

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RYAN MICHAEL PAYNE,

Defendant-Appellant.

UNPUBLISHED

December 16, 2021

No. 348706

Oakland Circuit Court

LC No. 2018-268254-FH

Before: GLEICHER, P.J., and STEPHENS and CAMERON, JJ.

PER CURIAM.

Defendant appeals by right, following a jury trial, his conviction of domestic violence, third offense, MCL 750.81(4). He was sentenced as a fourth habitual offender, MCL 769.12, to 365 days in jail. We remanded this case to the trial court for a *Ginther* hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), for counsel’s failure to file pre-trial motions or object at trial to the admission of testimony regarding 2001 acts of domestic violence.¹ Upon review of the record after remand, we affirm.

I. BACKGROUND

The domestic violence charge that gave rise to this case arose from an interaction between defendant and his then domestic partner whom we refer to as “the victim.” Both defendant and the victim agreed that on the day in question, there was a long series of arguments between them at their home. Defendant consumed at least twelve beers and admitted to being intoxicated. The victim spent most of the day in their bedroom suffering from allergies and a sinus infection. Defendant exited the house around midnight and parked his truck directly outside the bedroom

¹ *People v Payne*, unpublished order of the Court of Appeals, entered September 14, 2020 (Docket No. 348706).

where the victim was resting. He played music loudly enough to prompt a neighbor to call the police and make a noise complaint.

While outside, defendant knocked on the bedroom window. The victim opened the window and defendant asked for his cellular telephone. The victim refused. Defendant reached through the open window and grabbed the television remote control from the bed, prompting the victim to give defendant his telephone. As defendant started to walk away from the window, the victim asked for the remote control. Defendant threw the remote control through the open window. It was disputed whether the remote control struck the victim in the face. It was undisputed that the victim threw the remote back at defendant and closed the window. Defendant knocked on the window asking the victim to open it, but she refused. Defendant hit the window, causing it to crack. The victim then called the police, requesting officers remove defendant from the premises. Oakland County Sheriff's Deputy Michael Pankey was dispatched to the residence and encountered defendant in the driveway. Pankey interviewed the victim, who refused to give a written statement, and observed a raised mark under her left eye. Defendant was charged with domestic violence, third offense, MCL 750.81(4). Pretrial, the prosecution filed a notice of intent to introduce prior acts of domestic violence between defendant and the victim, and between defendant and an ex-girlfriend.

At trial, the testimony elicited regarding the remote control incident came from the victim, Pankey, and defendant. The victim denied that the remote control struck her and that defendant aimed the remote control at her when he threw it back into the window. The jury heard the victim's 911 call to the police in which she told dispatch that defendant, whom she described as her ex-boyfriend, had assaulted her in an attempt to break into the home. Additionally, the jury heard testimony regarding jailhouse calls between defendant and the victim in which defendant discussed his need to be released from jail because the two of them had a business opportunity valued at 100,000 dollars that was at risk if he was not released. Pankey testified that the victim reported to him that she had been struck with the remote and he had observed a mark on her face. Defendant admitted throwing the remote but denied aiming at the victim.

The jury heard testimony about prior incidents of domestic violence and physical altercations between defendant and his domestic partners. The prosecution introduced evidence of two altercations between defendant and the victim: (1) an August 2009 altercation, after a wedding, during which defendant pushed a vacuum cleaner at the victim; and (2) a May 2013 altercation during which defendant pulled the victim's hair, choked her, and dragged her across the floor, resulting in defendant pleading guilty to domestic violence. The prosecution also introduced testimony regarding a domestic violence conviction involving defendant and another ex-girlfriend. Defendant's ex-girlfriend testified that in 2001, she and defendant argued over defendant and his friend tracking mud in the house and smoking marijuana in the basement. Defendant's ex-girlfriend chastised defendant. Defendant became angry and yelled, calling his ex-girlfriend various derogatory names. Defendant tackled his ex-girlfriend to the ground, held her face, and then let her go. Defendant also threw a bottle of cleaning product at his ex-girlfriend, breaking the handle. When his ex-girlfriend tried to go toward the door, defendant blocked it. Defendant then grabbed his ex-girlfriend's throat and held her until the friend yelled at defendant to let her leave. Defendant's ex-girlfriend went to the police, defendant was arrested, and plead guilty to domestic violence. Defense counsel did not object to the admission of the 2001 ex-

girlfriend's testimony. He also did not cross-examine her or object to the admission of defendant's conviction record.

