STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 20, 2011
v	No. 299402 Oakland Circuit Court
JOSEPH DAMIAN SUSALLA, Defendant-Appellant.	LC No. 2009-228601-FC

Before: FORT HOOD, P.J., and HOEKSTRA and METER, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), and sentenced to life imprisonment without the possibility of parole. He appeals as of right. We affirm.

I. BASIC FACTS

Defendant's conviction arises from the murder of Kelley Duberg. Defendant did not dispute that he killed Duberg, his girlfriend, but claimed that he killed her while in a fit of rage, and not with premeditation and deliberation.

On the morning of May 23, 2009, which was the Saturday before Memorial Day, defendant asked his stepfather and mother, Roger and Karen Wickstrom, if it was okay if he camped on their property in Crawford County. He planned to take Duberg with him. Defendant also borrowed a shovel and an ax from the Wickstroms. The Wickstroms next saw defendant the following evening, May 24, 2009, when he returned the shovel and ax. Defendant told the Wickstroms that he and Duberg had not camped because Duberg was drunk.

Based on defendant's history of violence with women, Karen Wickstrom became concerned about Duberg's safety. She told defendant that she wanted to see or talk with Duberg, to which defendant gave varying responses, such as Duberg was drunk, sleeping, or not answering her telephone, and had left with another man. Karen tried calling Duberg on her cellular telephone over the next two days, but Duberg never answered her telephone. Finally, on Wednesday, May 27, 2009, Karen called the Michigan State Police to report Duberg missing.

Sergeant Melinda Logan, who took the missing person report, went to Duberg's apartment to conduct a welfare check. Logan did not find Duberg. Logan also sent a police

officer to Duberg's place of employment; her coworkers reported that Duberg had not appeared for work that week.

That same day, Logan received information that defendant was at Doug Fletcher's house on Bentler Street in Detroit. Defendant was taken into custody. After waiving his *Miranda*[1] rights, defendant told two Michigan State Police officers that he had last seen Duberg on Saturday and that he believed she was with someone named Ian. Duberg's car, which defendant was known to drive, was found at a convenience store approximately nine blocks from Fletcher's house. The car had been backed into the parking spot, such that the car's license plate was not visible.

According to Fletcher, he saw Duberg's car on his property on May 25, 2009. He sent Bruce Cousins across the street to Karen McCartney's house to ask defendant to move the car. Defendant asked to speak to Cousins alone. He told Cousins that he had killed someone and buried the body. He explained that he had hit the person and the person had urinated and defecated. Defendant further told Cousins that his girlfriend was passed out at home. Sean Voegler was also at McCartney's house. Defendant told Voegler that he had murdered and buried his girlfriend. He explained that he was jealous over his girlfriend. Defendant stated that his girlfriend deserved everything that she had received and that he also wanted to take care of the other man.

On June 5, 2009, the Michigan State Police received consent from the Wickstroms to search their property in Crawford County. With the aid of a cadaver dog, the officers found the buried remains of Duberg. Duberg's body was wrapped in a shower curtain, tied with extension cords and twine, and several garbage bags. According to the medical examiner, Duberg suffered blunt force trauma to her face, which caused swelling and bruising around her eyes, but the cause of death was ligature strangulation. The medical examiner testified that it generally takes ten to 15 seconds for a person being choked to lose consciousness, but that it takes a few minutes of strangulation for irreversible brain damage and death to occur. After defendant was arrested for the killing of Duberg, he made a telephone call to his mother from jail in which he stated, "I'm going to try to get it down."

Defendant testified that he and Duberg argued during the evening of May 22, 2009. Duberg told defendant that she hated him, and when he asked her what her problem was, she did not respond; she just glared at him. Defendant attempted to give her a hug, but she kicked him in the groin. According to defendant, he then went into a rage and lost of control of himself; he stated that he just "blacked out." He put his hands around Duberg's neck and strangled her. When Duberg urinated on him, defendant hit her three times in the face. And then, after Duberg just laid there for about two hours, defendant realized that she was dead. He wrapped her up and buried her the next day. Defendant denied that he ever planned to kill Duberg.

On cross-examination, defendant admitted that he put a piece of twine around Duberg's neck. After he punched Duberg, he walked to the kitchen and took the twine from a drawer.

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Defendant first claimed that the twine broke as soon as he placed it around Duberg's neck and pulled, but then he admitted that he pulled the twine hard enough to break through the cartilage in Duberg's neck and applied pressure long enough for Duberg to lose consciousness and die.

Defendant admitted that he was jealous and controlling with regard to women and, especially, to the women that he dated. Barbara Polson and Kenneth McCray, who lived in the apartment above Duberg's apartment, testified that they often heard defendant and Duberg argue. They also heard sounds related to shoving and pushing. Two weeks before Memorial Day, Polson saw defendant "pulling" Duberg by the arm. Jeffrey Saucerman, who knew defendant from AA, testified that it seemed defendant was jealous in his relationship with Duberg. Defendant told Saucerman that he checked Duberg's panties for semen. Telephone records established that on May 12, 2009, defendant called Duberg's cellular telephone 74 times and that on May 13, 2009, he called 78 times. Two of Duberg's coworkers testified that, based on conversations with Duberg about defendant, they were concerned for Duberg's safety. Gregory Barber, Duberg's boss, testified that he received a note from Duberg on April 22, 2009, stating that she had broken up with her boyfriend and that she needed to take the day off because she needed to change the lock on her door and because she needed to go to Verizon to get a battery for her cellular telephone to replace the one that defendant had taken. According to Janet Sylvester, who attended AA with Duberg, Duberg told her two weeks before she went missing that she was afraid that defendant was going to kill her.

Deborah Aquilina, defendant's sister, testified that she called 911 on a day in March 2005 because defendant had "kicked [her] ass." She had a bloody nose and a black eye. Robin Susalla, defendant's wife, testified that defendant punched her in the face on four or five occasions. Fletcher testified that he had seen defendant beat a former girlfriend in the head with a tire iron.

II. VICTIM'S STATEMENT OF FEAR OF DEFENDANT

Defendant claims that the trial court erred in allowing Sylvester to testify to Duberg's out of-court statement that Duberg was afraid that defendant was going to kill her.

Defendant did not object that Duberg's out-of-court statement to Sylvester was inadmissible under MRE 803(3). Although defendant objected to the admission of Duberg's out-of-court statements to Duberg's boss and coworkers, those objections were not sufficient to preserve a challenge to the victim's out-of-court statement that was testified to by Sylvester. See *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007) ("For an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court."); *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993) ("An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground."). Accordingly, the issue whether Duberg's statement to Sylvester was admissible under MRE 803(3) is unpreserved, and we review defendant's claim of error for plain error, i.e., clear or obvious error, affecting defendant's substantial rights. *People v Seals*, 285 Mich App 1, 4; 776 NW2d 314 (2009); *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003).

Hearsay, which 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," is

inadmissible except as provided by the Michigan rules of evidence. MRE 801(c); MRE 802. Under MRE 803(3), an out-of-court statement of the declarant's then existing mental, emotional, or physical condition is not precluded by the hearsay rule. *People v Moorer*, 262 Mich App 64, 68; 683 NW2d 736 (2004). MRE 803(3) provides:

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

In support of his argument, defendant cites *Moorer*, 262 Mich App 64. In *Moorer*, this Court held that the out-of-court statements by the victim that he had a confrontation with the defendant, that the defendant wanted to kill him, that the defendant had threatened to kill him, that the defendant said he had a bullet for him, and that defendant had a gun and was looking for him were not admissible under MRE 803(3) because the statements related to past events. *Id.* at 73. Duberg's out-of-court statement is distinguishable from the statements ruled inadmissible in *Moorer*. Duberg's statement that she was scared that defendant was going to kill her did not describe the past actions of defendant. See *id.* Rather, the statement was a statement of her then existing mental feeling. In addition, based on defendant's testimony, Duberg's state of mind was relevant. Defendant testified that he killed Duberg because of the rage he experienced after Duberg kicked him in the groin. Duberg's statement of fear of defendant made it less probable that Duberg provoked defendant as he claimed. Under the circumstances, defendant has failed to establish plain error in the admission of Duberg's out-of-court statement.[2]

III. EVIDENCE OF DEFENDANT'S ACTS OF PRIOR DOMESTIC VIOLENCE

Defendant argues that the trial court erred in admitting evidence of his prior acts of domestic violence under MCL 768.27b and MRE 404(b) because the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. Defendant also claims that the trial court erred in denying his request for a limiting instruction and instructing the jury that it could consider the evidence in determining whether defendant killed Duberg.

