

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MINOR ALEXANDER,

Plaintiff/Counter-Defendant-  
Appellant,

v

DIANE ALEXANDER,

Defendant/Counter-Plaintiff-  
Appellee.

UNPUBLISHED

April 26, 2002

No. 229688

Wayne Circuit Court

LC No. 99-921580-DO

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Before: White, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals as of right a divorce judgment and qualified domestic relations order (QDRO). We affirm.

The parties were married in February 1995, and plaintiff filed a complaint for divorce on July 13, 1999. Defendant filed a counterclaim alleging assault and battery, citing three specific instances of abuse, and seeking damages including medical expenses and pain and suffering. Defendant also sought damages for plaintiff's destruction of several items of defendant's personal property.

The parties were the only witnesses at trial, and each gave very different accounts of the nature of the relationship. Defendant testified that she was aware at the time of the marriage that plaintiff had killed a woman and that plaintiff had abused other women with whom he had relationships. She indicated that plaintiff first beat her six months after the wedding, using a bottle and his fist. Later that same month, plaintiff threw defendant down a flight of stairs, threw liquid bleach on her, and then dragged her back up the stairs. In April 1996, plaintiff prevented defendant from attending a women's church retreat by beating her as she sat in the car prepared to leave.

Defendant further testified that in 1996 she went to the hospital because she was suffering from sharp stomach pains. When doctors informed her that she was bleeding internally, defendant informed the hospital staff that her husband was abusing her. Defendant received psychiatric treatment and medication for stress, depression, and anxiety, and was placed on a secure floor after plaintiff attempted to see her. Defendant was advised to go to a battered women's shelter, but she returned to plaintiff after he promised he would change his behavior.

In July 1996, plaintiff again began hitting and verbally abusing defendant. On one occasion when defendant attempted to leave the house, plaintiff took defendant's car keys and got into the driver's seat of defendant's car. As defendant approached the open driver's side door to ask for her keys, plaintiff put the car in reverse, knocked defendant to the ground, and ran over her leg. Defendant's leg was seriously injured, requiring her to undergo three surgeries and to walk with crutches for nearly a year. Defendant's leg remains numb in places, is permanently scarred, and she walks with a limp.

According to defendant, she quit her job at a group home for the mentally ill in 1996 as a result of stress from plaintiff's abuse, and she did not return to work until May 1998. Defendant had filed three criminal complaints against plaintiff, but dropped the first charge after plaintiff asked her not to testify, and the last charges after he threatened to kill her if she testified or if he went to jail.

Plaintiff denied defendant's allegations of abuse. He testified that defendant's testimony regarding abuse was false, and that defendant had only been hospitalized for substance abuse and psychiatric problems that began before the marriage. He indicated that defendant was never hospitalized for physical abuse, and that defendant walked with a limp because of her prior intravenous drug use, not because of being run over by a car. Plaintiff testified that he was arrested twice for domestic violence but was never convicted. Plaintiff also admitted, over a relevance objection, that he was convicted twenty years earlier of the involuntary manslaughter of a woman he was dating. He also admitted to a conviction for bank robbery in 1989.

In 1999, plaintiff earned approximately \$38,000 and had just over \$1,500 in a 401(k) plan. The only property acquired during the marriage was a vehicle. Both parties had also been sued for a \$3,000 medical bill for defendant's psychiatric treatment. After setting forth its findings of fact, including detailed instances of abuse and findings that defendant's accounts of the events were more credible, the court found that defendant was entitled to spousal support of \$100 a week for life plus the entire marital estate and plaintiff's 401(k) funds up to the date of divorce.

## I

Plaintiff first argues that evidence of his involuntary manslaughter and bank robbery convictions was improperly admitted, and that he was improperly asked whether he had been arrested for domestic abuse involving defendant. Plaintiff objected to the admission of the manslaughter conviction on relevance grounds, and this issue is preserved for appeal. However, plaintiff did not timely object to admission of his bank robbery conviction, and did not object at all to the question regarding domestic abuse arrests. Therefore, these issues are not preserved for appeal. *In re Weiss*, 224 Mich App 37, 39; 568 NW2d 336 (1997). We review preserved evidentiary issues for an abuse of discretion and unpreserved evidentiary issues for plain error affecting a party's substantial rights. *Hilgendorf v St John Hosp and Medical Center Corp*, 245 Mich App 670, 700; 630 NW2d 356 (2001).

