STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 12, 2009
v	No. 282685 Oakland Circuit Court
BRANDEN MICHAEL LEWIS-ELLIOTT, Defendant-Appellant.	LC No. 2007-212400-FC

Before: Servitto, P.J., and O'Connell, and Zahra, JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to do great bodily harm less than murder, MCL 750.84. He was sentenced, as a fourth habitual offender (MCL 769.12) to 102 to 240 months' imprisonment. He appeals as of right. We affirm defendant's conviction, but vacate his sentence and remand this matter to the trial court with instructions to resentence defendant as a third habitual offender.[1]

Defendant argues on appeal that he was denied his constitutional right to the effective assistance of counsel because defense counsel failed to object to inadmissible testimony regarding the existence of an unrelated warrant for defendant's arrest. We disagree. When reviewing a claim of ineffective assistance of counsel when an evidentiary hearing is not previously held, we conduct a de novo review of the existing record. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been

[1] We need not address defendant's claim that the trial court erred in refusing to grant a new trial because a portion of the trial transcript was unavailable. This Court takes notice that on April 6, 2009, the missing trial testimony was filed in this Court. A case is moot if it presents only abstract questions of law that do not rest on existing facts or rights. *Ryan v Ryan*, 260 Mich App 315, 330; 677 NW2d 899 (2004). Since the missing transcript has been located, defendant's claim is moot.

different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). MRE 609 limits what prior convictions can be used to impeach a defendant.

> (a) For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross examination, and
>
> (1) The crime contained an element of dishonesty or false statement, or
>
> (2) the crime contained an element of theft, and . . .

MRE 404(b)(1) further provides that evidence of a defendant's "other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith," but can be used to establish "proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident." *People v Orr*, 275 Mich App 587, 589; 739 NW2d 385 (2007).

Defendant cites the following testimony in his brief on appeal to which he claims defense counsel should have lodged an objection:

> *Prosecutor*. . . . Can you tell the jury the circumstances of him [defendant] being present for that second interview?
>
> *A.* Yes. Based on the interview that we had with Norman Bean and additional investigation, we learned that Mr. Elliott had a warrant for his arrest out of another jurisdiction, completely unrelated to this case or this investigation.
>
> During that period of time between the 9th and the 13th, Mr. Elliott had been calling our station. He had been contacting our crime scene investigator, both myself and my partner and leaving us voice mails and things of that nature.
>
> * * *
>
> The telephone contact that we had -- had collectively had -- had -- because we had -- had discussions from the defendant, was that he wanted to come to the station to retrieve that makeshift wallet and money . . . . This is the property that belonged to Branden Elliott that was recovered at the crime scene by Deputy Grandesack. And he -- he was contacting us. This is what he wanted, he wanted this in the worst way.

We disagree with defendant that the above testimony is evidence of a crime being used to show that defendant acted in conformity when committing the instant offense. Rather, the purpose was clearly to merely establish the circumstances in which defendant was placed in police custody. Indeed, the above testimony does not indicate the nature of the crime for which defendant had an outstanding warrant. Moreover, even if we were to find the above testimony inadmissible, MRE 404(b)(1); MRE 609; *Orr, supra* at 589, defense counsel's failure to object to the testimony did not prejudice defendant. The jury was made aware of several prior convictions

through defendant's own testimony. In addition, there was overwhelming evidence that defendant hit the victim in the head with a glass bottle. We cannot conclude that there is a reasonable probability that, but for counsel's alleged error in failing to object to the alleged improper testimony, the result of the proceedings would have been different. Accordingly, defense counsel's failure to object to the testimony did not deny defendant his constitutional right to the effective assistance of counsel. *Toma, supra* at 302-303.

Defendant's next argument on appeal is that the trial court committed error requiring reversal when it refused to instruct the jury on self-defense and/or defense of another. We disagree. We review a trial court's determination whether a jury instruction was applicable to the facts of the case for an abuse of discretion. *People v Hawthorne*, 265 Mich App 47, 50; 692 NW2d 879 (2005).

A criminal defendant is entitled to have a properly instructed jury consider the evidence against him, and a requested instruction that is supported by the evidence must be given. *Hawthorne, supra* at 57. "Conversely, an instruction that is without evidentiary support should not be given." *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999). A criminal defendant has a state and federal constitutional right to present a defense, and thus, instructional errors which directly affect a defendant's theory of defense can infringe on a defendant's due process right to present a defense. *People v Kurr*, 253 Mich App 317, 326-327; 654 NW2d 651 (2002). "A defendant asserting an affirmative defense must produce some evidence on all elements of the defense before the trial court is required to instruct the jury regarding the affirmative defense." *People v Crawford*, 232 Mich App 608, 620; 591 NW2d 669 (1998).

To establish lawful self-defense or defense of another, the evidence must show that: (1) the defendant honestly and reasonably believed that he or another was in danger; (2) the danger feared was death, serious bodily harm or "imminent forcible sexual penetration," (3) the action taken appeared at the time to be immediately necessary to defend himself or another; and (4) the defendant was not the initial aggressor. *People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002); *Kurr, supra* at 321.