II. OTHER-ACTS EVIDENCE

Defendant argues that the trial court erred by permitting evidence of other acts that occurred approximately 17 years prior to the charged offense under MCL 768.27b. He further argues that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice under MRE 403. We agree. Because defendant did not object to the other-acts evidence at trial, this issue is unpreserved. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). This Court reviews unpreserved issues affecting defendant's substantial rights for plain error. *People v Carines*, 460 Mich 750, 763-764; 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." *Id.* at 763. "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id.* Once these three requirements are met, reversal is required only when the plain error "resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id.* at 763-764 (quotation marks and alterations omitted).

A. MCL 768.27B

MCL 768.27b states, in pertinent part:

(1) Except as provided in subsection (4), in a criminal action in which the defendant is accused of an offense involving domestic violence or sexual assault, evidence of the defendant's commission of other acts of domestic violence or sexual assault 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)].

"When a defendant is accused of an offense involving domestic violence, MCL 768.27b permits evidence of prior domestic violence in order to show a defendant's character or propensity to commit the same act," *People v Railer*, 288 Mich App 213, 219-220; 792 NW2d 776 (2010). However, evidence of a prior bad act of domestic violence is limited to evidence that satisfies the more probative than prejudicial balancing test of MRE 403, and the act generally must have taken place less than 10 years before the charged offense. MCL 768.27b(1); *People v Rosa*, 322 Mich App 726, 732-733; 913 NW2d 392 (2018). A prior bad act that occurred more than 10 years before the prior incident is still admissible if the trial court deems it is in the "interest of justice." MCL 768.27b(4).

Here, it was error to admit the prior acts from the 2001 conviction. The incident occurred more than 10 years before the current offense and its admission, contrary to the prosecution's argument, was not in the "interest of justice." In Michigan, the interest of justice exception has not been expressly defined, however caselaw has held prior acts evidence that occurred more than 10 years before the charged offense must do more than demonstrate that the incident at issue is probative of a defendant's propensities in order to survive an MRE 403 challenge. "To avoid rendering the 10-year limit nugatory, the exception should be narrowly construed. Accordingly,

we conclude that evidence of prior acts that occurred more than 10 years before the charged offense is admissible under MCL 768.27b only if that evidence is uniquely probative or if the jury is likely to be misled without admission of the evidence.” *Rosa*, 322 Mich App at 734.

The prosecution in this case argued that the victim was giving false testimony when she denied being hit and that defendant was aiming at her. It was the prosecution’s theory that the victim was credible when she made the 911 calls but recanted because she was economically trapped and had children with defendant. The prosecutor argued that the 2001 incident was probative of defendant’s intent when he threw the remote because he threw a household object as a part of the assault in 2001. The defense countered that the altercation at issue was an argument where a drunken defendant did not have the intent to threaten the victim nor did he actually assault her. The jury was well-equipped to make a credibility determination and the 2001 assault was not needed to prevent them from being misled. Thus, the 2001 incident, with all of its graphic details, was not “uniquely probative.”

B. MRE 403

Admission of the 2001 other-acts evidence was not only inadmissible under MCL 768.27b, but also inadmissible when evaluated under MRE 403, which states:

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.

