STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOEY CICI LAMARQUE,

Defendant-Appellant.

UNPUBLISHED
December 16, 2021

No. 351588
Macomb Circuit Court
LC No. 2018-001967-FC

Before: CAVANAGH, P.J., and SHAPIRO and GADOLA, JJ.

PER CURIAM.

Defendant was convicted after a jury trial of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(c), and assault with intent to do great bodily harm, MCL 750.84. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to 300 to 456 months in prison. We affirm.

I. FACTS

Defendant's convictions arise from the January 1, 2017 sexual assault of CC, who claimed that defendant also strangled her during the assault. On that evening, CC was introduced to defendant at a bar by a mutual friend. Video from the bar shows CC and defendant dancing together, hugging, and kissing. After drinking alcohol and allegedly using heroin, she accompanied defendant to his apartment. CC testified that she remembered being at the bar, but had no memory of meeting defendant, leaving the bar, or going to defendant's apartment. She testified that she recalled regaining consciousness in defendant's apartment and realizing that a man was having sex with her and choking her. She testified that she fought with the man and succeeded in pushing him away, then ran from the apartment building to a nearby fire station. Afterward, she identified the apartment building where the assault occurred to police and provided a description of her assailant. The police identified defendant, a tenant in the building, as a suspect. Defendant told police that he met CC at the bar on the night in question, and that CC voluntarily went with him to his apartment where they had consensual sex. At trial, defendant similarly testified that he was introduced to CC at a bar by mutual friends, that they spent the evening

drinking, dancing, and engaging in consensual sexual conduct while at the bar, and that she thereafter voluntarily went with him to his apartment where they engaged in consensual sex.

At trial, the prosecution presented evidence of another sexual assault committed by defendant in July 2017 against SS, a coworker he had recently met. SS testified that she joined defendant at his apartment where they drank alcohol and used marijuana. SS testified that she agreed to stay the night at defendant's apartment but told him that she would sleep on the couch. She testified that she became intoxicated and fell asleep on the couch. She later awoke to find defendant having sex with her. When she told defendant to stop and pushed him away, he went back to his bedroom. SS awoke a second time to again find defendant engaging in sex with her and choking her. SS later reported the incident to the police. Defendant was convicted as charged for the assault of CC.

II. DISCUSSION

A. OTHER ACTS EVIDENCE

Defendant contends that the trial court erred by admitting evidence under MCL 768.27b that he sexually assaulted SS. Defendant argues that the evidence should have been excluded under MRE 403 because it was unduly prejudicial. We disagree.

Absent an abuse of discretion, we will not disturb a trial court's decision to admit evidence. *People v Denson*, 500 Mich 385, 396; 902 NW2d 306 (2017). A trial court abuses its discretion when its decision falls outside the range of principled outcomes, *People v Thorpe*, 504 Mich 230, 252; 934 NW2d 693 (2019), or if it admits evidence that was inadmissible as a matter of law. *Denson*, 500 Mich at 396. Whether a rule or statute precludes the admission of evidence is a preliminary question of law that we review de novo. *Id*. In addition, under MCL 769.26, "[n]o judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice."

Evidence of a defendant's other acts generally is not admissible to demonstrate the defendant's propensity to commit similar acts. *People v Railer*, 288 Mich App 213, 219; 792 NW2d 776 (2010). The admissibility of evidence that a defendant committed other acts generally is governed by MRE 404(b), which provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." MRE 404(b)(1). However, in cases alleging sexual assault, MCL 768.27b permits the admission of evidence that the defendant committed other acts of sexual assault for any relevant purpose, including for the purpose of showing a defendant's propensity to commit sexual assault. See *Railer*, 288 Mich App at 219. MCL 768.27b(1) provides:

> 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.

