STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR GRAND TRAVERSE COUNTY

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee,

v

File No. 07-25863-AR
HON. PHILIP E. RODGERS, JR.

KENNETH EDER,

Defendant/Appellant.
/

Erin House (P66642)
Special Assistant Attorney General
Attorney for Plaintiff/Appellee

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Attorney for Defendant/Appellant

DECISION ON APPEAL

The Defendant/Appellant was charged in the 86th District Court with aggravated domestic assault, contrary to MCL 750.82a(2), for head-butting his live-in girlfriend, breaking her nose.[1]

[1] MCL 750.81a provides:

> (1) Except as otherwise provided in this section, a person who assaults an individual without a weapon and inflicts serious or aggravated injury upon that individual without intending to commit murder or to inflict great bodily harm less than murder is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both.
>
> **(2) Except as provided in subsection (3), an individual who assaults 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 the same household without a weapon and inflicts serious or aggravated injury upon that individual without intending to commit murder or to inflict great bodily harm less than murder is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both.**
>
> (3) An individual who commits an assault and battery in violation of subsection (2), and who has 1 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 the

At the conclusion of the trial, held on March 14, 2007, the jury found the Defendant guilty. On March 8, 2007, he was sentenced to 730 days on probation with 60 days confinement in the county jail with credit for 16 days served, fines, costs and restitution. The Defendant filed this appeal.

The issues presented on appeal are:

I. Whether the trial court erred by excluding the testimony of two defense witnesses that was offered to show the Complainant's plan, design or system to create reckless, dangerous situations in arguments with Defendant and that the Complainant threatened to file a false domestic violence complaint against the Defendant.

II. Whether the Defendant's Fifth Amendment privilege against self-incrimination was violated when the Prosecuting Attorney commented in her opening statement, and there was other evidence admitted to show, that the Defendant did not return the investigating officer's telephone call or submit to a breathalyzer test.

III. Whether the trial court erred when it admitted evidence of other acts of domestic violence pursuant to MCL 768.27b.

IV. Whether the Defendant was denied the effective assistance of trial counsel in violation of the Sixth Amendment.

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same household, in violation of 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, or both:

(a) This section or an ordinance of a political subdivision of this state substantially corresponding to this section.

(b) Section 81, 82, 83, 84, or 86.

(c) A law of another state or an ordinance of a political subdivision of another state substantially corresponding to this section or section 81, 82, 83, 84, or 86.

(4) As used in this section, "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. [Emphasis added.]

I.

WHETHER THE TRIAL COURT ERRED BY EXCLUDING THE TESTIMONY OF TWO DEFENSE WITNESSES THAT WAS OFFERED TO SHOW THE COMPLAINANT'S PLAN, DESIGN OR SYSTEM TO CREATE RECKLESS, DANGEROUS SITUATIONS IN ARGUMENTS WITH DEFENDANT AND THAT THE COMPLAINANT THREATENED TO FILE A FALSE DOMESTIC VIOLENCE COMPLAINT AGAINST THE DEFENDANT.

On appeal, the Defendant/Appellant contends that he was denied due process of law because the trial court excluded two witnesses' testimony thereby depriving him of his opportunity to present a defense.

A criminal defendant has a right to present a defense under our state and federal constitutions. US Const, Ams VI, XIV; Const 1963, art.1, §§ 13, 17, 20.[2] The Compulsory Process Clause of the Sixth Amendment grants a defendant the right to call "witnesses in his favor," a right that is guaranteed in the criminal courts of the States by the Fourteenth Amendment. *Washington v Texas*, 388 US 14, 17-19; 87 S Ct 1920, 1922-1923; 18 L Ed 2d 1019 (1967). "[T]he right to present a defense is a fundamental element of due process . . ." *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984). In *Pennsylvania v Ritchie*, 480 US 39, 56; 107 S Ct 989; 94 L Ed 2d 40 (1987), the United States Supreme Court stated, "Our cases establish, at a minimum, that criminal defendants have the right to . . . put before a jury evidence that might influence the determination of guilt." Thus, an accused has the right to call witnesses whose testimony is "material and favorable to his defense." *United States v Valenzuela-Bernal*, 458 US 858, 867; 102 S Ct 3440, 3446; 73 L Ed 2d 1193 (1982).

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense.

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[2] Although not asserted by the Defendant, Const.1963, art. 1, § 13 provides:

> A suitor in any court of this state has the right to prosecute or defend his suit, either in his own proper person or by an attorney.

> This right is a fundamental element of due process of law. [*Washington v Texas*, 388 US 14, 19; 87 S Ct 1920, 1923; 18 L Ed 2d 1019 (1967)].

