STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 16, 2014
v	No. 316992 Oakland Circuit Court
JEFFREY LEROY BUCKLEY, Defendant-Appellant.	LC No. 2013-244374-FH

Before: METER, P.J., and K. F. KELLY and M. J. KELLY, JJ.

PER CURIAM.

Defendant Jeffrey Leroy Buckley appeals by right his jury conviction of domestic violence, third offense. See MCL 750.81(4). The trial court sentenced Buckley to serve 18 months to 15 years in prison for his conviction. On appeal, Buckley raises several claims of error, which he maintains warrant a new trial. However, because we conclude there were no errors warranting relief, we affirm.

I. BASIC FACTS

Tina Johnson testified that she had had a "very intimate", "ten-year relationship" with Buckley and that at times "it was good" and at times "it was very abusive." She lived with Buckley for nine years, but would occasionally move out for a couple of days and then move back.

In November 2012, she was staying at an apartment leased by her friend, Larry Shinhulster. She moved to Shinhulster's apartment about a month and a half earlier because Buckley had started "drinking and carrying on a lot" with their roommate, Michael Randles, and the abuse had begun again: "[S]o I just cut my ties and moved out." Johnson and Shinhulster both testified that they did not have an intimate relationship. Shinhulster testified that he grew up in the same neighborhood as Johnson and they were just friends.

Johnson testified that, at around nine in the evening on November 14, 2012, Buckley and Randles arrived at Shinhulster's apartment. They were "very intoxicated" and had brought along beer. After some time, they all moved to the living room. Shinhulster was just returning from the bathroom and Johnson was about to go herself, when Buckley attacked her: "And I was getting up to go to the bathroom, and that's when [] Buckley attacked me and started bashing in my head. I felt like a baseball in a batting cage." Buckley struck her repeatedly in the head with

both fists. She recalled Shinhulster getting him off her and forcing him out the door. Randles was sitting on the couch and did nothing to help.

Shinhulster stated that Buckley and Randles had called and said they were coming over. After they arrived, Shinhulster had a beer with them and went to the bathroom. While he was in the bathroom, he heard arguing, but he thought they were "playing." When he returned from the bathroom, he saw Buckley and Johnson fighting: Buckley "had her around the head or something, and he hit her somewhere in the head . . . ." Shinhulster ran up to them and "broke it up." Shinhulster saw Buckley hitting Johnson right on the head and Johnson was "[h]ollering and screaming." He did not see Johnson hitting Buckley; he only saw her with her hands raised in a defensive posture.

Randles testified that, on the night at issue, he and Buckley went to visit their friend, Shinhulster. He did not expect to see Johnson at Shinhulster's apartment. They all sat around and chatted for a while. At some point Johnson stated that she wanted drugs and she began to argue with Buckley. There was "pushing going on here and there," but Johnson started it. She took something from Buckley and began pushing him. Buckley eventually fell and hit a coffee table. Shinhulster came in and broke it up, telling Buckley to settle down.

Johnson testified that she did not seek medical attention after the attack and did not immediately report it to police officers. She explained that she "didn't really want to see him in trouble." She admitted that she still had feelings for him. Instead, she went to see her case manager at Easter Seals the next day. It was then that she "broke" down and called the police department. Johnson's case manager, Heather Nawrocki, testified that Johnson came to see her on November 15; she was "agitated" and "visibly crying." She reported that Buckley attacked her the night before. Nawrocki encouraged Johnson to report the attack to a police officer and, after Johnson agreed, Nawrocki called the police department and an officer responded.

Johnson also testified in general about several prior incidents where Buckley attacked her. She stated that he threw a screwdriver at her back on one occasion and, after he became intoxicated on another occasion, he threw her down on the porch. She did not recall the details of the other incidents, but acknowledged that she gave a statement to police officers after several. She also described an incident where Buckley wanted her "to get out" of his home, so he poured gasoline over her head. She did not call the police department after that incident and she does not know why.

The prosecution called several police officers, who testified about their responses to this incident and prior incidents. The prosecutor also submitted reports with Johnson's statements from those prior incidents.

In closing, Buckley's lawyer argued that the evidence did not support a verdict of guilty. It was her theory that Johnson was not credible—she had no injuries and did not report the alleged attack immediately, which contrasted with her practice from the prior incidents. In addition, Shinhulster was her friend and his testimony was selective. Buckley's lawyer maintained that the jury should accept Randles' testimony that Johnson started the argument with Buckley and that Buckley never hit Johnson.

The jury rejected this version and found Buckley guilty. Buckley now appeals to this Court.

II. HEARSAY AND OTHER ACTS EVIDENCE

A. STANDARDS OF REVIEW

Buckley first argues the trial court erred when it determined that the prosecution could admit Johnson's statements that Buckley had in the past assaulted her as well as her statements to police officers about the current incident. Buckley does not specifically address the grounds for this claim of error on appeal; rather, he merely notes that the trial court had a duty to ensure that the statements were relevant and not unduly prejudicial and characterizes the statements to the police officers as "testimonial." From this, he concludes that the statements were inadmissible. By failing to fully and properly address the bases for this claim of error, Buckley has abandoned this issue on appeal. See *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006). Nevertheless, to the extent that he appears to suggest that the evidence was inadmissible for the reasons stated in his motion in limine—namely, because the incidents were not relevant, not trustworthy, highly prejudicial, and violated his right to confront the witnesses against him—we shall briefly address whether the trial court erred when it denied that motion.

This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Roper*, 286 Mich App 77, 90; 777 NW2d 483 (2009). This Court, however, reviews de novo whether the trial court properly interpreted and applied statutes and the constitution. *People v Rose*, 289 Mich App 499, 505; 808 NW2d 301 (2010).

B. ANALYSIS

1. HEARSAY

Before trial, the prosecution gave notice to Buckley that it intended to admit statements—both oral and written—that Johnson made to various police officers after prior incidents of domestic violence involving Buckley. The prosecutor intended to admit the statements to prove that the prior incidents occurred and to demonstrate that Buckley has a propensity to assault Johnson, especially while intoxicated. The prosecutor also gave notice that it intended to present evidence of Johnson's statements to an officer concerning the incident at issue.

Michigan's rules of evidence generally preclude the admission of hearsay. MRE 802. 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(c). Because the prosecutor intended to admit Johnson's statements through testimony by officers and in written reports to prove the truth of the matters asserted in the statements, the testimony and reports would normally be barred under MRE 802. Our Legislature, however, has altered the hearsay rules as they apply to cases involving domestic violence.

With the enactment of MCL 768.27c, the "Legislature determined that under certain circumstances, statements made to law enforcement officers are admissible in domestic violence cases." *People v Meissner*, 294 Mich App 438, 445; 812 NW2d 37 (2011). In order to be admissible under this statute, the statement must be made to a law enforcement officer, purport

to "narrate, describe, or explain" an offense involving domestic violence against the declarant, be made "at or near the time" of the offense, and be made "under circumstances that would indicate the statement's trustworthiness." MCL 768.27c(1)(a)-(e).

The statements at issue each involve Johnson's description of an incident of domestic violence involving Buckley to a police officer within a short time after the incident. Thus, the statements met the requirements provided under MCL 768.27c(1)(a)-(c), and (e). Indeed, before the trial court, Buckley's lawyer only challenged whether the statements met the trustworthiness requirement stated under MCL 768.27c(1)(d). In determining whether the statements were made "under circumstances that would indicate the statement's trustworthiness," MCL 768.27c(1)(d), the Legislature provided that courts should examine—but are not limited to examining—whether the "statement was made in contemplation of pending or anticipated litigation", whether the declarant "has a bias or motive for fabricating the statement, and the extent of any bias or motive," and whether the statement "is corroborated by evidence other than statements that are admissible under this section," MCL 768.27c(2).

Here, with regard to the statements that Johnson made from the prior incidents, there was no evidence that Johnson had a specific bias or motive for fabricating her statements, or that she made the statements in anticipation of litigation. The only evidence of her motive or anticipation of litigation was that which applies to every case involving a statement by a victim of domestic violence: one can infer that the victim was motivated to make the statement to elicit the officer's help and that the victim anticipated that the officer might arrest the victim's attacker, which could lead to litigation. But these inferences were not, standing alone, sufficient to conclude that Johnson's statements were untrustworthy. Moreover, the prosecutor argued that for each of Johnson's statements, an officer or other eyewitness could testify to observations that corroborated her statements. And there was evidence at trial that this was indeed the case.

Officer Scott Sawyer, for example, testified that he knew Buckley because he has had "several contacts" with him. Sawyer responded to calls involving a domestic disturbance at the trailer occupied by Buckley and Johnson twice on the same day in March 2009. After the second visit, Sawyer saw that Johnson was crying and she told him that Buckley had thrown her out of the trailer and threw a "small pry bar, screwdriver-type tool at her." Sawyer testified that he recovered the tool and saw other signs that there had been a struggle or assault—namely, he saw a small chair outside the trailer that had been broken and which was not broken when he visited the trailer earlier that day. Sawyer was apparently familiar with the mobile home park and found Buckley in the park's laundry room. He was intoxicated and had wedged himself between a washer and a wall and was drinking a beer.

Similarly, officer Stanley Mathewson testified that he responded to Johnson and Buckley's home in April 2008 and then again in December 2008. With regard to the April incident, Johnson told him that Buckley had come home intoxicated, became angry at her because she was out all night, grabbed her by the hair, dragged her around, and finally threw her off the front porch. Mathewson saw signs that there had been a struggle: he saw a kitchen drawer thrown out onto the front lawn with silverware strewn about and saw that Johnson's shirt had been torn. When Mathewson arrived after the December incident, Johnson told him that she and Buckley had argued, he slapped her and threw a chair through the kitchen window. Mathewson saw that the trailer's kitchen window was broken and also saw women's clothing

thrown out in the yard and roadway. Given the evidence that various witnesses, including the officers who responded to the prior incidents, could corroborate Johnson's statements in some respect, we cannot conclude that the trial court erred when it determined that the statements to police officers from the prior incidents were made under circumstances tending to suggest their trustworthiness. MCL 768.27c(1)(d).

We also cannot conclude that the trial court erred when it admitted Johnson's statement to the officer who responded to the incident at issue. With regard to this statement, Buckley's lawyer did argue that Johnson had a motive to fabricate her statement—she purportedly wanted to regain access to her home and a van—but Buckley's lawyer did not present any evidence to support that allegation. In addition, although the officer did not observe conditions from the scene that tended to corroborate that there was an incident, the trial court could take into consideration that the officer took Shinhulster's statement, which corroborated Johnson's statement. See MRE 104(a). As such, there were sufficient indicia of trustworthiness on the record to support the trial court's exercise of discretion on this statement as well.

The trial court did not abuse its discretion when it determined that Johnson's statements to police officers concerning the incident at issue and the prior incidents of domestic violence were admissible under MCL 768.27c(1). *Roper*, 286 Mich App at 90.

2. CONFRONTATION

A criminal defendant has the constitutionally guaranteed right to confront the witnesses against him or her. *People v Yost*, 278 Mich App 341, 370; 749 NW2d 753 (2008), citing US Const, Am VI; Const 1963, art 1, § 20; and *Crawford v Washington*, 541 US 36, 42; 124 S Ct 1354; 158 L Ed 2d 177 (2004). In *Crawford*, the Supreme Court of the United States held that the Sixth Amendment bars the admission of a testimonial statement by a witness who does not appear at trial, except under certain limited circumstances. *Crawford*, 541 US at 53-54.

Here, Johnson testified at trial and was available for cross-examination about her prior statements to police officers. Therefore, because her prior statements were admissible under MCL 768.27c(1), their admission did not violate Buckley's right to confront the witnesses against him. See *id.* at 59 n 9 ("[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his [or her] prior testimonial statements."). This is true even though Johnson did not recall the details of her prior statements and, in one case, did not recall making the statement. See *United States v Owens*, 484 US 554, 559-560, 108 S Ct 838, 98 L Ed 2d 951 (1988); *People v Watson*, 245 Mich App 572, 584, 629 NW2d 411 (2001) ("[A] defendant's right of confrontation is not denied even if the witness, on cross-examination, claims a lack of memory."). Therefore, the trial court did not violate Buckley's right to confront the witnesses against him by admitting these statements.

3. OTHER ACTS EVIDENCE

Finally, we do not agree that the trial court erred to the extent that it allowed the prosecution to admit testimony and evidence concerning the prior incidents of domestic violence to prove that Buckley had a propensity to engage in domestic violence. Evidence that the defendant has engaged in past bad acts is relevant to prove that the defendant has bad

character—that is, a propensity to commit bad acts—and acted in conformity with his or her character. See *People v VanderVliet*, 444 Mich 52, 61-62, 62 n 11; 508 NW2d 114 (1993). Despite being relevant to establish propensity, evidence that a person has engaged in prior bad acts is generally not admissible for that purpose. See MRE 404b(b)(1). This is because "there is a significant danger that the jury will overestimate the probative value of the character evidence." *Roper*, 286 Mich App at 91. Nevertheless, our Legislature has determined that the general rule against the admission of prior acts to prove propensity should not apply in prosecutions involving domestic violence: "[I]n 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." MCL 768.27b(1). Under this statute, "trial courts have discretion to admit relevant evidence of other domestic assaults to prove any issue, even the character of the accused, if the evidence meets the standard of MRE 403." *People v Cameron*, 291 Mich App 599, 609; 806 NW2d 371 (2011) (quotation marks and citation omitted). Therefore, the prosecution could properly seek the admission of this evidence to prove that Buckley acted in conformity with his propensity to assault Johnson.

Moreover, on this record, we cannot conclude that the trial court erred when it determined that MRE 403 did not bar the evidence at issue. Under MRE 403, a trial court may exclude otherwise relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice . . . ."

The evidence concerning the prior acts established a recurring pattern with Buckley and Johnson: Buckley would become drunk, argue with Johnson, and then assault her. And the evidence concerning the event at issue was strikingly similar to the majority of the prior incidents. Buckley was intoxicated, apparently started to argue with Johnson, and then struck her repeatedly with his fists. The evidence that Buckley had several times assaulted Johnson during past arguments while intoxicated served as a powerful counterweight to the argument by Buckley's lawyer that Johnson had misstated the facts concerning the incident at issue. Moreover, with the exception of the incident involving the gasoline, none of the prior incidents involved circumstances that were so unusual or emotionally charged that one might reasonably conclude that the probative value of this evidence was substantially outweighed by the danger of unfair prejudice. MRE 403.

Although the dissimilarity between the incident involving the gasoline and the other incidents of domestic violence, along with its implications, makes the admission of that testimony a closer matter, we cannot conclude that the trial court's decision to permit that testimony fell outside the range of reasonable and principled outcomes. *Rose*, 289 Mich App at 524. While the incident with the gasoline represents a serious escalation in violence, it was consistent with Buckley's prior resorts to violence during disagreements. Moreover, the trial court properly instructed the jury that it could only consider the other acts evidence in deciding whether Buckley committed the assault at issue and warned that it "must not convict the Defendant here solely because you think he is guilty of other bad conduct." This instruction mitigated the potential for unfair prejudice and adequately safeguarded Buckley's rights. See *Roper*, 286 Mich App at 106.

The trial court did not abuse its discretion or violate Buckley's right to confront the witnesses against him when it admitted Johnson's statements to police officers concerning the present and prior incidents of domestic violence.

III. IMPROPER IMPEACHMENT

A. STANDARD OF REVIEW

Buckley next contends that the prosecutor improperly impeached his only witness, Michael Randles, with a November 2011 conviction for receiving and concealing a stolen vehicle, which was actually for a different Michael Randles. Because Buckley's lawyer did not object to the impeachment on this basis, our review is for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). In order to warrant relief under the plain error test, Buckley must show that there was an obvious error and that the error affected the outcome of the lower court proceeding. *Id.*

B. ANALYSIS

On cross-examination, the prosecutor asked Randles whether he had been convicted of receiving and concealing a stolen motor vehicle in November 2011. Randles denied that he had such a conviction in November 2011. The prosecutor then asked if he had ever been convicted of possessing stolen property and Randles admitted that he had: "I mean I've been convicted but not in 2011, no." When the prosecutor asked in what year he had been convicted, Randles responded that it was "a long time ago" and he did not recall when. The prosecutor then ceased questioning Randles.

On this record, there was no plain error. There is no evidence that the prosecutor or trial court knew that the November 2011 conviction applied to a different Michael Randles. Indeed, it does not even appear that Buckley's own lawyer knew that the conviction did not apply to the Michael Randles who was involved in this case, despite having been given notice of the prosecutor's intent to use the conviction to impeach Randles. There is similarly no evidence that the prosecutor acted in anything other than good faith when pursuing this line of questioning. See *People v Dobek*, 274 Mich App 58, 72; 732 NW2d 546 (2007) (stating that a prosecutor's good faith effort to admit evidence does not amount to misconduct). Therefore, it cannot be said that any error was clear or obvious. *Carines*, 460 Mich at 763. Likewise, even if it could be said that the trial court or prosecutor plainly should have realized that the conviction at issue was for a different Michael Randles, Buckley has not established that the error was outcome determinative.

At trial, Randles occasionally appeared confused and gave somewhat inconsistent testimony. He even at one point mistakenly testified that Johnson was currently living with him. In addition, although he testified that Buckley never struck Johnson and that it was just a little argument, he nevertheless testified that Buckley and Johnson had a physical altercation, which had to be broken up. He said that Shinhulster told Buckley to settle down and Buckley would not settle down. He (Randles) then "stepped in the middle" and ended up on the floor with Buckley. He then got "punched on and kicked on." (At that point, the transcript reflects that

Buckley blurted: "Thanks a lot, buddy."). Given this record, we cannot conclude that the prosecutor's questioning—even if plainly in error—prejudiced Buckley's trial. *Id.*

There was no plain error warranting relief.

IV. JUROR MISCONDUCT

In a brief submitted on his own behalf, Buckley argues that he was deprived of a fair trial when a juror accessed information about Buckley from the internet. He alternatively argues that his trial lawyer provided ineffective assistance by failing to move to disqualify the juror. On appeal, Buckley has not cited the record or provided any evidence to support his claim that a juror improperly accessed the internet to discover information about him. By failing to provide any support for this claim of error, Buckley has abandoned it on appeal. *Martin*, 271 Mich App at 315.

V. DISCOVERY ERROR

Finally, Buckley also argues on his own behalf that the trial court erred when it denied his request to discover Johnson's mental health records. Buckley maintains that her records might have contained information relevant to his defense.

Buckley's lawyer moved to discover Johnson's mental health records and, consistent with MCR 6.201(C)(2), the trial court examined the records *in camera*. See *People v Stanaway*, 446 Mich 643, 680-681; 521 NW2d 557 (1994). After concluding that the records did not contain information "necessary to the defense," as required under MCR 6.201(C)(2)(b), the trial court denied Buckley's motion. On appeal, Buckley has merely stated his claim of error without offering any support for his contention that the trial court erred when it concluded that the mental health records did not contain any information necessary to the defense. Therefore, he has again failed to properly support his claim of error and we will not consider it further. See *Martin*, 271 Mich App at 315.

There were no errors warranting relief.

Affirmed.

/s/ Patrick M. Meter
/s/ Kirsten Frank Kelly
/s/ Michael J. Kelly