This Court has observed that the purpose of the statute is to broaden the range of evidence admissible in such cases because "a full and complete picture of a defendant's history . . . tend[s] to shed light on the likelihood that a given crime was committed." *People v Cameron*, 291 Mich App 599, 609-610; 806 NW2d 371 (2011) (quotation marks and citation omitted). But although MCL 768.27b permits the admission of evidence of other sexual assaults for any relevant purpose, the statute also provides that other acts evidence is not admissible if exclusion is warranted under MRE 403. MRE 403 provides, in pertinent part, that relevant evidence "may be excluded if its probative value is substantially outweighed by danger of unfair prejudice." "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Musser*, 494 Mich 337, 357; 835 NW2d 319 (2013) (quotation marks and citation omitted).

In this case, defendant has not demonstrated that the evidence of the assault on SS was inadmissible. CC claimed that while at defendant's apartment, defendant engaged in sex with her while she was incapacitated and without her consent, and that during sex defendant choked her without her consent. SS testified to a very similar assault by defendant seven months later, also at defendant's apartment, in which she described waking up to find defendant having sex with her and choking her without her consent. SS's testimony was relevant to support CC's credibility, see *Cameron*, 291 Mich App at 612, and to show defendant's propensity to commit a sexual assault in the manner described by CC. The evidence also indicated a common plan or scheme for selecting victims and committing sexual assaults while the victims were unable to resist.

In addition, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Although all relevant evidence is prejudicial to some extent, the risk of prejudice renders evidence inadmissible only when the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995). Here, the evidence did not invite the jury to consider matters extraneous to the case, such as the jury's bias, sympathy, anger, or shock, nor was the jury invited to give marginally probative evidence undue or preemptive weight. *Cameron*, 291 Mich App at 611. The probative value of this evidence thus was not substantially outweighed by the danger of unfair prejudice under MRE 403. Accordingly, the trial court did not abuse its discretion by admitting the evidence.

Defendant also contends that MCL 768.27b is unconstitutional because the use of propensity evidence is fundamentally unfair and violated his right to due process. Defendant raises this challenge for the first time on appeal, and our review of the issue is therefore limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). MCL 768.27b reflects the Legislature's policy choice to allow juries to consider evidence of other acts for propensity purposes in certain cases. See *Cameron*, 291 Mich App at 609-610. "There is no clearly established Supreme Court precedent which holds that a state violates due process by permitting propensity evidence in the form of other bad acts

evidence." *Bugh v Mitchell*, 329 F3d 496, 512 (CA 6, 2003).[1] Furthermore, evidence offered under MCL 768.27b is subject to the requirement that the evidence be relevant and the requirement that its probative value not be substantially outweighed by the danger of unfair prejudice. These procedural safeguards are considered sufficient to protect a defendant's right to due process and a fair trial. See *United States v LeMay*, 260 F3d 1018, 1026 (CA 9, 2001). Accordingly, we reject defendant's argument that MCL 768.27b is unconstitutional.

B. PROSECUTORIAL ERROR

Defendant contends that the prosecutor improperly vouched for the credibility of CC and SS during closing argument, thereby denying defendant a fair trial. A claim of prosecutorial error must be preserved by a contemporaneous and specific objection. *People v Clark*, 330 Mich App 392, 433; 948 NW2d 604 (2019). Because defendant did not raise this objection before the trial court, we review this unpreserved issue for plain error affecting defendant's substantial rights. *Id*. However, we conclude that even if the challenge were preserved, no prosecutorial error occurred.

The purpose of closing arguments is to permit the attorneys to comment on the evidence and to argue their theories of the case to the jury. *Id*. Generally, the prosecution is given great latitude in its arguments at trial, and may argue all reasonable inferences arising from the evidence. *People v Mullins*, 322 Mich App 151, 172; 911 NW2d 201 (2017). Although a prosecutor may not vouch for the credibility of a witness by suggesting that he or she has some special knowledge regarding the truthfulness of the witness, *Clark*, 330 Mich App at 434, the prosecutor is free to argue from the facts that a witness is or is not credible, "especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). In addition, the prosecutor's arguments must be reviewed in the context of the defense arguments. *Mullins*, 322 Mich App at 172.

Defendant argues that the prosecutor in this case improperly vouched for the credibility of CC and SS by stating that he believed the similar accounts presented by both witnesses, and that the testimony of SS supported the similar testimony of CC. We disagree. The similarities between the two assaults were a matter of evidence, and the prosecutor was entitled to comment on this evidence and to argue that SS's testimony enhanced the credibility of CC's testimony. The prosecutor did not suggest that he had any special knowledge, unknown to the jury, that the witnesses were credible.

