STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 11, 2009
v	No. 284299 Calhoun Circuit Court
CHRISTOPHER LUKE PRATT, Defendant-Appellant.	LC No. 2007-002395-FH

Before: Fort Hood, P.J., and Cavanagh and K. F. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for assault with a dangerous weapon, MCL 750.82, interference with electronic communications causing injury or death, MCL 750.540(5)(b), assault and battery (domestic), MCL 750.81(2), and unlawful imprisonment, MCL 750.349b. Defendant received concurrent sentences of 15 to 48 months' imprisonment for the assault with a dangerous weapon conviction, 15 to 48 months' imprisonment for the interference with electronic communications causing injury conviction, 93 days to 3 months in jail for the domestic violence conviction, and 56 to 180 months' imprisonment for the unlawful imprisonment conviction. We affirm.

I.

Defendant first challenges the admission of other "bad acts" evidence pursuant to MCL 768.27b.[1] We review this preserved claim for an abuse of discretion. *People v Johnson*, 474 Mich 96, 99; 712 NW2d 703 (2006). Where the trial court selects one of several principled outcomes, there is no abuse of discretion. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Questions of law involved in resolving an evidentiary issue are reviewed de novo. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

[1] Defendant does not contest that the proffered evidence would have been admissible pursuant to MRE 404(b).

MCL 768.27b provides in part:

> (1) Except as provided in subsection (4), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403.
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> (2) If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered, to the defendant not less than 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown.
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> (4) Evidence of an act occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that admitting this evidence is in the interest of justice.

Under MCL 768.27b, "the Legislature now allows trial courts to admit relevant evidence of other domestic assaults to prove any issue, even the character of the accused, if the evidence meets the standard of MRE 403." *People v Pattison*, 276 Mich App 613, 615; 741 NW2d 558 (2007). Relevant evidence is defined as evidence that 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. "The threshold [of relevancy] is minimal: 'any' tendency is sufficient probative force." *People v Crawford*, 458 Mich 376, 390; 582 NW2d 785 (1998). MRE 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]"

We conclude that the trial court did not abuse its discretion in determining that the victim's other acts evidence was admissible under the statute. It was relevant to the domestic violence charge, MCL 750.81(2), to demonstrate defendant's continuing course of conduct that involved verbal and physical abuse that caused the victim to feel afraid, intimidated, and threatened, which supported that defendant had a propensity to engage in domestic violence against the victim, increasing the likelihood that the charged offense occurred. It was also relevant to the victim's credibility, particularly because defendant's defense focused on discrediting the victim by introducing evidence of multiple prior police reports by the victim regarding other men, and his claim that the charged incident did not occur and the victim actually assaulted defendant. The credibility of a witness is always at issue. *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). Further, the probative value of the other acts evidence was not outweighed by the danger of unfair prejudice. Although it was prejudicial to some extent, "[a]ll evidence offered by the parties is 'prejudicial' to some extent[.]" *Id.* at 75. The evidence at issue was not, however, *unfairly* prejudicial. MRE 403. Further, the trial court's instruction confined the jury's consideration of the other acts evidence to the domestic assault charge, and the jury is presumed to follow instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

With respect to other acts evidence presented by defendant's ex-wife, defendant does not argue that the evidence was irrelevant or unfairly prejudicial. Rather, he argues that the trial court abused its discretion in admitting the evidence because it was more than ten years old, and in determining that the prosecutor gave proper notice of the use of that evidence. The trial court held that the older evidence was admissible "in the interest of justice" in order to assist the jury in fully understanding the ex-wife's testimony about more recent other acts evidence which did fall within the ten year time frame permitted by MCL 768.27b(4). This decision did not fall outside the range of reasonable and principled outcomes. *Babcock*, *supra* at 269.

We also find no merit to defendant's argument that he did not receive timely notice that the complained of evidence would be offered at trial. The record reflects that the prosecutor provided the requisite notice to defendant on September 17, 2007, well before the November 27, 2007, trial began. The notice provided on that date indicated that the prosecutor intended to admit other acts evidence, and the substance of the evidence was identified as that offered in response to defendant's earlier motion to reduce bond. Attached to that response was the ex-wife's personal protection order (PPO) against defendant and her affidavit in application for a PPO in which she detailed the history of abuse that defendant inflicted upon her.

II.

Next, defendant argues that the trial court abused its discretion in denying his for-cause challenge to a juror. We review this issue for an abuse of discretion. See *People v Legrone*, 205 Mich App 77, 81; 517 NW2d 270 (1994). Defendant in this case exercised all of his peremptory challenges by the time the jury was impaneled, thus preserving this issue for appeal. *People v Jendrzejewski*, 455 Mich 495, 514 n 19; 566 NW2d 530 (1997). MCR 2.511(D) provides that grounds for challenging a juror for cause include having bias against a party, showing "a state of mind that will prevent the person from rendering a just verdict," or holding an opinion that would improperly influence the juror's verdict. "If, after the examination of any juror, the court finds that a ground for challenging a juror for cause is present, the court on its own initiative should, or on motion of either party must, excuse the juror from the panel." MCR 6.412(D)(2). When a defendant challenges the trial court's denial of a challenge for cause:

> A four-part test is used to determine whether an error in refusing a challenge for cause merits reversal. There must be a clear and independent showing on the record that (1) the court improperly denied a challenge for cause, (2) the aggrieved party exhausted all peremptory challenges, (3) the party demonstrated the desire to excuse another subsequently summoned juror, and (4) the juror whom the party wished later to excuse was objectionable. [*People v Lee*, 212 Mich App 228, 248-249; 537 NW2d 233 (1995).]

Where a defendant does not meet the first prong of the test, the trial court does not err in refusing to dismiss the challenged juror for cause. *Id.* at 251-252.

After reviewing the in-camera questioning of the juror, we conclude that the trial court did not abuse its discretion in refusing to dismiss the juror for cause. The juror was questioned extensively regarding the fact that he read some articles about defendant's involvement in this

case and the unrelated case of Mary Lands, and had discussed the Lands case with his wife. However, the juror indicated that the discussions were matters of opinion only, not fact, and his wife never expressed an opinion as to defendant's culpability. The juror repeatedly indicated that he did not associate the Lands case with the case at bar and that he believed he could be a fair and impartial juror. He agreed that he would follow the law as given by the trial court and restrict his consideration only to the evidence presented at trial, and exclude preconceived opinions, conversations with anyone, and any articles he read. "Juror exposure to information about a defendant's previous convictions or newspaper accounts of the crime for which he has been charged does not in itself establish a presumption that a defendant has been deprived of a fair trial by virtue of pretrial publicity." *Jendrzejewski*, *supra* at 502. Where the juror indicates that he can set aside a prior opinion and be fair and impartial, he may remain on the jury. *Id.* at 515-516. In addition, "[a] juror who expresses an opinion referring to some circumstance of the case which is not positive in character, but swears he can render an impartial verdict, may not be challenged for cause." *People v Roupe*, 150 Mich App 469, 474; 389 NW2d 449 (1986). Because defendant fails to establish the first prong of the four-prong test, *Lee*, *supra* at 248-249, defendant's claim fails, *id.* at 251-252.[2]

III.

Next, defendant argues that the trial court erred in denying his motions for a mistrial on grounds that the victim's doctor, Mark Machalka, offered opinions based on facts and data not in evidence and that a juror was missing on the fifth day of trial.

Although defendant moved for a mistrial regarding Dr. Machalka's testimony, he did not contemporaneously object to the testimony, and only raised the claim of error two days later, after the prosecutor concluded its presentation of the proofs. This issue is therefore unpreserved and reviewed for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999). We note that, in general, we review the trial court's decision to deny a motion for a mistrial for an abuse of discretion. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003). The trial court's decision to remove a juror is also reviewed for a clear abuse of discretion, *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001), as are a trial court's evidentiary rulings, *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008).