We review a trial court's evidentiary decisions for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Id.* at 217. We review de novo issues of law arising from the jury instructions, but we review for an abuse of discretion

[2] Even if the admission of Duberg's out-of-court statement constituted plain error, defendant fails to carry the burden that the error prejudiced him, i.e., that the error affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *Seals*, 285 Mich App at 4. Given all the evidence concerning the relationship of defendant and Duberg, which indicated defendant's jealousy and discord between the two, and the evidence that Duberg died from ligature strangulation, we cannot conclude that the error, if there was error, affected the outcome of defendant's trial.

a trial court's determination whether a jury instruction was applicable to the facts of the case. *People v Waclawski*, 286 Mich App 634, 675; 780 NW2d 321 (2009).

Under MRE 404(b), evidence of a defendant's other crimes, wrongs, or acts is not admissible to prove the defendant's propensity to commit a crime. *People v Railer*, 288 Mich App 213, 219; 792 NW2d 776 (2010). However, in cases involving domestic violence, MCL 768.27b allows the admission of evidence of prior acts of domestic violence to prove a defendant's character or propensity to commit the same crime. *Id.* at 219-220. MCL 768.27b(1) provides:

> Except as provided in subsection (4)[3], 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.

Here, defendant does not claim that the present case is not "a criminal action in which [he] is accused of an offense involving domestic violence," nor does he claim that the evidence of him beating up his sister, punching his wife in the face, and striking a former girlfriend in the face with a tire iron is not "evidence of [his] commission of other acts of domestic violence." He claims that the evidence of his prior acts of domestic violence should have been excluded under MRE 403.

Under MRE 403, relevant evidence may be excluded if its probative value is substantially outweighed by unfair prejudice. *People v Cameron*, ___ Mich App ___; ___ NW2d ___ (2011). All relevant evidence is damaging to some extent, and the fact that evidence is prejudicial does not make its admission unfair. *People v Murphy (On Remand)*, 282 Mich App 571, 582-583; 766 NW2d 303 (2009). 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." *Cameron*, ___ Mich App at ___ (quotation marks and citations omitted). Unfair prejudice also exists where marginally probative evidence will be given undue or preemptive weight by the jury. *Id.*

Defendant claims that the evidence of his prior acts of domestic violence was unfairly prejudicial because, given his admission that he killed Duberg, the probative value of the evidence was minimal. However, a defendant's not guilty plea places all elements of the crime "at issue." *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998). The prosecutor has the burden to prove each element of the crime beyond a reasonable doubt, regardless of whether the defendant specifically disputes or offers to stipulate to any of the elements. *Id.* In addition, a prosecutor does not have to use the least prejudicial evidence in presenting the case to the jury. *Cameron*, ___ Mich App at ___. Defendant does not dispute that the evidence of his prior acts

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[3] Subsection 4 provides: "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." MCL 768.27b(4).

of domestic violence was not relevant to the issue whether he killed Duberg. Where the testimony of defendant's sister, his wife, and Fletcher concerning defendant's prior acts was brief and limited in detail, MRE 403 did not preclude the admission of the prior acts evidence. While the evidence was prejudicial, it did not prevent the jury from logically weighing all the evidence to determine whether defendant acted with premeditation and deliberation in killing Duberg. See *Railer*, 288 Mich App at 220-221. Accordingly, the trial court did not abuse its discretion in admitting the evidence of defendant's prior acts of domestic violence.

Because the evidence was admissible under MCL 768.27b, the trial court did not abuse its discretion in denying defendant's request for a limiting instruction and instructing the jury that the evidence of defendant's prior acts of domestic violence could be used to determine whether defendant committed the charged offense of first-degree murder. Evidence that is admitted under MCL 768.72b may be used to prove a defendant's propensity to commit a crime. *People v Pattison*, 276 Mich App 613, 615; 741 NW2d 558 (2007) ("We first note that the Legislature [with the enactment of MCL 768.27b] now allows trial courts to admit relevant evidence of other domestic assaults to prove any issue, even the character of the accused . . . ."); see also *People v Schultz*, 278 Mich App 776, 778; 754 NW2d 925 (2008) ("This statute [MCL 768.27b] stands in stark contrast to MRE 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.").

Affirmed.

/s/ Karen M. Fort Hood
/s/ Joel P. Hoekstra
/s/ Patrick M. Meter