Although the right to present a defense is a fundamental element of due process, it is not an absolute right. The accused must still comply with "established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038, 1049; 35 L Ed 2d 297 (1973).

This Court reviews de novo the constitutional question whether a defendant was denied his constitutional right to present a defense. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). However, unpreserved claims of constitutional error are reviewed for "plain error." *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). We thus apply the principles articulated in *Carines* at 763:

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice . . . Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. [Citations and internal quotation marks omitted.]

Accordingly, the Defendant must show that the court's ruling excluding these witnesses' testimony affected his substantial rights. That is, he must show that this ruling affected the outcome of the trial.

A.

Testimony regarding the Complainant's plan, design or system.

The Defendant offered the testimony of two witnesses, Steve Jamrok and Jacqueline Gwin. The defense argued that their testimony was relevant to establish that the Complainant's reckless, drunken behavior was part of her system or plan of creating a dangerous situation when she argued with the Defendant. According to defense counsel, these witnesses would testify that, when the Defendant and the Complainant argued, the Complainant "becomes assaultive and gets right in his face within inches" and, by pushing her away, he "tried to put space between them."

This testimony was offered to support the Defendant's defense that he did not head-butt the Complainant in the nose, but instead, "she was the aggressor" and, on the particular occasion in question, "she came off the hearth at him and between her coming off and him [sic] ducking, [they] ended up colliding . . . the top of his head and her nose." In addition, this testimony was offered to refute the Complainant's testimony regarding other acts of domestic violence. The Complainant testified the Defendant assaulted her on two prior occasions by pushing her. The Defendant claimed he only pushed her to "put some distance between them" because she always got "in his face" when they argued.

The Court excluded these witnesses because "that's not relevant to your overall defense, that she fell down." "It's collateral at best anyway's, okay?"

If, in fact, the defense had been that "she fell down," the Court might have been right to exclude the evidence. However, from a thorough reading of the trial transcript, it appears there was more to the defense than was inartfully articulated by counsel. The Defendant's defense actually was that the Complainant was always the aggressor during their arguments and would get in the Defendant's face so that he had to push her away to "put some space between them." On the particular occasion in question, the Complainant came at him in her usual fashion to get in his face, but fell off the hearth and her nose collided with his head.

In order to substantiate this defense, and to put the People's prior acts evidence in context, the Defendant offered to call these two witnesses who could testify to having witnessed the parties arguing on at least one occasion where the Complainant was the aggressor and got in the Defendant's face. By the Court's ruling, the Defendant was precluded from offering this evidence. As a result, the jury heard about other acts of domestic violence from the Complainant and one of those incidents was corroborated by the Complainant's son, but the Defendant was not able to introduce the testimony of two witnesses who purportedly would have corroborated his version of those events. The Defendant was prejudiced. In view of the Court's ruling herein with respect to the prior acts evidence, this Court must find that the prejudice did affect the Defendant's substantial rights.

B.

Testimony regarding false domestic violence report.

During cross-examination of the Complainant, the Complainant testified that she "[n]ever!" threatened to file a false report about domestic violence against the Defendant. The

trial court again excluded the testimony of Steve Jamrok and Jacqueline Gwin, who were allegedly present for at least one of the parties' arguments and who would have testified that the Complainant made that particular threat.

The trial court ruled that the testimony was "the improper use of extrinsic evidence to impeach a witness on a collateral matter." On appeal, the Defendant claims that the matter upon which the defense sought to impeach the Complainant was not collateral.

A party may introduce extrinsic evidence to contradict an adversary's answers on cross-examination regarding matters germane to the trial. *People v Vasher*, 449 Mich 494; 537 NW2d 168 (1995), and *Wischmeyer v Schanz*, 449 Mich 469; 536 NW2d 760 (1995). However, it is a "well-settled rule that a witness may not be impeached by contradiction on matters which are purely collateral." *People v Teague*, 411 Mich 562, 566; 309 NW2d 530 (1981). The rules of evidence do not allow extrinsic evidence to be used to prove specific instances of a witness' conduct for the purpose of attacking the witness' credibility. MRE 608(b).

Whether a matter is collateral "depends upon the issue in the case." *Cook v Rontal*, 109 Mich App 220, 229; 311 NW2d 333 (1981). The trial court must weigh the benefit of extrinsic impeachment evidence "against countervailing factors such as whether admission will result in or cause undue prejudice, confusion, surprise and the like . . . " *Id.*

Here, although the proffered testimony was narrowly focused on refuting the Complainant's denial that she threatened to file a false domestic violence report against the Defendant on a prior occasion and had a direct bearing on the Complainant's credibility, the Court cannot say that the trial court abused its discretion in excluding this evidence.

II.

WHETHER THE DEFENDANT'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION WAS VIOLATED WHEN THE PROSECUTING ATTORNEY COMMENTED IN HER OPENING STATEMENT, AND THERE WAS OTHER EVIDENCE ADMITTED TO SHOW, THAT THE DEFENDANT DID NOT RETURN THE INVESTIGATING OFFICER'S TELEPHONE CALLS OR SUBMIT TO A BREATHALYZER TEST.

The Prosecuting Attorney commented during her opening statement that the jury would not hear about the Defendant's blood alcohol level because "he left and never came back to the

house that night" and he did not return phone calls from the trooper. In addition, the trooper testified that he never got a chance to talk to the Defendant or administer a breath test the night of the incident. At trial, the Defendant did not object to either the Prosecuting Attorney's comments or the trooper's testimony.

The Defendant/Appellant now claims that these statements violate the Defendant's Fifth Amendment privilege against self incrimination because the Defendant's non-responsiveness or unavailability is tantamount to silence which cannot be used as substantive evidence of guilt, citing *Combs v Coyle*, 2000 Fed App 0064P (6th Cir).

Unpreserved claims of constitutional error are reviewed for "plain error." *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). We thus apply the principles articulated in *Carines* at 763:

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice . . . Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. [Citations and internal quotation marks omitted.]

Accordingly, if error occurred, the Defendant must show that the Prosecutor's comments and questions of the trooper regarding his non-responsiveness or unavailability on the night of the incident affected his substantial rights. That is, he must show that the Prosecutor's comments and questions of the trooper affected the outcome of the trial.

A defendant's right to due process is implicated only where his silence is attributable to either an invocation of his Fifth Amendment right or his reliance on the Miranda warnings. *People v McReavy*, 436 Mich 197, 201 n 2; 462 NW2d 1 (1990); *People v Schollaert*, 194 Mich App 158, 163; 486 NW2d 312 (1992). Thus, where a defendant has received no Miranda warnings, no constitutional difficulties arise from using the defendant's silence before or after his arrest as substantive evidence unless there is reason to conclude that his silence was attributable to the invocation of his Fifth Amendment privilege. *Id* at 165-166, citing *United States v Rivera*, 944 F2d 1563, 1568 (C.A.11, 1991), and *McReavy, supra* at 221 n 28.

In the instant case, the Defendant was not under arrest when he failed to return the trooper's phone calls or submit to a breathalyzer test. He had not been read his Miranda warnings. If, as he testified, he believed the Complainant was the aggressor, he would not have envisioned being arrested. Therefore, his absence and silence were not attributable to an invocation of his Fifth Amendment privilege against self-incrimination and no error occurred.

III.

WHETHER THE TRIAL COURT ERRED WHEN IT ADMITTED OTHER ACTS OF DOMESTIC VIOLENCE PURSUANT TO MCL 768.27B.

The Prosecuting Attorney offered evidence of other acts of domestic violence under MCL 768.27b as evidence of the Defendant's propensity to do "this type of thing." She also offered this evidence under MRE 404b to prove the Defendant's motive - "when he doesn't like what someone else is doing, when he doesn't like what she is saying, that he reacts in a way that's assaultive as opposed to walking away in those situations," intent, common scheme and to prove absence of mistake or accident - it was "part of a pattern for him."

The Defendant objected to the admission of this evidence. He argued that the prior acts were not acts of domestic violence because he did not intend to harm the Complainant, but was merely responding to her aggression.[3] He further argued that the Complainant caused her own injury in the instant case by her pattern of being the aggressor and getting in the Defendant's face when they argued. It was his contention that the other acts evidence was more prejudicial than

[3] Domestic violence is not a specific crime, but a description of circumstances surrounding a violent crime in which the perpetrator and the victim have a preexisting relationship that may be categorized as a "domestic" relationship. Nowhere does the Legislature supply the label "domestic assault." Nor does the Legislature define the misdemeanor domestic assaults as separate crimes. Rather, within the provisions of the existing misdemeanor assaults (assault, assault and battery, and aggravated assault), the Legislature has provided for sentence enhancements for persons convicted of those assaults if committed in a domestic context and if the defendant has a prior conviction for any of a variety of assaults committed in a domestic context. In establishing those enhancements, the Legislature defines an assault as being a domestic assault if the defendant and the victim have ever been married to each other, have ever resided together, had a child in common, or have ever had a dating relationship. See MCL 750.81(2), (3), and (4), and MCL 750.81a(2) and (3). Prior convictions that can be considered, if committed in a domestic context, include certain felony assaults--felonious assault, assault with intent to commit murder, assault with intent to do great bodily harm, and assault with intent to maim. Therefore, the Legislature clearly includes these felony assaults as being "domestic assaults." If a defendant has been convicted of one of the crimes listed in the statute and the victim was his wife, defendant's subsequent conviction may properly be used as a predicate conviction for any future enhancement of a misdemeanor domestic assault conviction. Thus, the Legislature clearly regards those assaults as constituting domestic violence. See *People v Wilson*, 265 Mich App 386; 695 NW2d 351 (2005).

probative and that admitting it would impermissibly require the Defendant to defend against other charges of domestic violence for which he was not on trial.

After weighing the probative value of this evidence against its prejudicial effect, the trial court admitted it under MCL 768.27b. At trial, the Complainant was allowed to testify about four specific prior incidents when the Defendant and she argued and the Defendant (1) forcefully hit her in the back of the head with a pillow; (2) grabbed her by the hair on both sides of her head and shook her head back and forth, causing her neck to be sore for a number of days; (3) grabbed her by the throat and shoved her across the kitchen into the counter/bar; and (4) shoved her across the kitchen into the counter/bar and she sustained a bruise on her shoulder. The trial court further held that this evidence was substantive and not admissible under MRE 404b because intent was not an issue in an aggravated domestic violence case.

This issue presented a question of first impression. There is no Michigan case law interpreting MCL 768.27b. The Court has reviewed the history of the law and rules governing the admissibility of other acts evidence and has looked at laws and rules of evidence allowing such evidence in domestic violence cases in other jurisdictions

Historically, common-law principles recognized that "character evidence" is prejudicial and misleading to a jury and, therefore, it is not admissible to prove a defendant's propensity to commit a crime. Nearly all states have criminal rules that do not admit a defendant's other acts evidence, except under very limited circumstances, because traditionally we do not punish a defendant for general character or conduct. See, *People v Knox*, 469 Mich 502; 674 NW2d 366 (2004).

Recently, however, our society has realized that battering typically involves a pattern of acts - physical violence in some incidents, emotional abuse or threats in others - and narrowly defined legal admissibility plays a significant role in creating a vicious circle where many batterers go unpunished.

In 1994, Congress amended the federal rules of evidence to address the social evil of rape and child molestation by allowing prior victims to testify concerning a defendant's propensity to commit such crimes. More recently, in order to address the social evil of domestic violence, many states have adopted legislation or similar special evidentiary rules for the admissibility of other acts of domestic violence evidence. California in 1996 and Alaska in 1997 were the first. Many other states have since followed their lead.

In *Bingaman v State*, 76 P3d 398 (Alaska App 2003), the Alaska Court extensively analyzed Alaska's rule of evidence and pointed out the following:

> [i]n prosecutions for crimes involving domestic violence, Rule 404(b)(4) authorizes the court to admit evidence of the defendants other acts of domestic violence even though the sole relevance of those acts is to show that the defendant characteristically commits such acts, so that the defendant's character can be taken as circumstantial evidence that the defendant acted true to character during the episode being litigated.

In *Bingaman*, the Court held that, to be admissible, the evidence had to be relevant to the case and the probative value of the evidence had to outweigh the danger of unfair prejudice. The court's rationale was that character evidence has the greatest potential relevance when the defendant's past wrongdoing involves the same type of situational behavior as the current charge. The court noted that "[e]ven if the court determines that the evidence of prior domestic violence is relevant, the court still must determine whether the probative value of the evidence is outweighed by the danger of unfair prejudice." And, the court cautioned that "[a] court needs to consider the danger that a jury might convict a defendant based on placing too much weight on his prior acts."[4] The *Bingaman* court warned that "[t]rial judges have a duty to explain their decision on the record" and "instruct the jury that evidence of the defendant's other acts is never sufficient, standing alone, to justify the defendants conviction" because "[t]he jury must understand that it is the government's burden to prove beyond a reasonable doubt that the defendant committed the crime currently charged and that this can not be done simply by showing that the defendant has committed similar acts in the past."

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[4] The *Bingaman* court set out certain factors for courts to consider in weighing whether evidence of a defendant's prior acts of domestic violence could be admitted under Alaska Evidence Rule 404(b)(4):

1. How strong is the government's evidence that the defendant actually committed the other acts?
2. What character trait do the other acts tend to prove?
3. Is this character trait relevant to any material issue in the case?
4. Assuming that the offered character evidence is relevant to a material issue, how seriously disputed is this material issue?
5. How likely is it that litigation of the defendant's other acts will require an inordinate amount of time?
6. And finally, how likely is it that evidence of the defendant's other acts will lead the jury to decide the case on improper grounds, or will distract the jury from the main issues in the case?

The Michigan Legislature enacted MCL 768.27b in 2006.[5] It provides, in pertinent part, as follows:

> (1) . . . 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.

MRE 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

As used in MCL 768.27b,

> (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.
>
> (ii) Placing a family or household member in fear of physical or mental harm.
>
> (iii) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.
>
> (iv) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested. [Emphasis added.]

MCL 768.27b, like the Alaskan rule, makes other acts of domestic violence admissible to prove a defendant's propensity for committing acts of domestic violence. The legislature must have carefully balanced several competing policy considerations about the importance of holding batterers accountable when they act violently yet providing them with a fair trail and protecting the victims of such violence.

The Defendant/Appellant argues on appeal that the trial court erred when it admitted other acts of domestic violence evidence because the prejudice far outweighed the probative value of such evidence. In addition, the Defendant challenges the constitutionality of MCL

[5] MCL 768.27b(6) provides that the statute applies to all trials and proceeding taking place on or after May 1, 2006.

768.27b, claiming that it destroyed his rights to due process of law and to a fair trial. More specifically, the Defendant contends that, "in so far as MCL 768.27b supports the wholesale admission of other acts evidence, it is unconstitutional."

The Legislature's decision to enact this particular law was obviously one of policy. This Court may not substitute its judgment for that of the Legislature in matters of policy. *Ecorse v Peoples Community Hosp Authority*, 336 Mich 490, 500; 58 NW2d 159 (1953). "[A]rguments that a statute is unwise or results in bad policy should be addressed to the Legislature." *People v Kirby*, 440 Mich 485, 493-494; 487 NW2d 404 (1992). The issue before this Court is not whether the statute is wise or results in good policy; rather, our inquiry is strictly limited to whether it is constitutional. We conclude that it is.

Where defendant failed to preserve the constitutional issue by raising it at trial, he must show plain error affecting his substantial rights, which requires a showing of prejudice and whether such error was outcome determinative. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Moreover, reversal is warranted only when the plain error results in a conviction of an actually innocent defendant or when the error seriously affects the fairness, integrity, or public reputation of judicial proceedings independent of a defendant's innocence. *Id.* Error in the admission of this evidence must be outcome determinative. *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999).

There was no question that the incident in this case occurred in a domestic context. There is no question that the Defendant was accused of an offense involving domestic violence. The question here is whether the other acts were acts of domestic violence.

The Prosecuting Attorney offered the Complainant's testimony regarding prior acts of domestic violence to show a pattern of domestic violence. The Defendant testified that he did not recall one of the incidents and that the others were not acts of domestic violence "because he was not the aggressor and he never intended to harm [the Complainant.]" The trial court excluded the Defendant's offer of the testimony of two witnesses who would have corroborated the Defendant's testimony. The trial court did not give the jury any particular instructions regarding the prior acts evidence or the purpose for which they could consider it.

The Court finds that MCL 768.27b is constitutional. However, in order for evidence of prior acts to be properly admitted, the trial court must instruct the jury on the proper use of the evidence. This did not occur, and the Defendant's substantial rights were affected. This Court

cannot say that admitting this evidence without any limiting instruction was harmless. Therefore, the Defendant's conviction should be overturned and a new trial ordered.

IV.

INEFFECTIVE ASSISTANCE OF COUNSEL

Since the Court has already decided that the Defendant's conviction must be overturned and a new trial ordered, the Court does not need to reach this issue.

CONCLUSION

MCL 768.27b is constitutional. However, if there is a question about whether the other acts are in fact acts of domestic violence (which may be the case whenever a defendant has not been previously charged and convicted), then the trial court must make a preliminary determination that the alleged behavior is an act of domestic violence before allowing the introduction of that evidence. If the evidence is ultimately determined to be admissible, the trial court must instruct the jury on the purpose for which the evidence is being offered and the purpose for which it may be considered. The Defendant must be allowed to offer testimony regarding those prior acts consistent with his theory of the case. Otherwise, the case may be decided on improper grounds.

For the reasons stated herein, the Defendant's conviction is reversed. The case is remanded to the District Court for a new trial.

IT IS SO ORDERED.

This decision resolves the last pending claim and closes the case.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 14/02/07