STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 10, 2009
v	No. 287858 Jackson Circuit Court
ROBERT DAVID LATTING, Defendant-Appellant.	LC No. 08-003954-FH

Before: Stephens, P.J., and Cavanagh and Owens, JJ.

PER CURIAM.

Defendant appeals by right his jury conviction for domestic violence, third offense, MCL 750.81(4). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant was accused of striking his girlfriend, Jan Jones, on February 14, 2008. Both defendant and Jones denied that defendant assaulted Jones. However, Jones' sister, Lee Rinehold testified that she heard the couple arguing after they returned to their bedroom in the basement of Rinehold's home. Rinehold heard Jones tell defendant to let go of her hair, and then heard something that sounded like a slap. Rinehold went to the basement door, but Jones "shooed" her back out, and told her that she would handle it. Jones appeared to be crying. Rinehold called the police, and as she dialed, she returned to the basement to check on Jones. She then saw Jones lying on the bed. Jones was holding her face and crying, and had a red mark on her face. Subsequently, Rinehold noticed that Jones face became swollen, and that she had a black eye. A photograph documenting the injury taken by the police was presented to the jury.

Jones testified that the injury was accidental. Defendant and Rinehold were yelling at each other. Jones yelled at defendant to stop, got Rinehold to leave, and began calming defendant down. She pushed him onto the bed, and he began to thrash around in what she thought was a seizure. She got on top of him and bent down, and as she did, he came up and accidentally hit his forehead on her cheekbone. She started crying because the situation was overwhelming and she was upset that her sister was calling the police. She also maintained that she told defendant to get off her hair because he was lying on it as she was on top of him.

In addition to the testimony concerning the instant incident, the jury was presented with evidence of defendant's four assaults on a former girlfriend, Renee Ellingson,[1] over defendant's objections. As to three of the assaults, the investigating officer described Ellingson's report of the assault, and testified concerning his observations of Ellingson's injuries. The prosecution also presented evidence of defendant's subsequent convictions for the assaults, as well as his plea testimony admitting responsibility. In addition, convictions and defendant's admissions concerning two other assaults on Ellingson and another woman were admitted into evidence.

On appeal, defendant first argues that the prosecution presented insufficient evidence to support his conviction. We review a defendant's allegations regarding insufficiency of the evidence de novo. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). We view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Id*. However, we will not interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1202 (1992). Satisfactory proof of the elements of the crime can be shown by circumstantial evidence, and the reasonable inferences arising therefrom. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). It is for the trier of fact to determine what inferences fairly can be drawn from the evidence and the weight to be accorded to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The prosecution presented sufficient evidence to support the conviction. The fact that defendant struck the victim was established by a number of sources, including the victim herself. She testified that he did not intend to harm her, but she admitted at trial that she had a reason to protect defendant, and that she did not welcome the police involvement. Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient to establish the element of intent. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). The testimony from Rinehold and the investigating officer, coupled with the evidence of defendant's past similar actions, could cause a reasonable jury to find that defendant intended to strike Jones. Defendant has a history of deliberately assaulting girlfriends during arguments while intoxicated. The jury could reasonably find that he did so again on this occasion, notwithstanding the victim's testimony.

Defendant next argues that the admission of testimony from his former deceased girlfriend concerning prior assaults violated his right to confrontation and was erroneously admitted. "Constitutional questions, such as those concerning the right to confront witnesses at trial, are reviewed de novo." *People v Pipes*, 475 Mich 267, 278; 715 NW2d 290 (2006). Further, an evidentiary issue concerning the applicability of a statute is reviewed de novo. *People v Pattison*, 276 Mich App 613, 615; 741 NW2d 558 (2007).

[1] Ellingson was deceased at the time of the instant trial.

Defendant correctly argues that the statements made by Ellingson to the various police officers were improperly admitted. These statements, while presumably inadmissible propensity evidence under MRE 404b, were admissible pursuant to MCL 768.27c. However, defendant is correct that the admission of hearsay statements under MCL 768.27c must yield to his right of confrontation. "It is axiomatic that a statutory provision . . . cannot authorize action in violation of the federal . . . constitution[]." *People v Conley*, 270 Mich App 301, 316; 715 NW2d 377 (2006). Accordingly, even if Ellingson's hearsay statements to law enforcement officers were admissible under MCL 768.27c, the statements were not admissible at trial if admission of the statements would violate defendant's right of confrontation.

A defendant has the right to be confronted with the witnesses against him. US Const, Am VI; Const 1963, art 1, § 20; *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998). The Sixth Amendment bars testimonial statements by a witness who does not testify at trial unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. *Crawford v Washington*, 541 US 36, 53-54; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *People v Yost*, 278 Mich App 341, 370; 749 NW2d 753 (2008). The United States Supreme Court has articulated the following standard regarding statements given during police interrogation:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. [*Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006).]

Here, the primary purpose of Ellingson's statements was to tell the officers who had committed the crime against her, and what defendant had done, not to enable police to assist her in an ongoing emergency. Ellingson's statements thus fall within this framework of a testimonial statement. See *People v Bryant*, 483 Mich 132, 142-143; 768 NW2d 65 (2009). The trial court therefore erred in allowing the prosecution to present these statements, at least absent a showing that defendant had had a prior opportunity to cross-examine Ellingson.

However, this constitutional error is harmless if it is clear beyond a reasonable doubt that a jury would have convicted the defendant absent the erroneously admitted evidence. *People v Shepherd*, 472 Mich 343, 347-348; 697 NW2d 144 (2005); *Carines*, *supra* at 774. MCL 768.27b provides in pertinent part:

> (1) Except as provided in subsection (4), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the 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.[2]

[2] MCL 768.27b(4) provides that evidence of an act occurring more than 10 years before the (continued…)

Thus, like MCL 768.27c, MCL 768.27b allows what previously would have been inadmissible propensity evidence in domestic violence cases, so long as it is admissible pursuant to MRE 403. *Pattison*, *supra* at 615-616. Here, pursuant to MCL 768.27b, the evidence of defendant's domestic violence convictions, defendant's admissions of guilt, and the observations of the officers concerning Ellingson's various injuries were still properly admissible. They were highly relevant to establish intent, were directly related to the main issue in the case, and were thus not improperly prejudicial. See *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909, modified 450 Mich 1212 (1995). We conclude that the outcome of the trial would have been the same, even without the improperly admitted testimony. We thus find the trial court's error harmless beyond a reasonable doubt.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Mark J. Cavanagh
/s/ Donald S. Owens

(…continued)

charged offense is inadmissible, "unless the court determines that admitting this evidence is in the interest of justice."