Defendant also argues that the prosecutor improperly vouched for the credibility of CC and SS by stating that neither witness had a reason to lie. However, it was not improper for the prosecutor to argue that CC and SS should be believed because there was no evidence that they had any reason to lie. See *Thomas*, 260 Mich App at 455 (prosecutor's argument that a witness had no reason to lie was not improper vouching). One basis for evaluating a witness's credibility is to determine whether the witness has a reason to lie. Indeed, M Crim JI 3.6(3) provides that in

[1] Caselaw from federal circuits is not binding upon this Court, but may be considered as persuasive authority. *Johnson v Vanderkooi*, 502 Mich 751, 764 n 6; 918 NW2d 785 (2018).

determining the credibility of a witness the jury should consider whether the witness has a special reason to lie. Accordingly, there was no error.

Because we find no error in the prosecutor's argument, we also reject defendant's contention that his trial counsel was ineffective for failing to object to the argument. See *People v Head*, 323 Mich App 526, 539; 917 NW2d 752 (2018) (defense counsel has no obligation to raise a meritless objection). Similarly, we reject defendant's argument that the combined allegations of error resulted in cumulative error warranting reversal; because defendant has not established any individual error, there can be no cumulative effect of errors meriting reversal. See *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007).

C. SENTENCING

Defendant also contends that the trial court erred by sentencing him as a fourth-offense habitual offender under MCL 769.12 because the prosecutor did not file a written proof of service showing that defendant was served with notice that he was subject to sentence enhancement as a habitual offender. Defendant did not raise this challenge in the trial court or otherwise argue that he did not receive notice of the prosecution's intent to seek an enhanced sentence because of that status. This issue therefore is unpreserved, and our review is limited to plain error affecting defendant's substantial rights. *Clark*, 330 Mich App at 433.

MCL 769.13 requires the prosecutor to file a written proof of service of a notice advising a defendant of the prosecution's intent to seek an enhanced sentence. MCL 769.13 provides, in relevant part:

> (1) In a criminal action, the prosecuting attorney may seek to enhance the sentence of the defendant as provided under section 10, 11, or 12 of this chapter, by filing a written notice of his or her intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense.[2]
>
> (2) A notice of intent to seek an enhanced sentence filed under subsection (1) shall list the prior conviction or convictions that will or may be relied upon for purposes of sentence enhancement. The notice shall be filed with the court and served upon the defendant or his or her attorney within the time provided in subsection (1). The notice may be personally served upon the defendant or his or her attorney at the arraignment on the information charging the underlying offense, or may be served in the manner provided by law or court rule for service of written pleadings. **The prosecuting attorney shall file a written proof of service with the clerk of the court.** [Emphasis added.]

[2] The prosecution in this case filed the written notice of intent on June 21, 2018, simultaneous with the filing of the information. Because defendant later waived arraignment, the written notice of intent was timely filed under MCL 769.13(1).

Our review of the lower court record in this case fails to disclose the required written proof of service. Thus, the record supports defendant's argument that the prosecution failed to file a written proof of service of the habitual offender notice as required by the statute, which amounts to plain error. However, we disagree that defendant's substantial rights were affected by this error. In *Head*, 323 Mich App at 543-544, although the prosecution failed to file a proof of service of the habitual offender notice, this Court concluded that the defendant was not prejudiced. This Court explained:

> The purpose of the notice requirement " 'is to provide the accused with notice, at an early stage in the proceedings, of the potential consequences should the accused be convicted of the underlying offense.' " *People v Morales*, 240 Mich App 571, 582; 618 NW2d 10 (2000) (citation omitted). The failure to file a proof of service of the notice of intent to enhance the defendant's sentence may be harmless if the defendant received the notice of the prosecutor's intent to seek an enhanced sentence and the defendant was not prejudiced in his ability to respond to the habitual-offender notification. *People v Walker*, 234 Mich App 299, 314-315; 593 NW2d 673 (1999).
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> In this case, defendant is correct that the prosecutor failed to file a proof of service of the notice of intent to enhance defendant's sentence. However, the error is harmless because defendant had actual notice of the prosecutor's intent to seek an enhanced sentence and defendant was not prejudiced in his ability to respond to the habitual-offender notification. [*Head*, 323 Mich App at 543-544.]