Regarding probative value, “prior-bad-acts evidence of domestic violence can be admitted at trial because a full and complete picture of a defendant’s history tends to shed light on the likelihood that a domestic violence crime was committed.” *People v Propp*, 330 Mich App 151, 172-173; 946 NW2d 786 (2019), lv gtd 506 Mich 939; 949 NW2d 459 (quotation marks and citation omitted). Evidence is not “unfairly prejudicial” just because it is damaging; rather, the term

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. Moreover, admission of evidence is unfairly prejudicial when . . . the danger exists that marginally probative evidence will be given undue or preemptive weight by the jury. [*People v Cameron*, 291 Mich App 599, 611; 806 NW2d 371 (2011) (quotation marks, citations, and brackets omitted).]

“[C]ourts must weigh the propensity inference in favor of the evidence’s probative value rather than its prejudicial effect.” *People v Watkins*, 491 Mich 450, 487; 818 NW2d 296 (2012). However, “[t]his does not mean . . . that other-acts evidence admissible under MCL 768.27a [or MCL 768.27b] may never be excluded under MRE 403 as overly prejudicial.” *Watkins*, 491 Mich at 487; see *People v Mack*, 493 Mich 1, 2-3; 825 NW2d 541 (2012) (holding that the analysis in *Watkins*, which evaluated MCL 768.27a, also applies to MCL 768.27b). To determine whether to exclude evidence under MRE 403, a trial court can properly consider the following nonexhaustive factors:

the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony. [*Id.* at 487-488 (citation omitted)].

Here, not only is the 2001 conviction arguably irrelevant to the case at bar, the evidence of defendant's 2001 conviction is limited by MRE 403 because its probative value is substantially outweighed by its prejudicial effect. The 2001 incident was a prolonged assault, replete with physical restraint, demeaning language, and attempted strangulation. Further, the fact that there was a household object thrown was a minor aspect of the 2001 incident. Its probative value, diminished by the passage of time, was substantially outweighed by its prejudicial effect. Moreover, we note that the prosecution's MRE 404(b) argument is irrelevant to the issues presented in this case. "A rule of evidence will prevail over a conflicting statute only if the statute unconstitutionally infringes on this Court's authority under Const. 1963, art 6, § 5 to establish, modify, amend and simplify the practice and procedure in all courts of this state." See *Watkins*, 491 Mich at 472 (quotation marks and citation omitted).

The trial court plainly erred with regard to this evidentiary issue. However, because this is an unpreserved non-constitutional issue, we must determine if the error affected defendant's substantial rights. *People v Jones*, 468 Mich 345, 355 NW2d 376 (2003). In that respect, we cannot say that defendant was prejudiced by the evidence of the 2001 incident. Neither does the record support a finding that the fairness, integrity or public reputation of the proceeding were affected. Given the other evidence in the case, the trial court's error in admitting the evidence did not affect the fairness or integrity of the proceedings. On the basis of the victim's testimony, Pankey's testimony, the 911 call, and evidence of the 2013 and 2009 incidents, a reasonable jury could still conclude that defendant intended to hit the victim with the remote and demonstrated a pattern of violence against this victim. Therefore, defendant is not entitled to reversal on this issue.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant also argues he was denied the effective assistance of counsel and his right to due process because of counsel's failure to object to evidence regarding the 2001 domestic violence conviction at trial. We remanded this issue to the trial court for an evidentiary hearing.

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

“Reviewing courts are not only required to give counsel the benefit of the doubt with this presumption, they are required to ‘affirmatively entertain the range of possible’ reasons that counsel may have had for proceeding as he or she did.” *People v Gioglio (On Remand)*, 296 Mich App 12, 22; 815 NW2d 589 (2012), vacated in part on other grounds 493 Mich 864 (2012) (citation omitted). “[A] reviewing court must conclude that the act or omission of the defendant’s trial counsel fell within the range of reasonable professional conduct if, after affirmatively entertaining the range of possible reasons for the act or omission under the facts known to the reviewing court, there might have been a legitimate strategic reason for the act or omission.” *Id.* at 22-23. Defendant has the burden of establishing the factual predicate of his ineffective-assistance claim. *People v Douglas*, 496 Mich 557, 592; 852 NW2d 587 (2014).

