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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MATTHEW LOUIS MOLLICONE,

Defendant-Appellant.

FOR PUBLICATION
November 20, 2026
9:20 AM

No. 371852
Macomb Circuit Court
LC No. 2023-000473-FC

Before: MARIANI, P.J., and O'BRIEN and WALLACE, JJ.

O'BRIEN, J.

Defendant appeals as of right his jury-trial convictions of manslaughter, MCL 750.321, assault with intent to murder (AWIM), MCL 750.83, and three counts of carrying a firearm during the commission of a felony (felony-firearm), MCL 750.227b(1).[1]

Defendant's convictions stem from the death of his wife, Kimberly Mollicone. Kimberly had a long-running affair with Daniele Giannone that had been an ongoing source of anger for defendant and tension in his marriage with Kimberly. On July 12, 2022, defendant forced Kimberly to accompany him to Giannone's home to confront Giannone. When defendant and Kimberly arrived, Giannone was in his garage. Defendant immediately got out and started walking towards Giannone. When defendant got close, Giannone—seeing that defendant was armed—took out his own firearm, and a shootout between the two ensued. Giannone eventually fled into his house, at which point defendant and Kimberly began to leave, with Kimberly driving. Giannone then came back into his garage and grabbed another firearm. Upon seeing Giannone, defendant stuck his firearm out the car window and began firing. A second shootout between the two ensued, during which one of Giannone's bullets struck Kimberly in the neck, and she died.

[1] Defendant was charged with felony-murder, MCL 750.316(1)(b), but the jury convicted defendant of manslaughter as a lesser-included offense. The jury also acquitted defendant of carrying a firearm with unlawful intent, MCL 750.226, assault with a dangerous weapon, MCL 750.82, and an additional count of felony-firearm.

Defendant was charged in relevant part with felony murder for Kimberly's death. As part of its case, the prosecution sought to admit various acts of domestic violence that defendant had committed against Kimberly under MCL 768.27b. The trial court kept out much of the evidence but allowed Kimberly's mother to testify that she started noticing unexplained bruises on Kimberly after defendant found out about the affair in 2014. The court also allowed two of Kimberly's friends to testify that defendant had choked Kimberly on multiple occasions. Defendant concedes that all of this evidence fell within the ambit of MCL 768.27b but contends that the evidence should have been excluded by MRE 403 because its probative value was substantially outweighed by the danger of unfair prejudice. We agree. And we conclude that the error in admitting this evidence was not harmless. The main purpose of this evidence was to attack defendant's character, as exemplified by the prosecutor's closing argument in which he explicitly invoked this evidence as proof of defendant's bad character. Allowing defendant's convictions to stand in light of this would be inconsistent with substantial justice. We accordingly vacate defendant's convictions and remand for a new trial.

I. BACKGROUND

Kimberly and defendant married in 2003. Diana Marie Dutkiewicz, Kimberly's mother, testified that in 2014, she became aware that Kimberly was having an affair with another man when defendant came to Dutkiewicz's house and told her. After this day, Dutkiewicz began noticing that Kimberly would "have bruising on her neck and her arms" and "her legs," but when Dutkiewicz asked about the injuries, Kimberly "always deferred, always excuses, bumped, whatever."

Daniele Giannone testified that his relationship with Kimberly began around 2012 or 2014. The relationship was intimate, and Giannone claimed that he did not know that Kimberly was married when the relationship started. Giannone found out later that Kimberly was married, but he never met Kimberly's husband, defendant. Giannone testified that his relationship with Kimberly stopped being intimate sometime before 2020, and that they stopped speaking around 2020 after Giannone started dating his fiancée.

Ann Marie Dillege, Kimberly and defendant's friend, testified that sometime in 2021 or 2022, Kimberly told Dillege that defendant had "tried to strangle her" and "only stopped . . . because [Kimberly and defendant's son] walked in the room." Dillege described Kimberly's demeanor when she spoke about the abuse as "hurt, emotion[al], a little frantic, [and] sad," and confirmed that Kimberly was crying. Dillege testified that she had another phone conversation with Kimberly in May of 2022 during which Kimberly was again "sad, hurt, frantic, upset," and described to Dillege how defendant had "question[ed] her for hours" in the "man cave" in the basement of defendant and Kimberly's home.[2] Kimberly told Dillege that the questioning centered around Kimberly's affair. Dillege confirmed that Kimberly had indicated that defendant "had been physical" during the questioning.

[2] Dillege explained that the "man cave" was "kind of like a guys' hangout area, probably where [defendant] would maybe go to relax or have a drink or something."