Here, defendant stated that he believed that the victim might have had a gun because (1) the victim kept pulling up his pants the whole evening, suggesting that there might be something heavy in his pocket, and (2) the victim was "posturing" and motioning toward his pocket. Norman Bean also testified that the victim motioned toward his pants, while Christine Reynolds testified that, at an early point in time, it looked like the victim was going to grab something out of his pocket. However, at the time of the incident in question, Reynolds was admittedly upstairs, and furthermore, Bean testified that he never saw a gun, and did not known the victim to carry a gun. Further, the police did not find any evidence to indicate that the victim had a gun.

We therefore conclude that even if defendant honestly believed that he was in danger because he thought that the victim had a gun, defendant's belief was not reasonable. In addition, defendant was admittedly the initial aggressor and under no circumstances could defendant's actions of kicking an unconscious victim three times be considered "immediately necessary to defend himself." Accordingly, the trial court did not commit error requiring reversal when it refused to instruct the jury on self-defense. *Riddle, supra* at 119; *Crawford, supra* at 620. We also note that the person the victim had allegedly sexually assaulted was upstairs and out of harms way at the time that defendant admittedly assaulted the victim, and thus, the trial court

likewise did not commit error requiring reversal when it refused to instruct the jury on defense of another. *Riddle, supra* at 119; *Crawford, supra* at 620.

Defendant's next argument on appeal is that the trial court abused its discretion when it scored five points for offense variable (OV) 10. We disagree. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "A scoring decision "for which there is any evidence in support will be upheld." *Id*.

In pertinent part, under OV 10, five points should be scored if the defendant "exploited a victim" who was "intoxicated, under the influence of drugs, asleep, or unconscious." MCL 777.40(1)(c). A defendant exploits a victim if he manipulates a victim for selfish or unethical purposes. MCL 777.40(2)(b). A victim is considered to be vulnerable if it is readily apparent that he is susceptible to injury, physical restraint, persuasion, or temptation. MCL 777.40(2)(c).

Here, evidence was presented that the victim was intoxicated. More importantly, evidence was presented that after defendant had hit the victim in the head with a glass bottle, thereby rendering the victim unconscious, defendant kicked the victim multiple times, stopping only after being restrained by Bean. Evidence was therefore presented that defendant exploited the victim while he was vulnerable. MCL 777.40. Accordingly, the trial court did not abuse its discretion when it scored five points for OV 10. MCL 777.40; *People v Cox*, 268 Mich App 440, 454; 709 NW2d 152 (2005).

Defendant last argues, and the prosecution concedes the point, that the trial court abused its discretion when it sentenced defendant as a fourth habitual offender. Specifically, defendant argues that one of his prior convictions supporting his status as a fourth habitual offender would not have been a felony if committed in Michigan. We agree. We review a trial court's imposition of a sentence for an abuse of discretion. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002).

MCL 769.10, provides that:

> If a person has been convicted of a felony or an attempt to commit a felony, whether the conviction occurred in this state or *would have been for a felony or attempt to commit a felony in this state if obtained in this state*, and that person commits a subsequent felony within this state, the person shall be punished upon conviction of the subsequent felony and sentencing [under the habitual offender provisions]. [(Emphasis added).]

In *People v Quintanilla*, 225 Mich App 477, 477-478; 571 NW2d 228 (1997), this Court reiterated that,

> [t]he [habitual offender] act requires that the offense be a felony in Michigan under Michigan law, irrespective of whether the offense was or was not a felony in the state or country where originally perpetrated. Hence, the facts of the out-of-state crime, rather than the words or title of the out-of-state statute under which the conviction arose, are determinative.

Thus, the trial court erred in "holding if it's felony in Arizona, at the time that it happened, it's a felony in Michigan for the purpose of the Habitual Offender Act."

Here, one of defendant's three prior convictions supporting his status as a fourth habitual offender is a conviction for "theft/control of stolen property" in Arizona. The undisputed facts of this crime involved the theft of a mountain bike valued at $300. Although the crime was considered a felony in Arizona, the facts adduced only support a misdemeanor conviction in Michigan. See MCL 750.535[2] and MCL 750.356.[3] The crime would not be punishable by more than a year in prison in Michigan, and thus cannot be used to enhance defendant's sentence under the habitual offender statute, MCL 769.12; *Quintanilla, supra* at 478-479; *People v DeLong*, 128 Mich App 1, 4; 339 NW2d 659 (1983). The trial court therefore abused its discretion when it sentenced defendant as a fourth habitual offender. Because defendant's minimum sentence was outside of his appropriate minimum sentence range as a third habitual offender, and because the trial court did not list any substantial and compelling reasons to depart from the proper guidelines range, resentencing is required. *People v Hegwood*, 465 Mich 432, 438; 636 NW2d 127 (2001).

We affirm defendant's conviction, but vacate defendant's sentence and remand this matter to the trial court with instructions to resentence defendant as a third habitual offender. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Peter D. O'Connell
/s/ Brian K. Zahra

[2] In relevant part, MCL 750.535 provides that a person who possesses stolen property that "has a value of $200.00 or more but less than $1,000.00" is "guilty of a misdemeanor punishable by imprisonment for not more than 1 year."

[3] In relevant part, MCL 750.356 provides that a person who commits larceny of a good that "has a value of $200.00 or more but less than $1,000.00" is "guilty of a misdemeanor punishable by imprisonment for not more than 1 year."