Plaintiff asserts that the manslaughter conviction was improperly used to undermine his credibility in contravention of MRE 609(a) and to show action in conformity therewith under MRE 404(b). However, the trial court's opinion reflects that it did not use the evidence for these

impermissible purposes. Rather, the court referred to the conviction only to mention that plaintiff himself told defendant that he had killed someone before and could do it again, and that because the conviction arose from his discharging a firearm into a car where his ex-girlfriend sat, defendant reasonably believed his threats to kill her if she testified against him. In a bench trial, a judge is presumed capable of considering evidence only for its proper purpose. See *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 102; 535 NW2d 529 (1995). Because the conviction was used for a permissible and limited purpose, no error requiring reversal occurred.

Second, plaintiff argues that his bank robbery conviction should not have been admitted under MCR 609. However, the only element of this rule that is arguably inapplicable is whether the conviction was significantly probative of credibility. Even if the court erred in finding that the conviction was significantly probative of credibility, the error was harmless. The trial court heard defendant give detailed, documented, and witnessed incidents of abuse that plaintiff simply denied, and nothing in the court's findings of fact indicates that the court based its credibility determination on the challenged conviction rather than an evaluation of the witness' testimony and demeanor over the course of the two-day trial.

Finally, there was no error in allowing plaintiff to answer the question whether he had ever been arrested for domestic violence. The question did not pertain to other crimes, wrongs, or acts under MRE 404(b); rather, the question pertained to the very acts that were the subject of defendant's counterclaim.

## II

Plaintiff argues that defendant's counterclaim was improperly merged with the divorce trial. Although plaintiff offers neither legal authority nor a coherent formulation for this position, the essence of the argument appears to be that plaintiff was deprived of his right to a jury trial on the assault claim. However, the constitutional right to trial by jury is waived in all civil cases unless demanded by one of the parties. Const 1963, art 1, §14. Plaintiff did not demand a jury when he received notice of defendant's tort counterclaim, nor did he challenge defendant's right to bring a tort action as part of a divorce case. Therefore, the question whether defendant's counterclaim for assault and battery was proper and whether plaintiff was deprived of the right to a jury trial on the tort action need not be decided on the facts of this case.

## III

Plaintiff argues that the trial court's findings of fact were not based on sufficient evidence. Specifically, plaintiff contends that no medical evidence connected defendant's stomach pains to plaintiff punching her in the stomach up to two weeks earlier and that there was no evidence that defendant suffered diminished earning capacity. However, defendant testified that plaintiff had punched her repeatedly in the stomach, and that a couple of days or weeks later she was treated for stomach pain and constant vomiting so severe she had to quit her job. No medical expert was necessary for the court to find that repeated blows to the stomach could cause stomach pains.

Furthermore, defendant testified that she quit her job and was unemployed for nearly two years as a result of stress from plaintiff's abuse, that she took extensive prescription medications for pain and stress, and that she suffered lasting physical damage including scars and a limp.

Given this evidence, we cannot say that the trial court's findings of fact were clearly erroneous. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992).

#### IV

Plaintiff asserts that the trial court placed disproportionate weight on the element of fault when determining the award of support and failed to adequately consider the other relevant factors set forth in *Sparks, supra*. However, the record indicates that the court took into account many factors in deciding the award, and even considered plaintiff's ability to pay when awarding a lesser amount than it considered justified. Furthermore, unlike the infidelity that gave rise to the finding of fault in *Sparks, id.* at 162, plaintiff's abusive conduct had wide-ranging effects that, of necessity, had to be considered in evaluating the other relevant factors, such as defendant's health and earning abilities. The trial court's dispositive ruling was fair and equitable in light of its findings of fact.

Affirmed.

/s/ Helene N. White  
/s/ William B. Murphy  
/s/ E. Thomas Fitzgerald