Lori Grant, another of Kimberly's friends, testified that Kimberly told her about an instance of domestic violence involving defendant that took place in February or March of 2022. Grant testified that the conversations about this incident took place both over the phone and in person, and Grant described Kimberly during these conversations as upset, scared, and crying. Grant could not recall all the details of the conversation, but she recalled Kimberly telling her that she got into an argument with defendant, and he choked her. Grant recalled that Kimberly also told her about another occasion during which defendant placed his foot on Kimberly's neck while she was on the floor. Kimberly never specified to Grant when this incident occurred.

Giannone testified that in the months leading up to July 2022, Kimberly gave Giannone tens of thousands of dollars by paying various bills for Giannone and his family. Giannone claimed that Kimberly did so without first telling Giannone her intentions, but he never told her to stop because he "wouldn't refuse free money." Giannone further claimed that he was not talking to Kimberly at the time she was giving him all of this money, and that they continued not speaking even after she gave him this money. The payments were made from an account titled to "State Barricades," which was the company that defendant owned and that Kimberly helped run. Giannone insisted that the money was intended as "a gift" from Kimberly.

Dillege testified that she had a text conversation with Kimberly on July 11, 2022—the day before Kimberly was killed—concerning marital discord between Kimberly and defendant. Later that day, Kimberly called Dillege and placed Dillege on speaker phone. According to Dillege, Kimberly was in a car with defendant, and they were heading to Giannone's house. Kimberly indicated to Dillege that she did not want to go, and Dillege was able to convince defendant to turn around and go home. Dillege testified that she had another phone conversation with defendant later that night during which defendant "expressed being upset about the affair."

Grant also testified about a text message that she received from Kimberly either the day she was killed or the day before in which Kimberly told Grant that defendant "interrogated" Kimberly from 12 a.m. to 9 a.m. When Grant later spoke with Kimberly about this "interrogation," Kimberly was, according to Grant, upset, scared, and sad, and told Grant "that she did not want to be part of it." Kimberly told Grant that defendant was asking Kimberly about specifics of her relationship with Giannone, like "[w]hen they had sex, where they had sex, how they had sex, how they met, you know, details."

Dillege testified that on July 12, 2022—the day that Kimberly was killed—Dillege talked with Kimberly throughout the day. At around 1:00 p.m., Kimberly told Dillege that she did not want to go home because of "some test or conversation" that she had with defendant, so Dillege encouraged Kimberly to go to her mother's or Dillege's home, but Kimberly declined because "she was afraid it would be maybe worse for her if she didn't go home." Dillege testified that because Kimberly was insisting on going home, Dillege came up with the idea of having "a code" that Dillege could use to "make sure that [Kimberly was] safe" and "not in trouble." Kimberly agreed to the idea, which Dillege thought unusual, explaining that Kimberly "normally would have never said yes to that." The "code" that the two agreed upon was that Dillege would ask Kimberly "if your girls want to play tennis today," and if Kimberly responded in the affirmative, then Dillege would "know that [she's] in trouble" and would go to Kimberly's house. After Kimberly went home, Dillege sent a text to Kimberly at 2:36 p.m. that read, "Should I pick up your girls for tennis, or are they busy today," and Kimberly responded, "Yes please." Dillege then called her family

members and told them that she was going to Kimberly's home, asking them to text Dillege in ten minutes and to "send the cops" if Dillege did not respond.

When Dillege arrived, Kimberly came outside and appeared "frantic," "very nervous, jittery," and "[h]er face was all red, flushed." Kimberly told Dillege that she wanted her to come inside, and when Dillege did so, she saw defendant, who "brought" everyone outside "on the deck." There, the three had a conversation about defendant and Kimberly's relationship. According to Dillege, defendant explained that he "was hurt about the affair, upset," and Kimberly "was upset, too." Defendant believed that Kimberly's affair was still ongoing, but Kimberly said that she had stopped talking to Giannone in February. Dillege further explained that defendant "was really upset" and called Kimberly "a whore" because he learned that Kimberly "had given [Giannone] money," which Kimberly denied. This conversation lasted for about an hour and a half, and Dillege later talked to Kimberly on the phone. During this phone conversation, Kimberly told Dillege that defendant was "upset again." After this conversation, Dillege began doing housework and got "in a zone," so she did not think to look at her phone and had no contact with Kimberly again until 9:00 p.m.

Grant testified that at around 8:00 or 8:30 p.m. on July 12, 2022, Kimberly unexpectedly came to the front door of Grant's home, driven there by her son. Grant described Kimberly's appearance as "frantic, worried, scared," and "panicked," and Grant noticed that Kimberly was covered in "[s]hards of glass" and was bleeding from "small cuts" on her arms and legs. Kimberly told Grant that defendant "hit over the head with a picture frame."[3] Kimberly also told Grant that defendant wanted to go to Giannone's house, which Kimberly thought was not "a good idea." Grant testified that, as Kimberly was leaving, she gave Grant a hug and "said he's going to kill me."

