

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

---

PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
May 22, 2014

v

BRIAN DAVID SHANLEY,  
  
Defendant-Appellant.

No. 314804  
Grand Traverse Circuit Court  
LC No. 12-11446-FC

---

Before: BECKERING, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals from his convictions, following a jury trial, of two counts of criminal sexual conduct in the first degree (CSC I), MCL 750.520b(1)(f) (personal injury to the victim and force or coercion used to accomplish sexual penetration), and three counts of criminal sexual conduct in the third degree (CSC III), MCL 750.520d(1)(b) (force or coercion used to accomplish sexual penetration). Defendant was sentenced to concurrent terms of imprisonment of 25 to 60 years for each CSC I conviction, and ten to 15 years for each CSC III conviction. We affirm.

**I. PERTINENT FACTS AND PROCEDURAL HISTORY**

Defendant was convicted of forcibly penetrating the victim's mouth, vagina, and anus both digitally and with his penis. Defendant and the victim met at a community resource center for homeless people. At the time of the incident they had been dating for about one month and lived together in a tent or, for a short period, in a friend's trailer.

Prior to trial, the prosecution provided notice to defendant of its intent to admit other acts evidence pursuant to MCL 768.27b. At the start of trial, the trial court heard defendant's motion in limine seeking to prevent the prosecution from presenting the testimony of a former girlfriend of defendant that defendant forced her to have sexual intercourse. Defense counsel argued that defendant was not in a domestic relationship with the victim. The trial court found that defendant and the victim were living together, and further that they were in a dating relationship and that therefore the proffered testimony was admissible under MCL 768.27b. Defense counsel then further argued that the evidence should be excluded under MRE 403, on the grounds that the testimony was more prejudicial than probative. Specifically, defense counsel argued that the incidents involved were dissimilar and that defendant would be prejudiced by the introduction of issues involving family court and child custody with the witness. The trial court found that the

probative value of the proffered testimony was not substantially outweighed by the danger of unfair prejudice.

At trial, defendant's former girlfriend testified that she was in a relationship with defendant for approximately three years and had two children with him. She testified that defendant raped her after she kicked him out of her home, and that although the police were called, she did not speak to them about the rape. She further testified that she continued her relationship with defendant and that he continued to force her to have unwanted intercourse. She testified that she eventually again kicked defendant out of her home and obtained an order of protection against him.

The jury convicted defendant as described above. This appeal followed, limited to the issue of whether the trial court erred in admitting evidence of defendant's other acts.

## II. STANDARD OF REVIEW

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Pattison*, 276 Mich App 613, 615; 741 NW2d 558 (2007). However, when the decision regarding admissibility involves a preliminary question of law, such as interpretation of statutes or rules of evidence, our review is de novo. *Id.* An abuse of discretion occurs when the trial court selects an outcome outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

## III. ANALYSIS

Defendant first argues that the trial court erred in admitting the testimony of defendant's former girlfriend under MCL 768.27b, because defendant was not accused of an offense involving domestic violence. We disagree, because the plain language of the statute indicates that defendant was charged with offenses involving "domestic violence" as defined in the statute.

The construction and application of MCL 768.27b is a question of law that this Court reviews de novo on appeal. See *People v Haynes*, 281 Mich App 27, 29; 760 NW2d 283 (2008). We begin our task by examining the plain language of the statute; unambiguous language must be enforced as written. *Id.*

"[T]he Legislature now allows trial courts to admit relevant evidence of other domestic assaults to prove any issue, even the character of the accused, if the evidence meets the standard of MRE 403." *Pattison*, 276 Mich App at 615; MCL 768.27b. MCL 768.27b provides in relevant part:

(1) Except as provided in subsection (4)<sup>1</sup>, in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the

---

<sup>1</sup> 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

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.

\* \* \*

(5) As used in this section:

(a) "Domestic violence" or "offense involving domestic violence means an occurrence of 1 or more of the following acts by a person that is not an act of self-defense:

(i) Causing or attempting to cause physical or mental harm to a family or household member.

\* \* \*

(iii) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.

\* \* \*

(b) "Family or household member" means any of the following:

\* \* \*

(ii) An individual with whom the person resides or has resided.

\* \* \*

(iv) An individual with whom the person has or has had a dating relationship. As used in this subparagraph, "dating relationship" means frequent, intimate associations primarily characterized by the expectation of affectional involvement. This term does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context.