This Court in *Head* concluded that because the charging documents in the trial court apprised the defendant of his fourth-offense habitual offender status, the defendant had not been prejudiced by the failure of the prosecutor to file the requisite proof of service. This Court observed that the conclusion that the defendant was not prejudiced and that he had received actual notice of the habitual offender enhancement was further supported by the fact that defendant and his attorney were not surprised at sentencing by defendant being sentenced as a fourth-offense habitual offender. This Court concluded that the prosecutor's failure to file a proof of service in that case constituted harmless error and that resentencing was not warranted.

In this case, the prosecution filed a notice with the trial court that defendant was subject to sentence enhancement as a fourth-offense habitual offender under MCL 769.12, including a mandatory 25-year minimum sentence. The record also contains a document entitled "Waiver/Schedule of Arraignment," signed by defendant, his attorney, and the prosecutor, in which the parties agreed that defendant was to be sentenced as a fourth-offense habitual offender and was subject to a mandatory 25-year minimum sentence. Defendant did not dispute his status as a fourth-offense habitual offender nor claim that he did not receive notice of the prosecution's intent to seek an enhanced penalty because of his habitual offender status. At sentencing, defense counsel expressly acknowledged that defendant was being sentenced as a fourth-offense habitual offender. At no point did the defense claim surprise or lack of notice of the prosecution's request for sentence enhancement. Because the record demonstrates that defendant had actual notice of the prosecutor's intent to seek enhancement of defendant's sentence as a fourth-offense habitual offender, defendant failed to demonstrate that he was prejudiced by the omission. We therefore conclude that the prosecution's failure to file the proof of service was harmless error.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael F. Gadola

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SHAPIRO, J. (*concurring*).

I concur in the majority opinion and write separately only as to whether MCL 768.27b is constitutional. In *People v Watkins*, 491 Mich 450; 818 NW2d 296 (2012), the Supreme Court upheld MCL 768.27a against the same challenge. Accordingly, I agree with the majority that, absent a Supreme Court ruling to the contrary or a clear basis for distinction, we must conclude that MCL 768.27b is also constitutional. I suggest, however, that this issue may merit further review by that Court. *Watkins* placed emphasis on the fact that despite MCL 768.27a, a defendant was still shielded from overly prejudicial evidence by MRE 403. However, my research does not reveal a single case of record in which a defendant's prior acts of domestic violence has been excluded pursuant to MRE 403 since *Watkins* was decided in 2012.[1] The likely reason is that the fundamental prejudice arising from such evidence is that it constitutes propensity evidence, but per *Watkins*, "when applying MRE 403 to evidence admissible under MCL 768.27a, courts must weigh the propensity inference in favor of the evidence's probative value rather than its prejudicial

[1] By contrast, this Court has reversed a trial court ruling's excluding such evidence under MRE 403. See *People v Tackett*, unpublished per curiam opinion of the Court of Appeals, issued January 28, 2020 (Docket No. 350497).

effect." *Id*. at 487. Thus, while MRE 403 remains available in theory, it is clear from its application since 2012 that it has little or no practical effect in such cases.[2]

/s/ Douglas B. Shapiro

[2] The three-Justice dissent in *Watkins*, citing Const 1963, art 6, § 5, would have held that "MCL 768.27a is an unconstitutional legislative intrusion into the power of the judiciary to establish, modify, amend and simplify the practice and procedure in all courts of this state," *Watkins*, 491 Mich at 496 (KELLY, J., dissenting) (quotation marks and citation omitted), a conclusion that would apply equally to MCL 768.27b. However, the *Watkins* majority rejected that view. See also *McDougall v Schanz*, 461 Mich 15; 597 NW2d 148 (1999).