set at \$25,000, and that he faced up to four years in prison. Defendant argues that his trial counsel should have objected to the admission of the recording because its probative value was substantially outweighed by its prejudicial effect.

Defendant argues that his trial counsel's mistakes amounted to ineffective assistance of counsel. Decisions regarding the impeachment of witnesses and the introduction of evidence are presumed to be trial strategy, and a reviewing court must not second-guess what could have been sound trial strategy. *People v Rockett*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999); *People v McFadden*, 159 Mich App 796, 800; 407 NW2d 78 (1987). A reviewing court should, however, inspect the challenged action to determine whether it was a sound strategic decision. See *People v Tommolino*, 187 Mich App 14, 17-19; 466 NW2d 315 (1991).

In this case, defense counsel's decisions cannot be attributed to sound trial strategy. By impeaching the former girlfriend with evidence that she gave perjured testimony in another case involving defendant, defense counsel opened the door for the admission of three tape-recorded conversations between defendant and the witness. The contents of the recordings revealed that defendant actually procured the perjured testimony—reinforcing the prosecution's theory that defendant was controlling and manipulative—and that he was in jail on multiple charges and faced up to ten years in prison. Similarly, the tape-recorded conversation between defendant and the stepmother revealed that he was in jail charged with home invasion, that bond was set at \$25,000, and that he faced up to four years in prison for that charge. Considering that the recording was introduced for the sole purpose of refreshing the stepmother's memory and contained highly prejudicial information, defense counsel should have objected to playing the recording, in its entirety, in the presence of the jury. Additionally, we note that it is rarely sound practice to ask questions of a witness without first knowing the answer. *People v Toma*, 462 Mich 281, 304-305 n 18; 613 NW2d 694 (2000). It is apparent that when defense counsel questioned Jacobs about rehabilitating domestic abusers, he was unaware of what her response would be. In fact, defense counsel admitted that he was surprised by Jacobs' response and that, in his opinion, her response was damaging to defendant's case.

While defendant has overcome the presumption of sound trial strategy, he has not established that but for defense counsel's deficient performance, the outcome of the proceedings would have been different. *Snider, supra* at 423-424. The evidence presented at trial, even

absent the tape-recorded phone conversations and Jacobs' testimony about rehabilitating domestic abusers, was more than sufficient to establish defendant's guilt. The victim provided a detailed description of the events in question and several witnesses, including the victim's friends, defendant's neighbors, and investigators, corroborated her testimony. The only person who provided conflicting testimony was defendant's mother, and she admitted that defendant and the victim were alone for significant periods of time that night. The jury also heard evidence that defendant committed prior acts of violence against the victim and his former girlfriend. Further, as previously indicated, the trial court instructed the jury on the limited purpose of the tape-recorded conversations between defendant and his former girlfriend. The court also instructed the jury that the conversation between defendant and the stepmother was not evidence and that it was admitted for the sole purpose of refreshing the witness's memory. Considering the evidence presented at trial and the limiting instructions provided by the trial court, defendant's ineffective assistance claim must fail.

Affirmed.

/s/ Henry William Saad
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering