

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 11, 2012

v

RENEE HOUSTON,

No. 306015
Oakland Circuit Court
LC No. 2011-236267-FH

Defendant-Appellant.

Before: WILDER, P.J., and METER and GLEICHER, JJ.

PER CURIAM.

A jury convicted defendant Renee Houston of malicious destruction of property valued at \$1,000 to \$20,000 in violation of MCL 750.377a(1)(b)(i).¹ The circuit court sentenced defendant to serve 30 days in jail followed by a 24-month probation term, and ordered her to pay \$3,788.00 in restitution.² Because the circuit court properly admitted evidence regarding the complainant's restraining order against defendant and calculated the restitution based on the evidence presented, we affirm.

I. BACKGROUND

On February 20, 2007, defendant went to the car wash where her ex-boyfriend, Eric Brownlee, worked. The two argued and Brownlee claimed that defendant became violent, attacking him with a switchblade knife. Brownlee further accused defendant of scratching his car with the knife before entering her own car. Brownlee asserted that defendant tried to run him down with her car as she left the parking lot.

Brownlee decided against calling the police because his manager and coworker did not want to be involved in the matter. However, defendant did call the police and accused Brownlee

¹ The jury acquitted defendant of two charged counts of felonious assault. MCL 750.82.

² The judgment of sentence dated August 22, 2011, actually orders defendant to pay \$3,916.01 in restitution. This amount was reduced by court order to \$3,788.00 following an October 13, 2011 evidentiary hearing.

of domestic violence. Auburn Hills police officers arrived on the scene and arrested Brownlee, holding him in jail for four days.³ Rather than leaving Brownlee's vehicle at the car wash, a coworker drove it to Brownlee's parent's house. While Brownlee was incarcerated, his mother witnessed defendant use a knife to slash all four tires on the vehicle. Brownlee later discovered that additional scratches had been added to defendant's handiwork on the car's body.

II. PERSONAL PROTECTION ORDER

A. RIGHT OF CONFRONTATION

Brownlee was permitted to testify that defendant continued to harass him after he was released from jail and he therefore secured a personal protection order (PPO) against her on February 27, 2007. The prosecutor presented the PPO into evidence. Defense counsel objected "to the relevance of this document because it doesn't refer to anything about what happened on February 20 as far as I can see." The court admitted the PPO over defendant's objection.

Defendant now contends that the circuit court violated her Sixth Amendment right to confront a witness against her—the judge who issued the PPO—by admitting that evidence. Contrary to the prosecution's assertion on appeal, defendant did not waive any claim of error regarding the admission of the PPO. However, defendant did not preserve this issue for appeal by objecting to the PPO on the same ground in the trial court. See MRE 103(a)(1); *People v Bauder*, 269 Mich App 174, 178; 712 NW2d 506 (2005). We review unpreserved constitutional challenges for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The accused in any state or federal criminal prosecution has the right to be confronted with the witnesses against him. US Const, Am VI; const 1963, art 1, § 20; *Crawford v Washington*, 541 US 36, 42; 124 S Ct 1354; 158 L Ed 2d 177 (2004). The Confrontation Clause precludes the admission of testimonial statements as substantive evidence absent the opportunity to challenge the declarant face-to-face. *People v Fackelman*, 489 Mich 515, 528; 802 NW2d 552 (2011). A statement is testimonial in nature if it represents "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford*, 541 US at 51 (alteration in original) (quotation marks and citation omitted).

MCL 600.2106 provides that a court order "shall be admissible in evidence in any court in this state, and shall be prima facie evidence . . . of all facts recited therein . . ." In *People v Williams*, 134 Mich App 639, 641-642; 351 NW2d 878 (1984), this Court held that "the use of certified court records in accordance with MCL 600.2106 . . . does not violate a defendant's right of confrontation." Here, as in *Williams*, the PPO entered by a court against defendant "contains no impermissible hearsay statements." *Id.* at 641. The PPO simply sets out the parameters of the restraining order. The *court* made no testimonial or hearsay statements against defendant in this

³ Brownlee went to trial on the domestic violence charge but was acquitted. We assume the current matter was delayed four years pending the domestic violence trial.

regard. To obtain the PPO, *Brownlee* had to make testimonial statements against defendant before a court of law. And Brownlee was available for confrontation at defendant's trial. Accordingly, the circuit court did not violate defendant's right of confrontation by admitting the previously-issued PPO at her trial.

B. MCL 768.27B

Defendant also complains that the circuit court improperly admitted the PPO and allowed Brownlee to testify regarding past incidents of "harassing telephone calls and stalking" based on MCL 768.27b, which allows evidence of other acts of domestic violence to prove a defendant acted in conformity therewith. Prior to trial, the prosecutor notified defendant of his intent to present into evidence Brownlee's affidavit supporting the issuance of the PPO. In that affidavit, Brownlee described an October 19, 2006 incident during which defendant "cut the front tire and keyed Eric Brownlee's car. Defendant called Mr. Brownlee, her former boyfriend, and made threats to him." The prosecutor asserted that this evidence was admissible as another act of domestic violence under MCL 768.27b. The circuit court excluded this proffered evidence and the prosecutor did not renew his attempt to present Brownlee's affidavit. Rather, at trial, the prosecutor moved for admission of the PPO because it was relevant to prove that Brownlee had a reasonable apprehension of battery, an element of the felonious assault charges. The prosecutor did not rely upon MCL 768.27b, defense counsel did not object on this ground, and the circuit court did not cite the statute to support its decision to admit the evidence. Accordingly, we need not consider defendant's claims regarding the applicability of the statute.

C. UNFAIR PREJUDICE

Defendant implies that, regardless of the grounds for admitting the PPO and evidence of defendant's prior conduct toward Brownlee, the unfair prejudice from this evidence outweighs its probative value. Defendant objected on this ground at trial, preserving her challenge for appellate review. *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992). We must therefore determine if the circuit court abused in discretion by admitting the evidence. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003).

MRE 403 provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice" "[P]resumably all the evidence presented by the prosecutor was prejudicial because it attempted to prove that defendant committed the crime charged." *People v Pickens*, 446 Mich 298, 336; 521 NW2d 797 (1994). "[U]nfair 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.'" *Id.* at 337, quoting *People v Goree*, 132 Mich App 693, 702-703; 349 NW2d 220 (1984).

Evidence of Brownlee's PPO against defendant and the reasons he secured that PPO are not unduly prejudicial. The challenged evidence tends to explain the parties' history and relationship. It tended to establish Brownlee's state of mind, i.e. why he rationally feared an imminent battery at defendant's hands. The evidence could also persuade the jury that defendant likely damaged Brownlee's vehicle on February 20, given her history of harassing Brownlee. However, the evidence is not so shocking that it would unfairly bias the jurors or render them

unable to fairly determine what occurred on the day in question. Accordingly, the circuit court did not abuse its discretion by admitting the challenged evidence.

III. RESTITUTION

Defendant argues that she was denied due process of law when the circuit court ordered her to pay restitution without allowing her to first examine Brownlee's vehicle to independently assess the damage. Defendant further contends that the prosecution's experts could not accurately calculate Brownlee's damages because they did not know the vehicle's condition prior to February 20, 2007. Defendant did not request production of the restitution hearing transcript as required by MCR 7.210(B)(1)(a) and thereby abandoned her appellate challenge. *Waterford Sand & Gravel Co v Oakland Disposal, Inc*, 194 Mich App 571, 572; 487 NW2d 511 (1992); *People v Dukes*, 189 Mich App 262, 264; 471 NW2d 651 (1991).

In any event, we discern no error on the record before us. Defendant challenged the amount of restitution recommended in her presentence investigation report. The circuit court therefore conducted a hearing on October 13, 2011, at which the prosecution had the burden to prove Brownlee's loss by a preponderance of the evidence. MCL 780.767(4). At the evidentiary hearing, Brownlee presented evidence supporting his claimed damages for the purpose of restitution. The court thereafter issued an order for restitution "in the amount of \$3,788."

MCL 769.1a(3)(b)(i) and MCL 780.766(3)(b)(i) provide that a court must order a defendant to pay as restitution the fair market value of the property less the value of the property as returned damaged to the victim. Here, the court calculated this difference in value by considering the cost to repair the damages. The prosecutor presented a receipt from Brownlee's fiancée reflecting the cost of replacing three of the vehicle's tires and repairing the fourth as well as a body shop estimate to repair the scratches on the vehicle. Four years had passed since the offense and Brownlee no longer possessed the damaged vehicle. Accordingly, the vehicle was not available for defendant's requested independent examination.

Had the property been available for inspection but withheld from defendant, we may have found error. We find no reason to penalize a victim entitled to restitution, however, when he no longer possesses the property simply due to the passage of time. Under the circumstances, the court did not deny the defendant due process of law.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher