STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 14, 2010
v	No. 292647 Kalamazoo Circuit Court
THEODORE J. BRANION, JR., Defendant-Appellant.	LC No. 2008-001741-FC

Before: MURPHY, C.J., and SAWYER and MURRAY, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to murder, MCL 750.83, and arson, MCL 750.72. He was sentenced as a habitual offender, fourth offense, MCL 769.12, to 20 to 40 years' imprisonment for the former conviction, and to 10 to 20 years' imprisonment for the latter, with credit for 229 days served. The sentences are to run concurrently. Defendant appeals as of right, and we affirm.

I. BASIC FACTS

On September 22, 2008, defendant and his wife of 16 years, the victim in this case, were separated. That evening as the victim sat alone and watched television in her bedroom, defendant stood outside her open window and squirted lighter fluid through the screen. Defendant ignited his lighter and set the window, windowsill and curtains ablaze. The victim's roommate, and owner of the home, put out the fire and he and the victim escaped to a neighbor's house across the street to telephone the authorities. From this location, the victim saw defendant running away from her residence. Before trial, the prosecutor sought to admit evidence of seven prior instances of domestic abuse between defendant and the victim, one of which involved defendant attempting to set the victim on fire with lighter fluid. The trial court admitted the evidence under MCL 768.27b and MRE 404(b).

II. ANALYSIS

A. EVIDENTIARY ISSUES

On appeal defendant raises several evidentiary issues. Defendant first challenges the admission of prior acts of domestic violence, arguing that the evidence was (1) inadmissible under MRE 404(b) because it impermissibly allowed the jury to infer his propensity to commit

the crimes, and (2) was inadmissible under MCL 768.27b because it violated the MRE 403 balancing test and because some of the acts occurred over ten years before the events of September 22, 2008.

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Abuse of discretion exists if the trial court's decision falls outside the principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). However, whether evidence is admissible under MRE 404(b) and MCL 768.27b involves a question of law, which we review de novo. *Lukity*, 460 Mich at 488. It is an abuse of discretion to admit evidence that is inadmissible as a matter of law. *Id.*

The admissibility of evidence of other acts of domestic violence in domestic violence cases is governed by MCL 768.27b, which provides:

> (1) Except as provided in subsection (4), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403.
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> (4) Evidence of an act occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that admitting this evidence is in the interest of justice.

In *People v Pattison*, 276 Mich App 613, 619-620; 741 NW2d 558 (2007), this Court held that in cases where a defendant is charged with a sexual offense of a minor, a companion statute, MCL 768.27a,[1] allows for the admission of evidence of prior uncharged acts of sexual conduct toward minors specifically for the purpose of showing the defendant's character or propensity to commit the same act. This Court further held that MCL 768.27a allows the other acts evidence where MRE 404(b) might have precluded it. *Id.* In *People v Schultz*, 278 Mich App 776, 778; 754 NW2d 925 (2008), this Court adopted and applied the *Pattison* holding to other acts of domestic violence under MCL 768.27b, noting that "[t]his statute stands in stark contrast to MRE

[1] MCL 768.27a(1) provides:

> Notwithstanding [MCL 768.27], in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant. If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence to the defendant at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered.

404(b)(1), which requires a proponent to offer more than the transparency of a person's character as justification for admitting evidence of other crimes or wrongs." See, also, *People v Railer*, ___ Mich App __; __ NW2d __ (2010). Accordingly, under MCL 768.27b, other acts of domestic violence are by law relevant to both character and propensity of the accused.

Nevertheless, the evidence must still comport with MRE 403, which provides:

> Although relevant, evidence may be excluded 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.

The focus behind MRE 403 is whether the evidence was unfairly prejudicial, because the prosecutor's evidence, and all relevant evidence, for that matter, is inherently prejudicial to some extent. *People v Pickens*, 446 Mich 298, 336; 521 NW2d 797 (1994); *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995). "This 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 Goree*, 132 Mich App 693, 702-703; 349 NW2d 220 (1984). See also *Mills*, 450 Mich at 75-76.

Here, the prior acts of domestic abuse were highly probative for the prosecution to show defendant's character for assaulting the victim and his propensity to commit acts of violence against her window. *Schultz*, 278 Mich App at 778; *Railer*, __ Mich App at __. It was also relevant to prove defendant's motive. Several of the prior acts of violence against the victim occurred after she expressed her interest in ending their marriage or while they were separated. Similarly, on the afternoon before the fire the victim told defendant that she wanted to end their relationship. Moreover, she lived with her boyfriend at the time, which, she testified, would have angered defendant. The circumstances leading up to the prior acts of domestic violence provided a motive for defendant to injure the victim and control her.

Additionally, the victim admitted at trial that she refused to assist the prosecution in some of the previous charges brought against defendant for domestic violence. Here, three investigating officers, two of whom interviewed the victim the night of the fire, testified that the victim identified defendant without hesitation. However, the victim testified that she never identified defendant as the perpetrator and she believed defendant did not set the fire. Thus, the prior acts evidence also became relevant and highly probative to explain why she recanted her previous incriminating statements.

The evidence was also relevant to counter defendant's alibi defense, as proving defendant's motive to hurt and control the victim helped place him at her window on the night in question, and made it less likely that defendant's alibi was true.[2] In light of the highly probative value of the other-acts evidence, we conclude that the evidence was not outweighed by the

[2] At trial, defendant called several of his family members who testified that he was at his daughter's home babysitting her children on the night of the fire.

danger of unfair prejudice, i.e., it did not violate MRE 403. The evidence was prejudicial, but there was no danger that marginally probative evidence would be given undue weight or that it was inequitable for the prosecution to use it. *Mills*, 450 Mich at 75-76. The evidence also did not inject extraneous considerations into trial. *Goree*, 132 Mich App at 702-703.