"A motion for a mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs the defendant's ability to get a fair trial." *People v Lugo*, 214 Mich App 699, 704; 542 NW2d 921 (1995). "A mistrial should be granted only where the error complained of is so egregious that the prejudicial effect can be removed in no other way." *People v Gonzales*, 193 Mich App 263, 266; 483 NW2d 458 (1992). "[T]he trial court must exercise the power to declare a mistrial with great caution and employ less drastic alternatives which would be revealed by the 'scrupulous exercise' of judicial discretion." *People v Little*,

[2] We note that defendant attempts to impermissibly expand the record on appeal by attaching numerous internet articles and postings regarding the Lands case that were not contained in the lower court file. See *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999). Defendant offers no proof that the juror viewed these articles, and we decline to consider them.

180 Mich App 19, 23; 446 NW2d 566 (1989). Further, with respect to expert testimony MRE 703 requires that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence."

After reviewing Dr. Machalka's testimony, we conclude that he did not testify to an opinion or inference based on facts or data that were not in evidence. Rather, the record reflects that Dr. Machalka specifically declined to testify about any information or conclusions related to hospital records regarding the victim's hospitalization or the victim's regiment of medications that was contained in charts that Dr. Machalka did not have with him at trial. Dr. Machalka indicated that when he assessed the victim in February and April of 2007, he did not possess the hospital records. Thus, his own reports from her appointments with him were not based on the hospital records, and he testified at trial only as to what was contained in his reports and his recollections and assessments. He indicated that he was only testifying with respect to the records that he had with him, and noted that the victim was placed on three different medications, but he did not know what other medications she was taking because that information was contained in a chart that was at his office. The trial court did not abuse its discretion in denying defendant's motion for a mistrial because there was no prejudicial irregularity that impaired defendant's right to a fair trial. *Lugo*, *supra* at 704. And, the trial court was required to consider less drastic alternatives to remedy any error before granting a mistrial. The trial court offered to obtain the other records but defendant did not avail himself of this opportunity. See *Gonzales*, *supra* at 266; *Little*, *supra* at 23. There was no plain error requiring reversal. *Carines*, *supra* at 763-765.

Regarding the missing juror, the record reflects that the trial court dismissed the juror on the morning of the fifth day of trial because she became ill, but the trial court forgot to inform the parties of this development until some evidence was already presented that morning without the parties noticing that there were only 13 jurors instead of 14. Pursuant to MCL 768.18, the trial court

> may order a jury impaneled of not to exceed 14 members . . . . Should any condition arise during the trial of the cause which in the opinion of the trial court justifies the excusal of any of the jurors so impaneled from further service, he may do so and the trial shall proceed, unless the number of jurors be reduced to less than 12.

This statute "is intended to avoid mistrials in cases where one or more of the original jurors is necessarily discharged during the trial due to personal disability or legal disqualification." *People v Harvey*, 167 Mich App 734, 744; 423 NW2d 335 (1988). The trial court properly exercised its broad discretion in dismissing the juror because of illness, when it empanelled 14 jurors and then reduced it to 13. *Id*. at 745. Defendant failed to establish that he suffered any prejudice to his Sixth Amendment right that deprived him of a fair trial as a result of the juror's dismissal. *Lugo*, *supra* at 704.

IV.

Defendant also contends that the trial court erred in denying his motion for judgment notwithstanding the verdict (JNOV), or a new trial, with respect to the unlawful imprisonment and interference with electronic communications causing injury convictions. The trial court's

decision on a motion for a new trial is reviewed for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

Defendant first argues that JNOV was warranted because his conviction for interfering with electronic communications causing injury was against the great weight of the evidence and supported by insufficient evidence. This issue is abandoned where defendant has not explained or rationalized the basis for his claim. He argues in a cursory fashion, stating only that the victim did not testify that defendant "allegedly destroyed the telephone by pulling it out of the wall for the purpose of preventing her from communicating, which resulted in injury. She testified that she did leave the home and use her cell phone and also told her youngest son, Tristand to call 911." Defendant completely fails to address the evidence that was presented to support the conviction, and he leaves it to this Court to discover and rationalize his argument, which we will not do. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

We nevertheless note that we considered the claims and found them to be without merit. The evidence did not preponderate so heavily against the verdict that a miscarriage of justice would result if the verdict is allowed to stand. *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003). The testimony, including defendant's own statement in a telephone call to his mother where he admitted ripping the telephone cord out of the wall, reasonably supported that defendant maliciously prevented or obstructed the victim's attempt to use the telephone to call for help during the course of the increasingly violent domestic dispute, when he threw a chair, came "barreling" at the victim as she ran to the kitchen and picked up the telephone, then ripped the telephone cord out of the wall as she had the telephone in her hand, asked her what she was doing, laughed, and continued his path of destruction by dropping the microwave at her feet. MCL 750.540(4); see *People v Hotrum*, 244 Mich App 189, 193; 624 NW2d 469 (2000). Although in the present case the victim and defendant presented conflicting testimony, this is insufficient ground for a new trial and the resolution of credibility issues are left to the jury. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998), We further find that based on the same evidence there was sufficient evidence to enable a rational trier of fact to conclude, beyond a reasonable doubt, that defendant interfered with electronic communications resulting in injury. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

Next, defendant argues that reversal on the unlawful imprisonment conviction was warranted because, according to his trial counsel's affidavit, interviews with some of the jurors after the verdict indicated that they misunderstood the unlawful imprisonment charge, MCL 750.349b.

> Generally, jurors may not impeach their own verdict by subsequent affidavits showing misconduct in the jury room. As the Court of Appeals has previously noted, once a jury has been polled and discharged, its members may not challenge mistakes or misconduct inherent in the verdict. Rather, oral testimony or affidavits may only be received on extraneous or outside errors, such as undue influence by outside parties. As the United States Supreme Court has explained, the distinction between an external influence and inherent misconduct is not based on the location of the wrong, e.g., distinguished on the basis whether the "irregularity" occurred inside or outside the jury room. Rather, the nature of the allegation determines whether the allegation is intrinsic to the jury's deliberative

> process or whether it is an outside or extraneous influence. In examining these affidavits, a trial court should not investigate their subjective content, but limit its factual inquiry to determining the extent to which the jurors saw or discussed the extrinsic evidence. [*People v Budzyn*, 456 Mich 77, 91; 566 NW2d 229 (1997) (citations omitted).]

"Any conduct, even if misguided, that is inherent in the deliberative process is not subject to challenge or review. A jury verdict may be challenged on the basis of juror misconduct only when the verdict is influenced by matters unrelated to the trial proceedings." *People v Fletcher*, 260 Mich App 531, 540-541; 679 NW2d 127 (2004).

We hold that the trial court did not abuse its discretion in denying defendant's motion for a new trial. The jury was polled in the present case, and all of the jurors indicated that they agreed with the verdicts rendered. Issues such as those raised here, which are "intrinsic to the jury's deliberative process," are not "extraneous." See *Id.* Thus, even misguided conduct "inherent in the deliberative process" may not be subsequently challenged. *Id*. An allegation that the jury failed to follow the trial court's instructions "relates to the mental processes of the jury and, therefore, inheres in the verdict." *Heintz v Akbar*, 161 Mich App 533, 540-541; 411 NW2d 736 (1987). Additionally, we note that the trial court properly instructed the jury on unlawful imprisonment, and defendant raised no objection to the instruction. Jurors are presumed to follow their instructions. *Graves*, *supra* at 486.

Although defendant briefly asserts that there was no evidence that he restrained the victim in order to facilitate his flight after committing the felonious assault, he offers no further analysis or supporting authority regarding a claim of insufficient evidence or great weight of the evidence. This issue is abandoned. *Kelly*, *supra* at 640-641. Therefore, assuming defendant raised this claim, he has abandoned it. *Id.* Nevertheless, we conclude that the evidence did not preponderate so heavily against the verdict that reversal was warranted. *Musser*, *supra* at 218-219. When the victim tried to run out of the house, defendant prevented her from leaving by running after her, taking her keys, restraining her by the arm, and blocking the doorway. Defendant then threw the victim's keys out in the yard away from the victim, and only then did he grab his own keys, run out of the door, and "flew" out of the driveway as the police were called. Although defendant claimed that he wanted the victim to leave and held the door open, the evidence that he took her keys and restrained her do not support this. Conflicting testimony is not sufficient grounds upon which to grant a new trial. *Lemmon*, *supra* at 642-643.

