

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL ROBERT FEDEROFF,

Defendant-Appellant.

UNPUBLISHED

January 26, 2010

No. 287416

St. Clair Circuit Court

LC No. 08-001114-FH

Before: Cavanagh, P.J., and Fitzgerald and Shapiro, JJ.

PER CURIAM.

Defendant appeals by right his convictions for domestic violence, third offense, MCL 750.81(4), and resisting and obstructing a police officer, MCL 750.81d(1). We affirm.

On appeal, defendant argues that he was denied a fair trial because the jury was not given an assault and battery instruction, but was given a transferred intent instruction. He claims that to be convicted of domestic violence, he had to intend to assault or assault and batter the specific victim—in this case, his former girlfriend, and not just any individual as the jury was led to believe by the transferred intent instruction. We disagree.

To preserve a challenge to jury instructions on appeal, a party must object to or request a jury instruction before the jury deliberates. *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000). Defendant did not request an assault and battery instruction before the jury began deliberations; thus, we will review this claim for plain error affecting defendant's substantial rights. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A defendant has the right to a properly instructed jury. *People v Rodriguez*, 463 Mich 466, 472-473; 620 NW2d 13 (2000). Here, consistent with CJI2d 17.2a, the following domestic assault instruction was given:

In Count 1, the Defendant's charged with a crime of domestic assault. To prove this charge, the Prosecutor must prove each of the following elements beyond a reasonable doubt. Beyond a reasonable doubt:

First, that the Defendant assaulted and battered [the victim].

A battery is the forceful, violent, or offensive touching of a person or something closely connected with him or her. The touching must have been intended by the Defendant, that is, not accidental, and it must have been against [the victim's] will.

Second, that at the time [the victim] was a resident or former resident of the same household as the Defendant, or was a person with whom the Defendant had a dating relationship. . . .

This instruction was followed by the instruction on (1) force and violence, CJI2d 17.14, (2) actual injury, CJI2d 17.16, and then (3) transferred intent, CJI2d 16.22. The transferred intent instruction was set forth as follows:

If the Defendant intended to commit – if the Defendant intended to assault one person, but by mistake or accident assaulted another person, the crime is the same as if the first person had actually been assaulted.

Defendant claims that he was entitled to an assault and battery jury instruction, “the offense for which he would be guilty had he intended to strike someone else and had struck the Complainant by mistake.” We disagree.

MCL 750.81 provides, in relevant part:

(1) Except as otherwise provided in this section, a person who assaults or assaults and batters an individual, if no other punishment is prescribed by law, is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than \$500.00, or both.

(2) Except as provided in subsection (3) or (4), an individual who assaults or assaults and batters his or her spouse or former spouse, an individual with whom he or she has or has had a dating relationship, an individual with whom he or she has had a child in common, or a resident or former resident of his or her household, is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than \$500.00, or both.

* * *

(4) An individual who commits an assault or an assault and battery in violation of subsection (2), and who has 2 or more previous convictions for assaulting or assaulting and battering his or her spouse or former spouse, an individual with whom he or she has or has had a dating relationship, an individual with whom he or she has had a child in common, or a resident or former resident of his or her household, under any of the following, is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than \$2,500.00

An assault is established by showing either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery. *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005). Battery is “an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the

person.” *Id.*, quoting *People v Reeves*, 458 Mich 236, 240 n 4; 580 NW2d 433 (1998). In this case, it is undisputed that the victim was actually struck; thus, the assault and battery component of the statute is at issue.

Defendant claims that, with regard to domestic assault, MCL 750.81(2) or (3) or (4), an intent to strike the domestically-related victim must be established. That is, not only must the harmful or offensive touching be intentional, but it must also be intentionally directed at the domestically-related victim. But defendant’s interpretation of the statute is inconsistent with its plain language. A well-established principle of statutory interpretation is that a statute’s clear and unambiguous language must be enforced without judicial construction. See *People v Schaefer*, 473 Mich 418, 427, 430-431; 703 NW2d 774 (2005). Here, defendant does not dispute that he and the victim were associated in one of the ways set forth in MCL 750.81(2). Therefore, if he committed a battery, i.e., “an intentional, unconsented and harmful or offensive touching,” against the victim, he could be found guilty under MCL 750.18(2) and, in this case, MCL 750.18(4). The domestic assault statutes do not require the “intentional, unconsented and harmful or offensive touching” *also* be intentionally directed at the domestically-related person. Thus, as defendant admits on appeal, the transferred intent jury instruction was proper.

And defendant was not entitled to an assault and battery jury instruction. Even if assault and battery is a necessarily included offense of domestic violence, a jury instruction is required only when a rational view of the evidence would support a conviction on the lesser offense. See *People v Mendoza*, 468 Mich 527, 545; 664 NW2d 685 (2003). In this case, such an instruction would have been proper only if defendant had contested the fact that he and the victim were associated in one of the ways set forth in MCL 750.81(2). He did not. Defendant’s argument was that, if he struck this victim, it was not intentional. This defense goes to the battery element of the charge, i.e., whether the harmful touching—or punch in this case—was intentional. The battery element is the same in MCL 750.18(1), (2), and (4). Thus, defendant was not entitled to an assault and battery jury instruction. The evidence would not support a conviction on such a charge because the victim was associated in one of the ways set forth in MCL 750.18(2). Accordingly, the jury instructions, read as a whole, sufficiently protected defendant’s rights to a properly instructed jury, *People v Huffman*, 266 Mich App 354, 371-372; 702 NW2d 621 (2005), and defendant has failed to establish a plain error affecting his substantial rights. See *Carines*, *supra*.

Next, defendant argues that he is entitled to a new trial because the trial court (1) failed to instruct the jury regarding the proper use of the victim’s prior inconsistent statements, and (2) failed to instruct the jury regarding the correct use of the evidence of defendant’s prior bad acts. Again, defendant failed to request either instruction; thus, our review is for plain error affecting his substantial rights. See *Carines*, *supra* at 763-764.

Defendant’s first argument is premised on the fact that the victim testified at defendant’s preliminary examination that there was a fight, but at trial she testified that there was no fight, only a “scuffle.” Review of the contested testimony as a whole leads us to the conclusion that the victim did not make a prior inconsistent statement. The “inconsistency”—as pointed out by defense counsel during the testimony—was one of semantics, not substance. Thus, the failure of the trial court to sua sponte give an instruction regarding the proper use of the victim’s purported prior inconsistent statement does not constitute plain error warranting relief. See *id.*

Defendant's second argument is apparently premised on the fact that the victim testified that her romantic relationship with defendant came to an end because defendant hit her in the past. Defendant's argument on appeal appears to be that this was MRE 404(b) evidence. It was not. As noted by the prosecution, this evidence was properly offered—and admitted—under MCL 768.27b, not MRE 404(b). See *People v Schultz*, 278 Mich App 776, 778; 754 NW2d 925 (2008); *People v Pattison*, 276 Mich App 613, 615; 741 NW2d 558 (2007). Thus, the failure of the trial court to sua sponte give an instruction regarding “the correct use” of the evidence of defendant's prior bad acts does not constitute plain error warranting relief. And defendant's ineffective assistance of counsel claim premised on his counsel's failure to request either or both of these instructions is without merit. Counsel is not required to advocate a meritless position. See *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005).

Finally, defendant argues that he was denied the effective assistance of counsel because his counsel incorrectly advised him with regard to his habitual offender status which caused him to reject the prosecution's plea offer. This Court granted defendant's motion for an evidentiary hearing with respect to this claim only, *People v Federoff*, unpublished order of the Court of Appeals, entered April 23, 2009 (Docket No. 287416), and a *Ginther*¹ hearing was conducted.

The felony complaint and warrant initially filed incorrectly identified defendant as a third habitual offender. However, the felony information that was filed the day of defendant's arraignment correctly identified defendant as a fourth habitual offender. At the *Ginther* hearing, defense counsel testified that, on the morning of trial, he asked the prosecuting attorney if she would consider reducing the charge to a one-year misdemeanor. The prosecutor's final offer was for defendant to plead guilty to a one-year offense with no habitual offender enhancement. Defense counsel further testified that he discussed this plea offer with defendant, and specifically discussed the fact that defendant was charged as a fourth habitual offender, but defendant rejected the deal. Defense counsel also testified that he discussed defendant's fourth habitual status at a jail meeting.

At the *Ginther* hearing defendant acknowledged that he rejected this plea deal, but testified that he learned for the first time that he was facing enhancement as a fourth habitual offender after he was convicted. The trial court rejected defendant's testimony in favor of his defense counsel's testimony. We defer to the trial court's determination with regard to the credibility of the witnesses before it, MCR 2.613(C), and find no clear error in this case. See *People v Dendel*, 481 Mich 114, 130; 748 NW2d 859, modified 481 Mich 1201 (2008). In the context of plea deals, “[t]he test is whether the attorney's assistance enabled the defendant to make an informed and voluntary choice between trial and a guilty plea.” *People v Corteway*, 212 Mich App 442, 446; 538 NW2d 60 (1995). Here, defendant was afforded the effective assistance of counsel in this regard; thus, this claim is without merit. See *Mack*, *supra* at 129.

Affirmed.

/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).