Dillege testified that she checked her phone at around 9:00 p.m. on July 12, 2022, and saw that she had several missed calls from Kimberly. Dillege called Kimberly back, and when Kimberly answered, she was in a car with defendant, and Dillege was placed on speaker phone. Dillege learned that they were again driving to Giannone's home, and Kimberly "said she did not want to go" and that defendant was armed. Dillege again tried to convince defendant that going to Giannone's home was "not a good idea," but defendant insisted on going because, according to Dillege, "he needed to have this conversation with [Giannone] and the girlfriend to let him know their relationship had been over." Dillege described Kimberly's demeanor during the conversation as "nervous, frantic." Dillege testified that defendant told her that "they just pulled into the driveway, he had to go, and he hung up the phone."

Giannone testified that on the evening of July 12, 2022, he was at home with his pregnant fiancée, his parents, his sister (Gabrielle Serra), and his two nieces. At around nine o'clock that night, Giannone was in his garage smoking a cigarette when he saw a vehicle approaching. The vehicle quickly pulled up Giannone's driveway toward his garage, and Giannone saw defendant get out of the vehicle and charge towards Giannone "with his shirt up, brandishing [a] weapon"

[3] Grant took a video of Kimberly covered in glass that was admitted into evidence. Grant also accidentally took another video that recorded a portion of a conversation that Grant had with Kimberly, which was also admitted into evidence.

tucked in his waistband and yelling. When Giannone saw defendant exposing a firearm, Giannone pulled out his own firearm that he had been carrying in his back pocket.[4] Giannone testified that defendant continued approaching—looking "[v]ery angry" and yelling "stay away from my wife"—and made it into Giannone's garage, at which point Giannone fired a warning shot. Giannone confirmed that the warning shot was not directed at defendant and was "fired in the air" out of the garage.

After Giannone fired the warning shot, defendant started retreating and Kimberly came out of the car, which is when Giannone first noticed her. As defendant retreated, Giannone told him to "get out of here" or Giannone was "going to blow your F-ing brains out." Giannone testified that defendant went to "the rear" of a vehicle in Giannone's driveway, "pulled his weapon[,] and started firing." Giannone returned fire, and during the initial exchange, Giannone was struck in the foot by a bullet that ricocheted. After Giannone ran out of bullets, he dropped his firearm and started running towards the front door of his house. As Giannone ran, defendant continued shooting at Giannone, striking him in the right knee. This caused Giannone to fall, and he started crawling. Giannone testified that he managed to get inside his house, then made his way back to the garage because he heard his sister screaming.

Serra (Giannone's sister) testified that she lived two houses down from Giannone and that on July 12, 2022, she had been at Giannone's home for a barbeque but briefly went back to her home to speak with someone from DTE. While there, she heard a gunshot outside her home, which Serra did not find unusual. Serra then heard more gunshots and became concerned, so she peeked outside and saw defendant with a gun shooting at Giannone. This caused Serra to feel "panicked, horrified," and she ran outside because her children were still at Giannone's home. As Serra ran, she was screaming, asking where her children were. When Serra first came outside, defendant was chasing after Giannone, shooting. As Serra was still running, defendant stopped chasing Giannone, then saw Serra and "came at [her] with a gun," acting "as if he were going to shoot [Serra]" by pointing his gun at her. This prompted Serra to jump under a vehicle in Giannone's driveway. Serra eventually made her way inside Giannone's home, where she saw Giannone. Serra testified that Giannone was going back into his garage, and Serra followed him.

Giannone testified that once he was back in his garage, he went into one of his vehicles and grabbed another firearm. Giannone then came out of his garage "[t]o make sure this man [left Giannone's] property." When Giannone did so, he saw the vehicle that defendant came in start moving, saw the passenger-side window roll down, and saw defendant in the passenger seat stick his firearm out the window and start firing. Concerned for himself and his family members, Giannone "[f]ired back" as the vehicle continued "rolling down" the driveway. According to Giannone, the vehicle eventually stopped at the end of the driveway, at which point Giannone saw defendant get out. Giannone testified that he noticed that his family members were outside at this point, and when defendant got out of the car, Giannone fired three more rounds at him. After Giannone was out of rounds, he went inside his house with his family. Giannone found his fiancée and nieces hiding in a closet, and Serra called 911.

[4] Giannone explained that he carried a firearm on his rural property to deal with "animals" that sometimes wandered onto the property.

Ryan Piszczek, a sergeant with the Macomb County Sheriff's Office, testified that on July 12, 2022, he responded to a report of a shooting. When he arrived, he stopped about 100 feet short of the residence and saw a vehicle at the end of the driveway. As Piszczek approached, he saw a man behind the vehicle and eventually found a female decedent—later identified as Kimberly—in the backseat. It appeared to Piszczek that Kimberly had been moved from the front seat, "kind of rolled . . . onto her side," and he "observed that there was a hole in her neck." Kimberly was eventually pronounced dead, and her cause of death was a gunshot wound to her neck.