V.

In defendant's final claim of error, he challenges the trial court's scoring decisions of offense variables (OV) 3, for ten points, and OV 7, for 50 points. MCL 777.33 and MCL 777.37. We review these preserved scoring issues to determine "whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). When the sentence is within the appropriate recommended minimum sentence range under the legislative guidelines, this Court must affirm unless there was an error in scoring the guidelines or the trial court relied on erroneous information in making its sentencing determination. *Babcock*, *supra* at 261; MCL 769.34(10). The proper construction of the sentencing guidelines and the legal questions involved in their applicability present issues of law reviewed de novo. *People v Underwood*, 278

Mich App 334, 337; 750 NW2d 612 (2008). We will affirm a sentencing court's scoring decision where there is any evidence existing to support the score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

MCL 777.33(1), provides that OV 3 is scored for "physical injury to a victim." Ten points are scored where the victim sustains "[b]odily injury requiring medical treatment." MCL 777.33(1)(d). Defendant argues there was no testimony that the victim sought medical treatment and no medical records were introduced showing that she did. The record does not support this argument.

The prosecutor provided a hospital record indicating that the victim visited the emergency room approximately one week after the incident for injuries sustained to her arm during the incident, and received X-rays, a splint, a sling, and was offered medication; the trial court indicated that defendant's presentence investigation report should be amended to reflect this. The victim testified that defendant grabbed her by the arm during the incident, and she went to the hospital later because the arm was not healing well. Because there was evidence to support the score, we affirm the trial court's scoring decision. *Hornsby*, *supra* at 468. To the extent that defendant may be arguing that no injury requiring medical attention occurred during the commission of the unlawful imprisonment charge, the issue is abandoned. *Kelly*, *supra* at 640-641.

Finally, defendant challenges the scoring of OV 7, contending that these points should not have been assessed for the unlawful imprisonment charge because that offense did not contain the fear and anxiety element of this variable. MCL 777.37 provides in part:

> (1) Offense variable 7 is aggravated physical abuse. Score offense variable 7 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) A victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense . . . . . 50 points

The trial court held that there was no "sadism, torture or excessive brutality," but there was "conduct designed to substantially increase the fear and anxiety a victim suffered during the offense[,]" and scored 50 points. We agree. The trial court considered the entire course of events during the 15 or 20 minute incident, during which defendant, who was over six feet tall and weighed approximately 300 pounds, demanded that the victim, who was five feet, two inches tall and weighed just over 100 pounds, give him the cordless telephone; slammed the telephone on the ground, telling her that she would never discover who he was talking to; informed her that he cheated on her and laughed; grabbed her in a bear hug, lifting her feet from the ground, and squeezed her so hard that he cut her finger on her ring; cursed at her and used derogatory names; pulled down a baker's rack full of items that scattered near the victim; ripped the telephone cord out of the wall when the victim ran to the telephone and tried to use it; and pushed the microwave oven off of the kitchen counter near her feet. When the victim then attempted to run out of the house, defendant grabbed her keys, threw them outside, blocked the doorway and restrained her. He then left in his truck when she told her son to call the police.

In our view, the trial court did not abuse its discretion in considering the entire course of conduct beginning before and continuing through the unlawful imprisonment when scoring OV 7. The threatening, anxiety-producing conduct continued throughout the commission of all the crimes, including the unlawful imprisonment. Under the facts of this case, the fear and anxiety during the short time of the unlawful imprisonment could not be separated from the incident.

In the present case, the trial court did not abuse its discretion in determining that defendant's conduct was designed to substantially increase the fear and anxiety the victim suffered during the unlawful imprisonment.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly