STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 26, 2011
v	No. 296328
KENNETH CHARLES JOHNSON, Defendant-Appellant.	Kalamazoo Circuit Court LC No. 2009-000604-FH

Before: HOEKSTRA, P.J., and MURRAY and M.J. KELLY, JJ.

PER CURIAM.

After a jury trial, defendant Kenneth Charles Johnson was convicted of possession of a firearm by a felon, MCL 750.224f; possession of a firearm during the commission of a felony, MCL 750.227b; and possession with intent to deliver less than five kilograms of marijuana, MCL 333.7401(2)(d)(iii). The jury acquitted defendant of felonious assault, MCL 750.82(1). Defendant appeals as of right, and we affirm.

Defendant first contends that the trial court erred when it admitted other-acts evidence regarding a May 2008 incident of domestic violence involving defendant. We review this issue for abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). In a criminal case where a defendant is accused of "an offense involving domestic violence," a prosecutor may introduce evidence of the defendant's commission of other acts of domestic violence "for any purpose for which it is relevant, if it is not otherwise excluded under" MRE 403. MCL 768.27b(1). The relevant evidence of other acts of domestic violence may be used to prove any issue, including the character of the accused. *People v Pattison*, 276 Mich App 613, 615; 741 NW2d 558 (2007). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Under MRE 403, a trial court may exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. Evidence is not unfairly prejudicial merely because it damages a party's case. *People v Vasher*, 449 Mich 494, 502; 537 NW2d 168 (1995). Rather, undue prejudice refers to "an undue tendency to move the tribunal to decide on an improper basis." *Id.*

In the present case, defendant was charged with feloniously assaulting the victim on March 27, 2009, an offense of domestic violence under MCL 768.27b. The victim's testimony and the photographs regarding the May 2008 incident with defendant were evidence of a prior

act of domestic violence by defendant. This challenged evidence was relevant because it had the tendency to make the existence of defendant's March 27, 2009, assault of the victim more probable than it would have been without the evidence. The evidence was probative of defendant's intent to inflict great bodily harm on the victim for purposes of proving the charge of felonious assault, MCL 750.82(1), and was also probative of defendant's violent character. *Pattison*, 276 Mich App at 615. The trial court did not fail to determine whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, as the trial court conducted a MRE 403 balancing test during a pretrial hearing. Moreover, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. The probative value of the evidence was especially high given the victim's reluctance to testify at trial and her inability to remember the May 2008 incident. And, the evidence did not have an undue tendency to move the jury to decide the felonious assault charge on an improper basis. *Vasher*, 449 Mich at 502. Accordingly, the trial court's admission of the other-acts evidence under MCL 768.27b was not an abuse of discretion.[1]

Next, defendant argues that the trial court erred when it admitted into evidence Officer Aaron Ham's testimony of his search of defendant's apartment and the fruits of the search, because he did not voluntarily consent to the search. We review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).[2] A search or seizure conducted by police without a warrant is unreasonable per se under the United States and Michigan constitutions, unless one of several well-established exceptions applies. US Const, Am IV; Const 1963, art 1, § 11; *People v Brown*, 279 Mich App 116, 131; 755 NW2d 664 (2008). One exception is where a person gives voluntary consent to a search. *People v Chowdhury*, 285 Mich App 509, 516-517; 775 NW2d 845 (2009). Consent to search must be "unequivocal, specific, and freely and intelligently given." *People v Dagwan*, 269 Mich App 338, 342; 711 NW2d 386 (2005). Whether a person has given voluntary consent to a search is determined by considering the totality of the circumstances. *Id.*

The crux of defendant's argument is that he gave consent while under the duress of being arrested. However, the fact that defendant gave consent while being arrested does not, per se, demonstrate that defendant's confession was involuntary. See *United States v Watson*, 423 US

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[1] Defendant's additional arguments that the trial court failed to properly instruct the jury on how to consider the other-acts evidence and that counsel was ineffective for failing to object to the court's instruction are meritless. Defendant provides only cursory treatment to his ineffective assistance of counsel claim and does not present this claim in his statement of questions. *People v Unger*, 278 Mich App 210, 262; 749 NW2d 272 (2008). The court did, indeed, instruct the jury on the other-acts evidence, and the instruction was consistent with MCL 768.27b.

[2] We note that the trial court did not abuse its discretion when it refused to hear defendant's midtrial motion to suppress Ham's testimony and the fruits of the search. Defendant knew the factual circumstances of the alleged illegal search of his apartment before trial and had a responsibility to inform his attorney of the circumstances. *People v Ferguson*, 376 Mich 90, 94-96; 135 NW2d 357 (1965); *People v Soltis*, 104 Mich App 53, 55-58; 304 NW2d 811 (1981).

411, 424; 96 S Ct 820; 46 L Ed 2d 598 (1976) ("[T]he fact of custody alone has never been enough in itself to demonstrate a coerced . . . consent to search."). Consequently, defendant's assertion is without merit. Additionally, looking at the totality of circumstances surrounding defendant's consent, we find that defendant's consent was voluntary. There was no indication that defendant was of low intelligence, mentally deficient, or unable to make a free choice. *Id.* at 424-425; *Schneckloth v Bustamonte*, 412 US 218, 226; 93 S Ct 2041; 36 L Ed 2d 854 (1973). To the contrary, at one point, defendant told Ham that he should obtain a warrant if he wanted to search the apartment. Although Ham did not explicitly advise defendant of his right to refuse consent, Ham did discuss with defendant his option of obtaining a search warrant in the event that defendant would not consent to a search. *Schneckloth*, 412 US at 227. The discussion about a search warrant indicates that defendant was aware of his right to refuse consent. Moreover, defendant consented to the search while in his home, not in a coercive environment, *Watson*, 423 US at 424-425, and Ham did not threaten defendant or physically punish him. *Id.*; *Schneckloth*, 412 US at 226. The time period of Ham's questioning of defendant was also relatively short: about 15 minutes from Ham's first contact with defendant until the time defendant consented to the search. *Schneckloth*, 412 US at 226. Accordingly, Ham's testimony regarding the search and the fruits of the search were admissible. There is no plain error.[3]

Next, defendant argues that counsel was ineffective by failing to move to suppress statements that defendant made to the police. Our review of this unpreserved claim is limited to mistakes apparent in the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). For defendant to succeed on his claim of ineffective assistance of counsel, he must meet the two-part test stated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). First, defendant must show that his counsel's performance "fell below an objective standard of reasonableness" under prevailing professional norms. *Strickland*, 466 US at 687-688. Courts strongly presume that counsel rendered adequate assistance. *Id.* at 690. Second, "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

In this case, the record is silent as to whether defendant was advised of his *Miranda* rights. Thus, there are no errors apparent in the record to support defendant's contention that counsel should have moved to suppress his statements to the police. Accordingly, defendant has not established the factual predicate for his claim. *Carbin,* 463 Mich at 600. We also reject defendant's additional argument that the trial court committed plain error when it admitted the statements defendant made to the police.

Defendant's final argument is that the trial court erroneously admitted Ham's redirect examination testimony in which Ham recited from his police report out-of-court statements by the victim regarding domestic abuse. During defendant's cross-examination of Ham, Ham

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[3]Additionally, because there was no error in the admission of the evidence, defendant cannot demonstrate that his counsel was ineffective for failing to timely move to exclude the evidence.

testified that his police report stated that the victim initially told him that defendant pointed a gun at her and that the victim later told him that she was not sure if defendant pointed the gun. The prosecutor objected, requesting only that an additional portion of the victim's statement be admitted into evidence. The trial court responded, and defendant agreed, that the prosecutor could introduce the complete statement on redirect examination. By agreeing with the trial court's ruling, defendant waived this issue. Defendant cannot acquiesce to the trial court's handling of the issue and then raise the issue as error on appeal. *People v Carter,* 462 Mich 206, 214; 612 NW2d 144 (2000).

Notwithstanding defendant's waiver, we hold that Ham's testimony was admissible. The victim's out-of-court statement to Ham was admissible under MCL 768.27c as it described a threat of physical injury upon her to an officer in a case involving domestic violence. And, the prosecution offered Ham's statements in the police report not for the truth of the matter asserted, but for the purpose of having the complete statement in evidence under MRE 106. We also reject defendant's argument that Ham's testimony was unfairly prejudicial, for as with defendant's hearsay argument, defendant waived this issue when he explicitly approved the trial court's decision to admit the evidence. *Carter,* 462 Mich at 214.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray
/s/ Michael J. Kelly