Decisions regarding what evidence to present are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). However, a defense attorney’s failure to move for the suppression of evidence may, under proper circumstances, constitute ineffective assistance of counsel. *People v Thomas*, 184 Mich App 480, 482; 459 NW2d 65 (1990). The failure to object to evidence can constitute ineffective assistance of counsel where the evidence was inadmissible and its introduction was so prejudicial that it could have affected the outcome of the case. *People v Ullah*, 216 Mich App 669, 685–686; 550 NW2d 568 (1996).

Whether a defendant received effective assistance of counsel is a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court’s factual findings at an evidentiary hearing are reviewed for clear error while questions of constitutional law are reviewed de novo. *Id.* “A trial court’s factual finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that the trial court made a mistake.” *People v Franklin*, 500 Mich 92, 100; 894 NW2d 561 (2017) (quotation marks and citations omitted).

At the *Ginther* hearing, defense counsel agreed that after he received the prosecution’s pretrial notice of intent to introduce defendant’s 2001 domestic violence conviction, he did not review the statute, did not file a formal objection, nor lodge a verbal objection to the notice at any time during defendant’s trial. Defense counsel also testified that he was unaware of the case law concerning the admissibility of an offense over ten years old under MCL 768.27b. He agreed that he did not object during the ex-girlfriend’s testimony or her reading of the police report narrative concerning the 2001 incident. Defense counsel testified that because he believed, based on his motion practice and dealing with 404b issues in the past, that the prior acts testimony would be “coming in anyway,” his chosen strategy was to factually distinguish the instant case from the 2001 one in his closing argument, and to rely on the trial court’s limiting instruction to the jury for its consideration of the evidence. As to the defense trial strategy, defense counsel intended to argue that the trial testimony supported that the remote incident did not happen, and that defendant’s prior domestic violence cases, in which defendant pled guilty, showed defendant took responsibility for crimes that he actually committed.

The court ruled that defendant received the effective assistance of counsel. The court found counsel to be credible and accepted his testimony as to strategy. The court found that defense counsel’s performance did not fall below an objective standard of reasonableness because counsel had a legitimate trial strategy. The court gave a cursory review of the probability that an objection would have been successful under 404(b) or otherwise. The court was emphatic in the conclusion that even had the 2001 incident been excluded from the trial, it would not have had a reasonable

probability of altering the case's outcome. The court reviewed the other evidence in the case and found that the evidence for conviction was strong. It noted the documented history of violence between the victim and defendant, the 911 call, Payne's testimony, and the coercive jailhouse recording. The court found that this evidence seriously undermined the testimony of defendant and victim: that either the remote was not thrown, the remote did not strike the victim, or if it was thrown, there was no intent to hit the victim and thus conviction was likely even without the admission of the 2001 assault. Our decision in this case is based on the court's analysis that there was no reasonable probability that even with the exclusion of the 2001 incident, the outcome would have been more favorable to defendant.

We are skeptical of the reasonableness of the defense strategy to neither investigate the notice of intent, research the statute, or even cross-examine the testimony concerning the 2001 assault. However, we cannot say that the outcome of the trial was affected by counsel's questionable decisions. The victim and defendant's trial testimony that the remote was either never thrown or thrown without intent to injure was not credible based upon the 911 call, the officer's observation, the victim's admission of injury to the officer at the scene, and the coercive jailhouse phone calls. Even without the 2001 conviction and its graphic detail, the jury heard that defendant was violent with this victim on two previous occasions; in 2013 when he choked the victim and dragged her by her hair; and in 2009 when defendant shoved a vacuum cleaner at the victim. We cannot say that the trial court erred in finding no reasonable probability that counsel's failures regarding the 2001 incident made a difference in the outcome of this case. Therefore, defendant is not entitled to a new trial on this issue.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Cynthia Diane Stephens
/s/ Thomas C. Cameron