As a result of the incident at Giannone's home, defendant was charged with (1) felony murder on grounds that Kimberly was killed as a result of defendant committing first-degree home invasion by entering Giannone's garage; (2) AWIM for trying to kill Giannone; (3) carrying a dangerous weapon with unlawful intent; and (4) felonious assault for pointing a firearm at Serra. Defendant was also charged with an attendant felony-firearm charge for each of these four counts.

Defendant was convicted as stated earlier. This appeal followed.

II. STANDARD OF REVIEW

On appeal, defendant argues that the trial court erred by allowing the prosecution to present other-acts evidence of defendant abusing Kimberly under MCL 768.27b. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Dixon-Bey*, 321 Mich App 490, 496; 909 NW2d 458 (2017). Preliminary questions regarding the admissibility of evidence, such as "whether a rule of evidence precludes the admission of evidence," are reviewed de novo. *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013).

III. MCL 768.27B AND MRE 403

MRE 404(b) generally prohibits other-acts evidence from being admitted when "its only relevance is to show the defendant's character or propensity to commit the charged offense." *People v Watkins*, 491 Mich 450, 468; 818 NW2d 296 (2012). There are exceptions to this general rule that allow certain other-acts evidence to be admitted to show a defendant's character or propensity. See *People v Wade*, ___ Mich App ___, ___; ___ NW3d ___ (2025) (Docket No. 369106); slip op at 10. As relevant here, "in prosecutions for offenses involving domestic violence or sexual assault, MCL 768.27b permits evidence of a defendant's prior commission of domestic violence or sexual assault to show the defendant's character or propensity to commit such acts." *People v Berklund*, ___ Mich App ___, ___; ___ NW3d ___ (2024) (Docket No. 367568); slip op at 8.[5] There are three limitations on other-acts evidence admissible under MCL 768.27b: (1) the

[5] At the time of defendant's trial, MCL 768.27b provided:

> Except as provided in subsection (4), in a criminal action in which the defendant is accused of an offense involving domestic violence or sexual assault, evidence of the defendant's commission of other acts of domestic violence or sexual assault is admissible for any purpose for which it is relevant, if it is not

other act in question must have occurred within 10 years of the charged offense subject to certain exceptions; (2) the evidence must be relevant; and (3) the evidence must not be barred by MRE 403. *Berklund*, ___ Mich App at ___; slip op at 4.

Defendant does not contest that the other-acts evidence was subject to possible admission under MCL 768.27b.[6] Nor does defendant argue that any of the other-acts evidence was irrelevant or that the acts in question occurred more than 10 years before the charged offense. Defendant exclusively argues on appeal that certain other-acts evidence heard by the jury should have been excluded under MRE 403.

MRE 403 provides, "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Evidence is "probative" if it "tends 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." *People v Crawford*, 458 Mich 376, 389-390; 582 NW2d 785 (1998).

Defendant argues that admission of the other-acts evidence in this case violated MRE 403 because the probative value of that evidence was substantially outweighed by the danger of unfair prejudice. Evidence is not "unfairly prejudicial" merely because it is "damaging to the defense." *Wade*, ___ Mich App at ___; slip op at 11 (quotation marks and citation omitted). Rather, evidence is unfairly prejudicial if it has a tendency "to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock." *People v Pickens*, 446 Mich 298, 337; 521 NW2d 797 (1994). Evidence can also be unfairly prejudicial if "there is a danger that the evidence will be given undue or preemptive weight by the jury or where it would be inequitable to allow use of the evidence." *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008).

Evidence that poses a danger of unfair prejudice is not per se inadmissible. When evidence is challenged as being unfairly prejudicial, MRE 403 requires courts to weigh the evidence's probative value against the unfair prejudice, and only when the evidence's probative value is substantially outweighed by the danger of unfair prejudice should a trial court consider excluding the evidence under MRE 403. See *Watkins*, 491 Mich at 486; *Berklund*, ___ Mich App at ___;

> otherwise excluded under Michigan rule of evidence 403. [MCL 768.27b, as amended by 2018 PA 372.]

MCL 768.27b was amended by 2024 PA 184, effective April 2, 2025. The amendments added offenses that are now included within the ambit of MCL 768.27b and do not change the substantive application of the statute to the facts of this case. That said, this opinion refers exclusively to the statute as it was written at the time of defendant's trial. See MCL 768.27b, as amended by 2018 PA 372.

[6] There may be a colorable argument that defendant was not charged with an offense "involving domestic violence," but defendant assumes for purposes of this appeal that the felony-murder charge involving Kimberly was such an offense. We accept that premise for purposes of this appeal only.

slip op at 9. Using other-acts evidence to prove propensity is unfairly prejudicial "by nature," which is precisely why using other-acts evidence in this way is barred by MRE 404(b). *Watkins*, 491 Mich at 486. But "when applying MRE 403 to evidence admissible under MCL 768.27b, courts should weigh the propensity inference in favor of the evidence's probative value rather than its prejudicial effect." *Berklund*, ___ Mich App at ___; slip op at 10. See also *Wade*, ___ Mich App at ___; slip op at 11.

This does not mean that other-acts evidence admissible under MCL 768.27b may never be excluded by MRE 403. The following is a nonexhaustive list of considerations, referred to as "the *Watkins* factors," which courts can use to determine whether evidence otherwise admissible under MRE 768.27b should nevertheless be excluded by MRE 403:

> (1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony. [*Berklund*, ___ Mich App at ___; slip op at 10, quoting *Watkins*, 491 Mich at 487-488 (quotation marks omitted).[7]]

Watkins drew these factors from *United States v Guardia*, 135 F3d 1326, 1331 (CA 10, 1998), and *United States v LeMay*, 260 F3d 1018, 1032 (CA 9, 2001) (Paez, J., concurring in part and dissenting in part).[8] In *Guardia*, the Tenth Circuit explained that a "403 analysis"[9] of other-acts evidence that can be admitted for any relevant purpose must pay "careful attention to both the significant probative value and the strong prejudicial qualities inherent in all" other-acts evidence. *Guardia*, 135 F3d at 1330. The court emphasized that "[p]ropensity evidence . . . has indisputable probative value" but cautioned that how probative such evidence is "in a given case will depend on" the considerations that it outlined (and that *Watkins* later adopted). *Id*. at 1331. See *Watkins*, 491 Mich at 487-488. Thus, properly understood, the *Watkins* factors help evaluate the probative value of evidence admissible under MCL 768.27b. That probative value is then weighed against the danger of unfair prejudice. The danger of unfair prejudice includes both "the strong prejudicial qualities inherent" in the other-acts evidence, *Guardia*, 135 F3d at 1330, and the risk of prejudice posed by the specific other-acts evidence at issue, see *id*. at 1331 (recognizing that "the risk of prejudice will likewise present in varying degrees" depending on the facts of a given case).

It is not necessarily error for a trial court to not take the *Watkins* factors into account because they are intended to "facilitate," not "supplant," a trial court's MRE 403 analysis. *Berklund*, ___ Mich App at ___; slip op at 10 (quotation marks and citation omitted). The *Watkins* factors simply highlight aspects of other-acts evidence admissible under MCL 768.27b that courts

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[7] *Watkins* adopted these factors for evidence admissible under MCL 768.27a, and *Berklund* extended consideration of the *Watkins* factors to evidence admissible under MCL 768.27b.

[8] The partial concurrence in *LeMay* drew its factors from *Doe ex rel Rudy-Glanzer v Glanzer*, 232 F3d 1258, 1268 (CA 9, 2000), which in turn drew its factors in part from *Guardia*.

[9] FRE 403 and MRE 403 mirror one another.

can use to assess the probative value of the other-acts evidence as part of determining whether that probative value is substantially outweighed by the danger of unfair prejudice. See *Watkins*, 491 Mich at 489; *Guardia*, 135 F3d at 1330-1331.

IV. OTHER-ACTS EVIDENCE ADMITTED AT DEFENDANT'S TRIAL THAT SHOULD HAVE BEEN EXCLUDED UNDER MRE 403

Before addressing the other-acts evidence that was improperly admitted during defendant's trial in this case, it is helpful to frame the charge that defendant was facing because it contextualizes the probative value of the other-acts evidence. The trial court admitted the other-acts evidence under MCL 768.27b solely for defendant's felony-murder charge. The elements of felony murder in Michigan are (1) the killing of a human being, (2) with malice, (3) while committing a specified felony. *People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999). To prove the intent element (malice), the prosecution must prove that the defendant "acted with intent to kill or to inflict great bodily harm or with a wanton and willful disregard of the likelihood that the natural tendency of his behavior is to cause death or great bodily harm." *People v Aaron*, 409 Mich 672, 733; 299 NW2d 304 (1980). It is undisputed that Giannone fired the shot that killed Kimberly, and the prosecution argued that defendant was criminally liable for Kimberly's death because he caused her death while committing a felony (first-degree home invasion[10]) "with a wanton and willful disregard of the likelihood that the natural tendency of his behavior is to cause death or great bodily harm." *Id.*[11] Defendant was thus not charged with killing or harming Kimberly, or even intending to kill or harm Kimberly; he was charged with causing Kimberly's death while committing a specified felony with a wanton and willful disregard of the likelihood that his behavior would result in death or great bodily harm.[12]

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[10] The prosecution's theory that defendant committed first-degree home invasion when he entered Giannone's garage without permission while armed and assaulted Giannone.

[11] This was not a case of "transferred intent" in which defendant's intent to kill or harm Giannone could constitute evidence that defendant intended to kill or harm Kimberly because defendant did not, himself, kill or harm Kimberly. See *People v Youngblood*, 165 Mich App 381, 388; 418 NW2d 472 (1988) (explaining that the doctrine of transferred intent provides that, if the evidence shows that a defendant intended to kill one person but accidentally killed another, the defendant's intent to kill transfers from the intended victim to the actual victim).

[12] Simply to illustrate this fact, we point to statements made by the prosecution during trial when the parties presented arguments regarding jury instructions, including, "[w]e have never argued that [defendant] intended to specifically kill Kimberly Mollicone." The jury was also instructed on the lesser included offense of second-degree murder, for which the prosecutor was required to prove that defendant "intended to kill or intended to do great bodily harm to Kimberly Mollicone or knowingly created a very high risk of death or great bodily harm knowing that death or great bodily harm knowing that death or such harm would be the likely result of their actions." During the above referenced argument regarding jury instructions, the prosecution conceded that he was not suggesting that defendant "intended to do great bodily harm to Kimberly . . . ." Thus, to summarize, with regard to the charge of felony murder, the prosecution did not argue that

Given this context, the propensity inference derived from evidence that defendant had previously committed acts of violence against Kimberly had little probative value. That is, as a general matter, evidence that defendant had previously harmed Kimberly is so dissimilar from the charged crime that the propensity inference derived from such evidence is minimal. This, of course, does not mean that such evidence should have necessarily been excluded under MRE 403 because the evidence may be particularly probative for a different reason, or the other-acts evidence could be only minimally prejudicial so as to not substantially outweigh the evidence's minimal probative value. It is therefore necessary to apply the MRE 403 balancing test "to each separate piece of evidence offered under" MCL 768.27b to determine whether the evidence's probative value was substantially outweighed by the danger of unfair prejudice. *Watkins*, 491 Mich at 489.

The first piece of other-acts evidence that we consider is Dutkiewicz's testimony that she started noticing bruising on Kimberly after defendant told Dutkiewicz that Kimberly was having an affair. While Dutkiewicz never testified that defendant caused the bruising, this was the implication of Dutkiewicz's testimony when she connected her noticing the bruising to defendant's finding out about Kimberly's affair.

The *Watkins* factors virtually all suggest that this evidence had minimal probative value. The prosecution argued below that this evidence was probative of defendant's propensity to commit violent "acts against Kimberly," but defendant was not charged with harming Kimberly, so that he had a propensity for harming Kimberly was only minimally probative of whether defendant committed the charged offense or had a propensity to engage in conduct that would result in his committing the charged offense. That is, as explained, the probative value of the propensity inference derived from this other-acts evidence was minimal because the other-acts evidence was wholly dissimilar to the charged offense.

The prosecution also argued below that Dutkiewicz's testimony about Kimberly's bruising was probative because it showed "marital discord," which was relevant to establishing defendant's motive and intent on the night Kimberly was killed. But Dutkiewicz's testimony about Kimberly's bruising was only relevant to the existence of marital discord if one infers that defendant caused Kimberly's bruising—Dutkiewicz all but admitted that she had no personal knowledge about whether defendant caused Kimberly's bruising when Dutkiewicz testified that Kimberly "always deferred, always [gave] excuses," whenever Dutkiewicz asked Kimberly about the bruising. Dutkiewicz's testimony about Kimberly's bruising was also unnecessary to establish the existence of marital discord in defendant's and Kimberly's marriage because numerous witnesses testified about how defendant and Kimberly argued for hours on end about Kimberly's affair and how these arguments often left Kimberly distraught and defendant angry.

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defendant "acted with intent to kill or inflict great bodily harm"; it argued that defendant acted with "willful disregard of the likelihood that the natural tendency of his behavior [was] to cause death or great bodily harm." With regard to lesser included offense of second-degree murder, the prosecution did not argue that defendant intended to kill Kimberly, or that he intended to do great bodily harm to Kimberly; it argued that he "knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of [his] actions."

It is also not clear when Dutkiewicz saw Kimberly's bruising relative to when the charged crime occurred. This not only impacted the evidence's probative value[13] but increased its prejudicial qualities by leaving it to the jury to speculate about whether the bruising started immediately after defendant found out about Kimberly's affair and lasted until she was killed. See *People v McFarlane*, 325 Mich App 507, 530; 926 NW2d 339 (2018) (explaining that "evidence was likely inadmissible under MRE 403" in part "because it invited speculation by the jury"). In a similar vein, Dutkiewicz's testimony about Kimberly's bruising was exceedingly vague, which both lessened the evidence's probative value while increasing its prejudicial qualities because, again, the lack of specificity invited speculation by the jury about the extent and frequency of the bruising. See *id*.[14]

On the basis of the foregoing, it is evident that Dutkiewicz's testimony about Kimberly's bruising had little probative value. And on top of "the strong prejudicial qualities inherent" in this type of other-acts evidence, *Guardia*, 135 F3d at 1330, Dutkiewicz's testimony about Kimberly's bruising had qualities that made it particularly prejudicial, as explained. Weighing this evidence's minimal probative value against the danger of unfair prejudice, we conclude that the evidence should have been excluded under MRE 403, and the trial court abused its discretion by allowing this evidence to be permitted.

The next piece of other-acts evidence we consider came through Dillege's and Grant's testimonies. Both Dillege and Grant testified that defendant tried to choke Kimberly at some point before the shooting. Grant testified that Kimberly said that defendant choked her on two occasions, and during the second occasion defendant placed a foot on Kimberly's neck while she was on the floor. Grant specified that one incident took place in four or five months before Kimberly was killed, but she was not sure when the other incident occurred. Dillege testified that Kimberly told Dillege that sometime in 2021 or 2022, defendant choked Kimberly in their bedroom and only stopped because their son came into the room.

The *Watkins* factors suggest that this evidence, too, was not particularly probative of whether defendant committed the charged crime. Like Dutkiewicz's testimony about Kimberly's bruising, evidence that defendant had previously choked Kimberly shared virtually no similarities with the charged offense, so the probative value of the propensity inference derived from this other-acts evidence was minimal. Also like with Dutkiewicz's testimony about Kimberly's

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[13] The probative value of other-acts evidence "is weakened when a very long period of time has passed between the prior acts and the current charges." *People v Hoskins*, 342 Mich App 194, 206; 993 NW2d 48 (2022).

[14] As a general proposition, other-acts evidence that leaves too much to speculation is unfairly prejudicial because a defendant cannot realistically combat that speculation. Either the defendant must ask for specifics about the other acts and risk placing into the record evidence damaging to their case, or the defendant must stay silent and leave the jury to its speculation. This places the defendant in a no-win scenario, and it is thus inequitable to permit such evidence. See *Blackston*, 481 Mich at 462 (explaining that evidence is unfairly prejudicial if use of the evidence would be "inequitable"). To be clear, evidence is not speculative and thus unfairly prejudicial merely because a defendant can identify some way that the evidence could be more specific.

bruising, there was little need for the evidence that defendant previously choked Kimberly. To the extent that the prosecution sought to admit this evidence to show marital discord or that defendant was upset with Kimberly about her affair, there was, again, plenty of evidence establishing these facts. The temporal proximity of when defendant choked Kimberly and when the charged offense occurred likewise makes the evidence less probative under the circumstances. Grant was unsure when one choking incident occurred and placed the other incident four or five months before Kimberly's death, and Dillege testified that the choking incident that Kimberly told Dillege about occurred in either 2021 or 2022, meaning that it may have occurred over a year before Kimberly was killed. Considering that defendant was not charged with harming or intending to harm Kimberly, evidence that he previously choked Kimberly was already not particularly probative, and evidence that he did so four months (or more) before she was killed was even less so. Evidence that defendant choked Kimberly was also explicitly violent. While this marginally increased the evidence's probative value, it greatly increased the evidence's prejudicial qualities under the circumstances because, again, defendant was not charged with harming or intending to harm Kimberly.

These considerations support that the probative value of evidence that defendant previously choked Kimberly was not particularly high, though it certainly had some probative value.[15] On the other side of the MRE 403 balancing scale, however, this evidence carried a very real risk of unfairly prejudicing defendant. In addition to "the strong prejudicial qualities inherent" in other-acts evidence, *Guardia*, 135 F3d at 1330, the evidence at issue dealt with violent conduct directed at Kimberly that was wholly dissimilar to the violence involved in the charged crime, thus increasing the risk of unfair prejudice. Considering the two sides of the MRE 403 balancing scale, we conclude that the mild probative value of evidence that defendant previously choked Kimberly was substantially outweighed by the danger of unfair prejudice, so the evidence should have been excluded under MRE 403, and the trial court abused its discretion by allowing this evidence to be admitted at defendant's trial.

V. WHETHER THE ERROR OF ADMITTING THIS EVIDENCE WAS HARMLESS

The error in admitting these pieces of other-acts evidence does not necessarily mean that defendant is entitled to a new trial. An error in the admission of evidence is only grounds for granting a new trial if refusing to do so appears "inconsistent with substantial justice." MCR 2.613(A).

One of the prosecution's themes during closing argument was that this case was set in motion in 2014 when defendant found out about Kimberly's affair, after which things "got worse and worse and worse. The black eyes, the injuries, the complaints, the fear. This didn't start on [the day of the shooting]." The prosecution also highlighted Dillege's testimony that defendant once choked Kimberly in their bedroom and only stopped because their son walked into the room.

[15] The probative value of this evidence was increased by the fact that the evidence was fairly reliable. While neither Dillege nor Grant had personal knowledge about whether defendant actually choked Kimberly because they both heard about it secondhand from Kimberly, their testimonies corroborated one another. The fact that Kimberly separately told Dillege and Grant that defendant abused her in this specific way also lends credence to the accusation.

And later, during rebuttal, in response to the defense's argument that Giannone was "dishonest and despicable," the prosecutor argued, "This isn't a who's worse, the guy that's [possibly stealing money from] and sleeping with a married woman or the guy who's taking that married woman, choking her by her throat, standing on her neck, dumping her on the side of the street, causing her bruises, making her show up." While these remarks were sporadic and made during the course of a lengthy closing argument, they nevertheless highlighted the improperly admitted other-acts evidence. The last remark in particular simply used the other acts to attack defendant's character.

The rationale underlying the general prohibition against using propensity evidence to show the defendant's character "is the fear that a jury will convict the defendant inferentially on the basis of his bad character rather than because he is guilty beyond a reasonable doubt of the crime charged." *Watkins*, 491 Mich at 468 (quotation marks and citation). See also *Michelson v United States*, 335 US 469, 475-476; 69 S Ct 213; 93 L Ed 168 (1948) (explaining that character evidence is "not . . . irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge"). Admittedly, this Court has stated that other-acts evidence admissible under MCL 768.27b may be used to attack a defendant's character. See *People v Cameron*, 291 Mich App 599, 609; 806 NW2d 371 (2011) (explaining that evidence admissible under MCL 768.27b may be admissible "to prove any issue, even the character of the accused") (quotation marks and citation omitted). But that is only true when the evidence is admissible. Here, the other-acts evidence should have been excluded under MRE 403, and the present inquiry is whether allowing defendant's convictions to stand would be inconsistent with substantial justice. For this inquiry, the risks inherent in using propensity evidence to show the defendant's character weigh in favor of granting defendant relief because the jury should not have heard the evidence in the first place and thus not have been permitted to draw any character inference from the evidence. Stated differently, because the jury should not have heard the other-acts evidence, the risk that the jury may have convicted defendant "inferentially on the basis of his bad character rather than because he is guilty beyond a reasonable doubt of the crime charged," *Watkins*, 491 Mich at 468 (quotation marks and citation), supports concluding that allowing defendant's convictions to stand would be inconsistent with substantial justice. That risk is especially prevalent here because the prosecutor encouraged the jury to consider how the improperly admitted other-acts evidence demonstrated defendant's bad character.[16] Given this, we conclude that allowing defendant's convictions to stand would be inconsistent with substantial justice. We accordingly hold that the

[16] We are not suggesting that the prosecutor committed error or engaged in misconduct by relying on the other-acts evidence to attack defendant's character under the circumstances. Evidence admissible under MCL 768.27b may be used for precisely this purpose. See *Cameron*, 291 Mich App at 609. The present inquiry, however, is not whether the prosecutor in this case committed error but whether allowing defendant's convictions to stand in light of the fact that the other-acts evidence should have been excluded would be inconsistent with substantial justice. And pertinent to this inquiry is the fact that the prosecutor highlighted the other-acts evidence in an effort to stress defendant's bad character.

admission of the other-acts evidence in this case was not harmless, so defendant's convictions must be vacated.[17, 18]

We vacate defendant's convictions and remand for a new trial. We do not retain jurisdiction.

/s/ Colleen A. O'Brien
/s/ Randy J. Wallace

[17] Defendant contests other pieces of other-acts evidence that the jury heard, but it is unnecessary to address the admissibility of that evidence to resolve this case. If defendant is retried, nothing in this opinion should be construed as offering an opinion about the admissibility of the other-acts evidence not explicitly addressed in this opinion. Rather, if the trial court again concludes that that other-acts evidence is otherwise admissible under MCL 768.27b, it should apply the MRE 403 balancing test "to each separate piece of evidence" to determine whether the evidence's probative value is substantially outweighed by the danger of unfair prejudice. *Watkins*, 491 Mich at 489.

[18] Given our resolution of this issue, it is unnecessary to address defendant's claim that his trial counsel provided ineffective assistance.