

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KAMAL DEJUAN KING,

Defendant-Appellant.

UNPUBLISHED

September 20, 2007

No. 271706

Wayne Circuit Court

LC No. 06-003239-01

Before: Borrello, P.J., and Jansen and Murray, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.224f, felonious assault, MCL 750.82, and domestic violence, MCL 750.81(2). Defendant was sentenced to two years' imprisonment for the felony-firearm conviction and 16 days time served for both the felonious assault and domestic violence convictions. The sentences for the latter two offenses were suspended. Defendant appeals as of right, and for the reasons set forth in this opinion we affirm.

This appeal arises from a domestic dispute between defendant and his live-in girlfriend, Jamesa Rogers on March 3, 2006, in the apartment they shared in Wayne County. At around 11:30 p.m. that evening, Jamesa telephoned her father, James Rogers, and stated that “[s]he and her boyfriend got into a fight, and he pulled out a gun and he was holding it to the baby. . . . He had the gun to her head and the baby’s head.” Rogers proceeded to the apartment where he encountered the police, but defendant had already left. The following afternoon, Rogers and others went back to the apartment to retrieve his daughter’s possessions. When they entered the apartment, they encountered defendant who was lying on the couch with two handguns next to him on the pillow. Rogers removed the guns from defendant without incident and gave them to the police.

Following defendant’s arrest, a tape recording was made of defendant and his mother wherein defendant is alleged to have stated something similar to “I’ve been running around with guns.”¹

¹ Because there is no transcription of the conversation in the lower court record, we are left to the
(continued...)

Defendant first contends that the trial court improperly admitted this recorded jailhouse telephone conversation between himself and his mother. Generally, a trial court's decision to admit evidence will be reversed only for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). An abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). When the trial court selects one of these principled outcomes, it has not abused its discretion. *Babcock, supra* at 269. When a trial court's decision regarding the admission of evidence involves a preliminary question of law, this Court reviews de novo. *Babcock, supra* at 269.

MRE 404(b)(1) governs the admission of other acts evidence. It provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

The list of exceptions in MRE 404(b)(1) is nonexclusive. *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000), on second rem 242 Mich App 656; 620 NW2d 19 (2000). To be admissible under MRE 404(b), other acts evidence generally must satisfy three requirements: (1) it must be offered for a proper purpose; (2) it must be relevant; and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994). Evidence is relevant if it could make a material fact in issue more probable or less probable than it would be without the evidence. *Knox, supra* at 509. The proffered evidence would be unfairly prejudicial if it presents a danger that marginally probative evidence will be given undue or preemptive weight by the fact-finder. *People v Crawford*, 458 Mich 376, 397-398; 582 NW2d 785 (1998).

At trial, it was defendant's contention that the guns that were found next to him on his pillow were not his, he knew nothing about the guns and the guns were planted or were there by some sort of accident. The statement at issue was therefore admitted for the proper purpose of showing that defendant had the opportunity to commit the charged offenses, namely the offenses involving possession of a firearm. The statement was also admitted for the proper purpose of showing an absence of mistake or accident as it relates to the two guns that were found on the pillow next to defendant. Pursuant to MRE 404(b)(1), the trial court properly admitted the tape of defendant's jailhouse phone conversations.

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summaries of the parties and what appears in the recorded transcript to ascertain what was stated between defendant and his mother.

Finally, an examination of the totality of the evidence does not support a finding that defendant's statement constituted marginally probative evidence that was given undue or preemptive weight by the fact-finder as there was substantial evidence against defendant. Jamesa Rogers testified that she and defendant got into a physical altercation. Jamesa's medical records reflect that she was the victim of an assault and was punched in the head and face, pushed, and kicked in the abdomen. Defendant either had a gun while telling Jamesa that he would kill her or told her that he would kill her, then picked up two guns and walked out of the apartment. The next morning, defendant was found on his couch with two guns lying next to him. Additionally, the testimony of Jamesa's father, James Rogers, suggests that Jamesa's differing testimony between the preliminary examination and the time of trial, was an attempt by her to downplay defendant's culpability in order to keep him out of jail. Given that defendant's statement was offered for a proper purpose, was relevant, and the probative value of the statement was not substantially outweighed by its potential for unfair prejudice, defendant's statement was properly admitted pursuant to MRE 404(b).

Next, defendant argues that there was insufficient evidence to sustain his convictions. When reviewing a claim of insufficient evidence, this Court reviews the record de novo. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). This Court reviews the evidence in the light most favorable to the prosecutor and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Wilkens*, *supra* at 738.

The elements of felonious assault are: (1) an assault, (2) with a dangerous weapon and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). A criminal assault consists of either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery. *People v Reeves*, 458 Mich 236, 240; 580 NW2d 433 (1998). A battery is an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person. *Reeves*, *supra* at 240 n 4.

As previously discussed, *infra*, Jamesa testified that she started a fight with defendant because she was upset with him for not helping her care for their daughter. Jamesa began pushing defendant and eventually defendant pushed back and a physical altercation ensued. As a result of the fight, Jamesa had a bloody face and bruises on her arms, sides, back and stomach. According to the testimony of Jamesa at the preliminary examination and then at trial, defendant either had a gun while telling Jamesa that he would kill her or told her that he would kill her, then picked up two guns and walked out of the apartment.

As previously stated, Jamesa's trial testimony differed from her preliminary examination testimony. At the preliminary examination, she testified that defendant grabbed her by the throat, bashed her head into the wall several times and put two guns to Jamesa's head, stating, "I'm going to blow your head off." Jamesa's admitted desire to keep defendant out of trouble casts doubt on the portions of her trial testimony that contradict her preliminary examination testimony and have the effect, if believed, of lessening defendant's culpability. This conclusion is supported by her father, who testified at trial that Jamesa called him, in a hysterical state, on the night in question and reported that defendant had pulled out a gun and held it to her head and their daughter's head. Jamesa went to the hospital the morning after the incident and reported

being the victim of an assault and being punched in the head and face, pushed, and kicked in the abdomen. Jamesa was diagnosed with having abrasions, contusions, blunt abdominal trauma and chest wall pain. With regard to the weapon element, defendant either had a gun while telling Jamesa that he would kill her or told her that he would kill her, then picked up two guns and walked out of the apartment.

To prove the offense of felony-firearm, the prosecutor must establish the following elements: (1) the possession of a firearm (2) during the commission of, or the attempt to commit, a felony. *Avant, supra* at 505. Constructive possession of a firearm is proved if the firearm is known to the person and is reasonably accessible to him. *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000).

The testimony established that defendant engaged in a serious physical altercation with Jamesa, which left her bruised and bloodied. Depending on which version of Jamesa's testimony the jury chose to believe, defendant either had a gun while telling Jamesa that he would kill her or told her that he would kill her, then picked up two guns. Defendant's actions indicate that he was aware of the presence of the firearm/firearms and the firearm/firearms were reasonably accessible to him while he was in the altercation with Jamesa. Further, defendant's possession of a firearm coincided with his felonious assault of Jamesa. Thus, the elements of felony-firearm were proven beyond a reasonable doubt.

Domestic violence is a specific intent crime which is proven by establishing that (1) the defendant and the victim were associated in a way described by statute; and (2) the defendant either intended to batter the victim or the defendant's unlawful act placed the victim in reasonable apprehension of being battered. *People v Corbiere*, 220 Mich App 260, 266; 559 NW2d 666 (1996). First, defendant and Jamesa were associated in a way described by the domestic violence statute, namely, Jamesa was in a dating relationship with defendant, and the couple resided together and shared at least one child in common. Second, the testimony adduced at trial established that defendant placed Jamesa in reasonable apprehension of being battered, intended to batter Jamesa and did in fact batter Jamesa. Jamesa testified that she and defendant got into a physical altercation which resulted in Jamesa having a bloody face and bruises on her arms, sides, back and stomach. Defendant told Jamesa that he was going to kill her, and then retrieved two guns immediately thereafter. Thus, defendant's actions constituted domestic violence. Accordingly, there was sufficient evidence to sustain defendant's convictions for felonious assault, felony-firearm and domestic violence.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Christopher M. Murray