STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 18, 2010
v	No. 293582 Oakland Circuit Court
KURT ALLEN KRUEGER, Defendant-Appellant.	LC No. 2009-226198-FH

Before: MURPHY, C.J., and METER and SHAPIRO, JJ.

PER CURIAM.

Defendant was convicted of domestic violence, third offense, MCL 750.81(4), following a jury trial. He was sentenced as a fourth habitual offender, MCL 769.13, to 2 to 15 years' imprisonment. Defendant appeals as of right. We affirm.

I. FACTS

At the time of the assault, defendant was and had been living in the home of his girlfriend, the complainant. According to written and verbal statements given to the police by the complainant,[1] on the evening of March 21, 2009, defendant had stepped out for awhile but

[1] The verbal and written statements, which are not the subject of any argument on appeal, were admitted pursuant to MCL 768.27c, which provides in relevant part:

> (1) Evidence of a statement by a declarant is admissible if all of the following apply:
>
> (a) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.
>
> (b) The action in which the evidence is offered under this section is an offense involving domestic violence.

then returned to the home he shared with the complainant. He arrived at the home driving a vehicle that was owned by the complainant. After defendant entered the home and settled in, the complainant asked him where he put the keys to the vehicle, and he said that he left them on the counter; however, the keys were not on the counter. She asked defendant to give her the keys, but he indicated that he did not have them. The complainant sat down at her computer, and defendant approached her, demanding that she give him $20. She indicated that she only had $10, and defendant responded by stating that he was going to take the computer's printer back to the store. In her written statement, the complainant asserted that she then told defendant that she would break the printer "before he took it back for drugs or alcohol."[2] Defendant reached for the printer, but the complainant kicked it. At that point, defendant pushed the complainant down and into a couch. After she arose from the floor, defendant cornered her at the front door of the home and put his hand over her mouth; she then bit him. Defendant proceeded to forcefully take $10 out of the complainant's right front pocket. He then walked out of the home and drove away. Soon thereafter, the complainant, accompanied by a neighbor lady, went to the police station to lodge a domestic violence complaint.

Police testimony indicated that two officers went to the home after the complainant's statements were taken. The responding officers knocked on the door, and from their vantage point outside the home, they were able to observe defendant rise from a chair, but then proceed to sit down without answering the door. An officer testified that defendant was able to see the police officers standing at the door. Subsequently, one of the complainant's children answered the door and let the police into the home. The police arrested defendant without incident.

The prosecutor called to the stand the complainant's daughter, along with a male and female friend of the daughter who all lived in the same neighborhood (hereinafter referred to as the "neighbor boy" and "neighbor girl").[3] On the evening of the assault, the three of them were playing at the home of the neighbor boy when the complainant's son, who did not testify, came running up to the home. The complainant's son wanted his sister to return to their own home. The complainant's daughter, along with the neighbor boy and girl and complainant's son, hurried back to complainant's home. As they approached the home, defendant was in the process of leaving, telling them that he was going up to the store; he then drove away. The children then

---

> (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.
>
> (d) The statement was made under circumstances that would indicate the statement's trustworthiness.
>
> (e) The statement was made to a law enforcement officer.

[2] A police officer testified that the complainant informed him that defendant was attempting to take the printer in order to sell it for drugs or drug money.

[3] The ages of the three ranged from 12 to 16.

encountered the complainant in the driveway, and she was crying, upset, and holding her head. The complainant told them that defendant had pushed or thrown her into the couch and she hit her head. The children indicated that the complainant typically wore glasses, but they were not on her face when the children found her crying and holding her head.

The complainant's daughter testified that she retrieved an ice pack, which complainant placed on her head. The children testified that the complainant asked the neighbor boy to take the printer to his home so that defendant could not get his hands on it, and the young man did as he was asked.[4] When he reached his home with the printer, he informed his mother what had transpired, and she went to check on the complainant and eventually convinced her to go to the police to report the assault. This neighbor lady then went with the complainant down to the police station, while the children all stayed together huddled in a room in complainant's home, after having locked the doors on complainant's insistence. The complainant and the neighbor lady had not yet returned from the police station when defendant returned to the home. There was testimony that defendant knocked on the door, but none of the children let him inside. However, defendant was able to get inside the home, although the children were not exactly sure how he made entrance, possibly through a sliding door. Defendant was angry and asked about the complainant. There was testimony that the children did not tell defendant that complainant had gone to the police station. The neighbor boy texted his mother at the police station, informing her that defendant had returned to the home. The police soon arrived at the home, and complainant's daughter let the police inside.

The complainant took the stand, but she did not testify in a manner that was consistent with her verbal and written statements given to police. Indeed, her testimony was extremely favorable to defendant. We note that, following her testimony, there was testimony by the neighbor lady who gave an account that was consistent with the children's testimony. The neighbor lady also testified that, at the time of the preliminary examination, she received a subpoena to testify at the hearing, and the complainant called her and begged her not to honor the subpoena. The complainant was rambling on and on, and when the neighbor lady informed her that she had no intention of disobeying the subpoena, the complainant threatened to call child protective services on her.[5] Complainant did not show up at the preliminary examination.

Returning to the complainant's testimony, she stated that she and defendant had argued earlier on the day in question after he took the last of their cigarettes. He actually packed up his belongings in a box and stated that he was going to leave the complainant, which left her upset and angry. The complainant testified consistently with her statements to police with respect to the handling of the car keys, but she then testified that, when defendant tried to talk to her about the keys, she bit him on the forearm and then returned to her computer. They started arguing about money and defendant indicated that he was going to take the printer and sell it. The

---

[4] The printer was recently purchased and used in a home business.

[5] There is nothing in the record remotely suggesting that the complainant's threat had any basis in fact.

complainant testified that she had no proof that defendant wanted to sell the printer for money to purchase drugs; he may have just needed gas money. When defendant reached for the printer, she kicked the printer and broke it, and she then bit defendant for a second time, at which point he pushed her away and into the couch in reaction to the bite.[6] She hit her head when pushed into the couch.

The complainant testified that she made the first physical contact by biting defendant, that defendant had not touched her up to that point, that she was not frightened of defendant, and that she was mad at defendant. She indicated that she was in a rage and not thinking clearly and that defendant pushed her in an effort to get away because she bit him hard. The complainant further testified that she had given the printer to the neighbor boy to keep defendant from retrieving and selling it and that, although she was crying and hollering when encountering the children after the incident, she was not in pain, as she had a high pain threshold. The complainant spoke about her history of suffering from anxiety and depression and stated that she was bi-polar. She was hospitalized due to a nervous breakdown for two and a half weeks on an out-patient basis after the incident. The complainant testified regarding an email that she sent after the incident and acknowledged that the email indicated that defendant had physically assaulted her for the first time in their relationship on the night in question; there was no mention of her biting defendant. In a letter sent by the complainant to the prosecutor, she claimed, simply, that there were omissions and falsehoods in her statements to police. The complainant elaborated at trial that the omissions and falsehoods pertained to her biting defendant multiple times and to the sequence of events. The complainant acknowledged that her account of the incident as given at trial was the first time that she had ever communicated such an account of the incident to anyone. She had never previously told anyone about biting defendant, except possibly during therapy. The complainant denied that she was trying to get defendant off the hook.

The jury was informed, before the first witness testified and again during instructions, that the parties stipulated that defendant had been charged and convicted of domestic violence on July 6, 1994, and again on October 7, 1996. During his closing argument, the prosecutor noted the consistency between the verbal and written statements given by the complainant to police and the testimony of all the witnesses, save the complainant's testimony. He argued that her version of events as described at trial was simply not credible. Defendant argued that the prosecutor failed to prove the elements of the charged crime beyond a reasonable doubt, as defendant was merely trying to free himself from the complainant's bite when he pushed her away.

Defendant was convicted by the jury of domestic violence. He appeals as of right.

---

[6] The complainant's testimony, which was unclear at times with respect to how matters transpired, suggested that she may have bit defendant up to three times.

II. ANALYSIS

Defendant first argues that evidence of his prior domestic assaults, as reflected in the stipulation, should not have been admitted, where MCL 768.27b conflicts with MRE 404(b) and therefore violates our Supreme Court's constitutional power to establish, modify, amend, and simplify the practice and procedure in the courts of this state. Defendant argues that, had MRE 404(b) applied instead of the statute, he would have been entitled to a jury instruction warning the jurors not to use the evidence for propensity purposes, and he claims to have been prejudiced by the lack of such an instruction. We note that this argument apparently concedes that evidence of the prior domestic violence convictions would have been admissible under MRE 404(b). Defendant makes no argument that the evidence was inadmissible under MCL 768.27b. Defendant accompanies this argument with a claim that counsel was ineffective for not raising the issue below and for stipulating to the admission of the evidence.

This issue presents a question of law that we review de novo on appeal. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). We initially note that the issue was not preserved below and could be deemed to have been waived, *People v Carter*, 462 Mich 206, 215, 219; 612 NW2d 144 (2000), but, given the ineffective assistance of counsel claim, we shall explore the matter. A claim of ineffective assistance of counsel presents a mixed question of law and fact, which we review, respectively, de novo and for clear error. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles governing examination of a claim of ineffective assistance of counsel, stated:

> To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland*, *supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

With respect to defendant's argument that MCL 768.27b violates the constitutional principle of separation of powers, the statute provides in part:

> (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.

As indicated, MCL 768.27b generally allows the admission of domestic violence evidence for any purpose, so long as it is relevant and comports with MRE 403. The statute permits "evidence of prior domestic violence in order to show a defendant's character or propensity to commit the same act." *People v Railer*, __ Mich App __; __ NW2d __, issued April 20, 2010 (Docket No. 291817), slip op at 4; see also *People v Schultz*, 278 Mich App 776, 779; 754 NW2d 925 (2008); *People v Pattison*, 276 Mich App 613, 620-621; 741 NW2d 558 (2007).

The argument posed by defendant here was specifically addressed by this Court in *Schultz*, 278 Mich App at 779, wherein the panel held:

> *Pattison* . . . controls our analysis of defendant's separation of powers argument. As with MCL 768.27a, which was the statute at issue in *Pattison*, the 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." *Pattison*, *supra* at 620. Therefore, in keeping with the analysis in *McDougall v Schanz*, 461 Mich 15, 31-32, 36-37; 597 NW2d 148 (1999), 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.

Accordingly, defendant's argument in the case at bar fails. Moreover, counsel was not ineffective for failing to present the argument below and for entering into the stipulation, as raising the argument would have been futile and meritless. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Defendant next argues that counsel was ineffective for failing to object to multiple references regarding his addiction to drugs and his drug use. We initially note that defendant does not explain why the evidence was inadmissible such that there should have been an objection. Nevertheless, we hold that any objection would have been futile.

The evidence of the verbal and written statements given by the complainant to police indicated that the assault occurred as a result of defendant trying to take the printer away from the complainant in order to sell it for drugs or drug money. The complainant testified that defendant was a drug addict and that he had been through counseling and Narcotics Anonymous (NA). There were a few additional references to defendant's drug addiction.

Given the complainant's testimony at trial that called into question her statements to police, including her testimony that she was not sure why defendant wanted to take and sell the printer, evidence of defendant's drug addiction was certainly relevant to reinforce the validity

and accurateness of the complainant's statements to police, which included her statement that defendant wanted the printer in order to acquire drugs. In that same vein, the evidence was also probative of the complainant's credibility, or lack thereof, relative to her trial testimony. In the context of MRE 404(b), the evidence was also relevant for the purpose of showing defendant's motive for taking the printer and thus a motive to assault the complainant. Additionally, the more the jurors know about the full transaction, the better equipped they are to perform their duties as jurors. *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996). Thus, as our Supreme Court stated in *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978):

> It is the nature of things that an event often does not occur singly and independently, isolated from all others, but, instead, is connected with some antecedent event from which the fact or event in question follows as an effect from a cause. When such is the case and the antecedent event incidentally involves the commission of another crime, the principle that the jury is entitled to hear the "complete story" ordinarily supports the admission of such evidence. [Citations omitted.]

Defendant's drug addiction and history helped explain the events that transpired on the night of the assault. We find that, on consideration of MRE 401 through 404, the evidence was admissible, and thus any objection would have been futile. Accordingly, counsel was not ineffective.

Finally, defendant argues that his due process rights were violated where his defense of self-defense was not recognized. More specifically, defendant contends that there was evidence that defendant acted in self-defense, i.e., the complainant's trial testimony; therefore, the burden shifted to the prosecutor to prove beyond a reasonable doubt that defendant did not act in self-defense and the prosecutor failed to meet the burden. "'Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt.'" *People v James*, 267 Mich App 675, 677; 705 NW2d 724 (2005) (citation omitted).

The trial court did not instruct the jury on self-defense, nor did the court instruct the jury, when reviewing the elements of the crime, that the prosecutor had to prove beyond a reasonable doubt that defendant did not act in self-defense. However, defendant affirmatively voiced approval of the jury instructions. Therefore, this issue is waived and is not reviewable. *Carter*, 462 Mich at 215, 219. Further, we are not in a position to determine whether there was sufficient evidence to support the jury's verdict on this matter because the issue was never presented to the jury for resolution. At trial, defendant did not technically present a defense based on self-defense; rather, defendant relied on the complainant's trial testimony to essentially argue that the criminal intent element of the crime was not established. Considering that the jury did not accept that argument, it is clear that it would not have accepted a pure self-defense argument and there was persuasive evidence that defendant did not act in self-defense. Reversal is unwarranted.

Affirmed.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Douglas B. Shapiro