Finally, although four of the prior acts of domestic violence occurred over ten years before September 22, 2008, we find that the trial court properly admitted the evidence in the interest of justice. The challenged evidence established a long-standing pattern between the parties. The pattern was essential to explaining and proving the present case. In sum, the evidence was properly admitted under MCL 768.27b. Thus, defendant's argument that the evidence violated MRE 404(b) is irrelevant. See *Pattison*, 276 Mich App at 618-619. The trial court did not abuse its discretion.

Next, defendant challenges the testimony of a retired officer who investigated a prior domestic violence dispute and testified that the victim told him that defendant said to her, "I'll kill you bitch, I'll burn you and this [expletive] house up." Defendant contends this statement was hearsay, occurred over five years before the instant charges were filed, and was therefore inadmissible under MCL 768.27c. Defendant also alleges his counsel was ineffective for failing to object to the hearsay.

Because defendant failed to preserve the issue, we review for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights[,]" meaning it affected the outcome of the lower court proceedings. *Id.* at 763 (citation omitted). "'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801. "Hearsay is not admissible except as provided by these rules." MRE 802. The relevant hearsay exception, MCL 768.27c(1), provides in pertinent part:

> (1) Evidence of a statement by a declarant is admissible if all of the following apply:
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> (c) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of a statement made more than 5 years before the filing of the current action or proceeding is inadmissible under this section.

There are two statements at issue: defendant's statement to the victim, and the victim's statement to the officer in which she conveyed defendant's statement. "Where multiple levels of hearsay are involved, all declarations made must not be hearsay or must fall within a recognized exception." *People v Mesik (On Reconsideration)*, 285 Mich App 535, 538; 775 NW2d 857 (2009).[3] Here, defendant's statement to Gina constitutes non-hearsay, as an admission of a party

[3] See also MRE 805: "Hearsay included within hearsay is not excluded under the hearsay rule if (continued…)

opponent. MRE 801(d)(2). However, the victim's statement to the officer was hearsay that occurred over five years before these charges were filed. Thus, it could not be admitted under MCL 768.27c, and the record does not support admission under any other relevant hearsay exceptions, MRE 803. Thus, the challenged testimony was inadmissible; plain and obvious error occurred. However, in light of the other testimony regarding the circumstances of the incident that led to the statement, and in light of the remaining overwhelming evidence of defendant's guilt in this case, we conclude that the error did not affect the outcome of trial. Thus, plain error requiring reversal did not occur. *Carines*, 460 Mich at 763. Moreover, defense counsel was not ineffective because her failure to object did not prejudice defendant by affecting the outcome of trial. *People v Gonzalez*, 468 Mich 636, 644; 664 NW2d 159 (2003); *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

B. STANDARD 4 ISSUES

Next, we address several issues presented by defendant in his Standard 4 brief. First, he argues that the trial court prevented him from presenting a defense of mistaken identity. Specifically, he alleges that the trial court did not allow the victim to recant her earlier statements to the officers in which she identified defendant. He further alleges that the trial court errantly limited her testimony for impeachment purposes only. We review this unpreserved issue for plain error affecting his substantial rights. *Carines*, 460 Mich at 764-765.

"There is no question that a criminal defendant has a state and federal constitutional right to present a defense." *People v Hayes*, 421 Mich 271, 278; 364 NW2d 635 (1984). This includes the right to cross-examine a state's witnesses to challenge their testimony and the right to present witnesses to establish a defense. *Id.* at 278-279, quoting *Washington v Texas*, 388 US 14, 19; 87 S Ct 1920; 18 L Ed 2d 1019 (1967). Here, contrary to defendant's claims, the record clearly indicates that at trial the victim attempted to clarify her earlier statements to investigating officers. She stated several times at trial that she never identified defendant as the perpetrator. She also testified that she never identified defendant with 100 percent certainty, and that she believed defendant did not commit the crime. We find no evidence that the trial court restricted her testimony, or instructed the jury that it was relevant for impeachment only. Thus, on the record before us, the trial court did not prevent defendant from asserting his defense. Defendant has misread or mischaracterized the record in making his argument. As the alleged errors never occurred, plain error did not occur.

Next, defendant alleges that the prosecutor knowingly used perjured testimony to convict him. We review this unpreserved issue for plain error affecting his substantial rights. *Carines*, 460 Mich at 764-765. This claim is without merit. The record indicates that an eyewitness to a break-in that occurred a few days before could not initially identify the perpetrator. However, she was later shown a photographic line-up that included defendant and five other men. She immediately identified defendant. Her testimony was not inconsistent or false, and there is no evidence to support defendant's claim.

(…continued)

each part of the combined statements conforms with an exception to the hearsay rule provided in these rules."

Finally, defendant argues that the trial court allowed an investigating officer to incriminate defendant by taking out of context a statement made by defendant. An investigating officer testified that during an interview, defendant said, "I didn't mean to hurt [the victim]." Defendant contends that he made the statement in reference to the several past incidents of domestic violence, and not the instant charges. Nothing in the record supports defendant's self-serving assertion, and nothing in the record supports that the officer misconstrued defendant's statement or took it out of context. Defendant made the statement during a conversation regarding the events of September 22, 2008. And, even if the officer misinterpreted defendant's statement, the trial court did not restrict defendant's ability to clarify the meaning of the statement on cross-examination or with other evidence. Plain error did not occur.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Christopher M. Murray