Contrary to defendant's contention, the proper inquiry is not whether the offense of which defendant is accused bears the label "domestic violence," but rather whether it is "an offense involving domestic violence" as defined in MCL 768.27b(5)(a). See *People v Railer*, 288 Mich App 213, 220; 792 NW2d 776 (2010). In *Railer*, this Court found that the defendant was accused of an offense involving domestic violence when the defendant was accused of assault with intent to commit great bodily harm less than murder, because "[s]uch conduct constitutes 'domestic violence,' which is defined to include occurrences causing physical or

---

evidence is in the interest of justice." Defendant does not argue that this subsection applies to the instant case.

mental harm to a family or household member or placing a family or household member in fear of harm.” *Id.* at 220-221, quoting MCL 768.27b(5)(a)(i) and (iii).

Here, defendant concedes on appeal that the relationship between defendant and his victim “could be termed a dating relationship.” The trial court found that defendant and the victim were living together and were in a dating relationship. Thus, under both MCL 768.27b(5)(b)(ii) and (iv), the victim constituted a “family or household member” of defendant. Further, defendant was charged with CSC I, MCL 750.520b(1)(f) (personal injury to the victim and force or coercion used to accomplish sexual penetration), and CSC III, MCL 750.520d(1)(b) (force or coercion used to accomplish sexual penetration). Defendant was thus accused of both “causing . . . a family or household member engage in involuntary sexual activity by force, threat of force, or duress” and “causing . . . physical . . . harm to a family or household member.” MCL 768.27b(5)(a)(i) and (iii). Therefore, according to the plain language of the statute, defendant was accused of offenses involving domestic violence, and the other acts evidence was properly admitted under MCL 768.27b. *Haynes*, 281 Mich App at 29; *Railer*, 288 Mich App at 220.

Defendant next argues that, even if the evidence was of the type that could have been admitted under MCL 768.27b, it should have been excluded under MRE 403. We disagree. MRE 403 precludes the admission of otherwise relevant evidence if its relevancy is substantially outweighed by the danger of unfair prejudice. See MRE 403; *People v Meissner*, 294 Mich App 438, 451; 812 NW2d 37 (2011).

Evidence offered against a criminal defendant is, by its very nature, prejudicial to some extent. Exclusion of the evidence is appropriate only when *unfair* prejudice outweighs the probative value of the evidence, meaning there is a danger that the evidence will be given undue or preemptive weight by the jury or it would be inequitable to allow the use of the evidence. [*Meissner*, 294 Mich App at 451 (citations and quotation marks omitted).]

Defendant contends that the testimony of defendant’s previous girlfriend contained numerous irrelevancies, including the witness’s statements that she could not sleep knowing defendant was not in jail, that defendant used drugs, that he was involved in litigation regarding child custody, and that he had repeatedly raped the mother of his children. We conclude that the trial court was within its discretion in finding the prior acts admissible.

Several of defendant’s complaints concern isolated statements from the witness. For example, the witness’s statement that she could not sleep when defendant was not in jail was made in response to the prosecution’s questions about how the witness became aware of the instant case. The prosecution did not belabor the point, and moved on when defense counsel objected. Similarly, the witness made one reference to defendant doing “some crazy drugs,” in the context of issues involving child custody. While arguably irrelevant to the instant case, it is unlikely that these references were given undue or preemptive weight by the jury in light of the relevant evidence.

Further, defendant elicited a great deal of testimony from the witness concerning the child custody dispute and argued that the custody proceedings provided a motivation for the

witness to fabricate her testimony. This Court will generally decline to consider error to which the party contributed by plan or negligence in the court below. *Lewis v LeGrow*, 258 Mich App 175, 210; 670 NW2d 675 (2003).

Finally, the witness's testimony concerning defendant's sexual assaults was highly relevant. Although defendant's assaults of the witness were not identical to the assault on his victim, "[p]rior acts of domestic violence can be admissible under MCL 768.27b regardless of whether the acts were identical to the charged offense." *Meissner*, 294 Mich App at 452. Further, the witness testified that defendant would force her to engage in sexual intercourse after drinking. This evidence was thus highly relevant to show defendant's tendency to have committed the offenses charged. *Railer*, 288 Mich App at 220. While this evidence was indeed damaging and prejudicial, as is most relevant evidence presented against a criminal defendant, we do not find that there was a substantial risk of *unfair* prejudice in its admission. *Meissner*, 294 Mich App at 451.

Affirmed.

/s/ Jane M. Beckering  
/s/ Amy Ronayne Krause  
/s/ Mark T. Boonstra