

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARTIN RANDOLPH MINIX,

Defendant-Appellant.

UNPUBLISHED

June 30, 2009

No. 283060

Kalkaska Circuit Court

LC No. 07-002836-FH

Before: Zahra, P.J., and Whitbeck and M. J. Kelly, JJ

PER CURIAM.

Defendant appeals as of right his convictions by a jury trial for unlawful imprisonment, MCL 750.349b; killing, torturing, mutilating or maiming an animal (animal torture), MCL 750.50b; and use of a controlled substance (morphine), MCL 333.7404. The trial court sentenced defendant as a habitual offender, MCL 769.12 (four or more felonies) and MCL 333.7413(2) (second or subsequent controlled substance violation), to serve 228 to 480 months in prison for the unlawful imprisonment charge, and concurrent terms of 48 to 180 months for killing or torturing an animal, and 16 to 24 months for the morphine charge. On appeal, we conclude that there were no errors warranting reversal of defendant's convictions or resentencing. However, we conclude that the judgment of sentence erroneously reflects that defendant was convicted of possession of a controlled substance in violation of MCL 333.7403(2)(a)(v) rather than use of a controlled substance in violation of MCL 333.7404(2). For these reasons, we affirm defendant's convictions and sentences, but remand for correction of the judgment of sentence.

I. Basic Facts

Defendant's convictions arise from an argument and altercation with Theresa Zimmer, with whom defendant had been sharing a home for three months. During the altercation, which lasted more than twelve hours, defendant took Zimmer's keys and prevented Zimmer from leaving or making a phone call. At one point defendant picked Zimmer up and forced her into a small windowless bathroom while she struggled against him. Zimmer was crying and screaming to be let out, but defendant refused. When Zimmer began to kick at the door, a metal rod defendant had propped against it came through the wood. After that, Zimmer was able to leave the bathroom. She estimated that she was locked in the bathroom for approximately 10 minutes. Defendant was waiting outside the bathroom door when she emerged and threw at least two closed-fist punches that went past her head into the bathroom door, leaving holes.

Defendant then attempted to restrict Zimmer to the bedroom by tying her hands and feet with a phone cord. He gave up when he was not able to secure the cord because she was struggling and rolling around. Defendant and Zimmer again engaged in pushing and shoving, and Zimmer was knocked to the floor. Defendant then put his hands around her throat and choked her. She stated that he squeezed hard enough to make it difficult to breathe and put red marks on her neck.

Defendant then stomped and hissed at Zimmer's cat, which attempted to run from him. Defendant picked up the cat by its head, lifted it over his own head, and threw it to the floor. The cat screamed and never moved again. It ultimately had to be euthanized. A veterinarian testified that the cat had a large displacement where the spine hooks into the pelvis as well as a fracture of the cup where the leg bone sets into the pelvis and a fracture of the lower part of the pelvis.

Zimmer testified she quit trying to leave the house after defendant threw her cat because she did not want the physical fighting to continue. Thereafter, defendant left the house for a few minutes after taking Zimmer's last \$30 from her wallet. When he came back in, he crushed up some pills on a plate and snorted the powder. After that defendant was calmer and less violent. Powder from the plate was later tested and confirmed to be morphine.

Defendant went to bed and Zimmer laid next to him. However, any time she got up he followed to make sure she did not leave. The next morning, defendant left the house and Zimmer immediately called the police.

II. Unanimity Instruction

Defendant first argues that the trial court erred when it failed to give the jury a specific unanimity instruction. We note that defendant specifically agreed to the instructions as given and, therefore, has waived this issue on appeal. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Nonetheless, even if this issue were not waived, it would not warrant relief.

A criminal defendant has a constitutional right to a unanimous verdict. *People v Cooks*, 446 Mich 503, 510-511; 521 NW2d 275 (1994). In most cases a general unanimity instruction will protect that right. However, a specific unanimity instruction must be given where "1) the alternative acts presented as evidence are conceptually distinct or there are distinct proofs regarding each alternative, or 2) other factors are present that create a genuine possibility of juror confusion or disagreement." *Id.* at 519.

Defendant claims that the prosecution presented evidence of conceptually distinct events that could have formed the basis for defendant's conviction for unlawful imprisonment: locking Zimmer in the bathroom, and the approximate 12 to 15 hour confinement at home. However, the prosecutor did not treat the time period in which Zimmer was locked in the bathroom as a conceptually distinct event. This incident was not described to the jury as an alternate basis upon which it could find defendant guilty of unlawful imprisonment. Rather, it was characterized as one event in a series of events that occurred during a several hour period in which defendant prevented Zimmer from leaving the house. There was also no indication that the jury was confused by the events related to the unlawful imprisonment charge. Because the record does not indicate the prosecution treated the overall restriction to the house and the restriction to the

bathroom area as distinct events and the proofs were not distinct, and because there was no indication of juror confusion or disagreement, a general unanimity instruction was proper. *Cooks, supra* at 524.

Alternatively, defendant asserts that he was denied the effective assistance of counsel because his counsel did not request a specific unanimity instruction. However, as we have already noted, a specific unanimity instruction was not warranted under the facts of this case. Hence, defendant's trial counsel was not ineffective for failing to request such an instruction. *People v Snider*, 239 Mich App 393, 425 (2000) ("Trial counsel is not required to advocate a meritless position.").

III. Hearsay Testimony

Defendant next argues that the trial court erred when it permitted a veterinarian to testify that Zimmer had informed her the cat's injuries were caused when defendant threw the cat to the floor. A trial court's decisions to admit or exclude evidence are reviewed for an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).

Hearsay is "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is generally inadmissible. MRE 802. However, under MRE 803(4), statements "made for purposes of medical treatment or medical diagnosis," including statements "describing medical history, past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof" are admissible as an exception to the general prohibition against the admission of hearsay.

We agree that, under the facts of this case, the veterinarian's statement that Zimmer told her that defendant caused the cat's injuries was not admissible under the exception stated in MRE 803(4). There is no indication the veterinarian needed to know who caused the cat's injuries in order to treat the cat. Nevertheless, this error will not warrant relief unless the admission prejudiced defendant's trial. *People v Bartlett*, 231 Mich App 139, 159; 585 NW2d 341 (1998). By the time the veterinarian testified, Zimmer had already testified that defendant had injured her cat by throwing it against the floor and defendant's trial counsel had had an opportunity to cross examine her about her version of events. Hence, the jury was well aware that Zimmer attributed the cat's injuries to defendant. Further, the improper statement did not, by itself, unduly bolster Zimmer's credibility. Because any prejudice was minimal, we conclude that the erroneous admission of the statement was harmless. *Id.*

IV. Sentencing Issues

Defendant next argues his sentence is invalid due to improper scoring under the guidelines. An appellate court reviews a sentencing court's decision for an abuse of discretion, and must determine whether the record evidence adequately supports a particular score. *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005).

Michigan's sentencing guidelines generally require a sentencing court to impose a minimum sentence within the appropriate sentence range. MCL 769.34(2); *People v McCuller*, 479 Mich 672, 684-685; 739 NW2d 563 (2007). "A sentencing court may consider all record

evidence before it when calculating the guidelines, including, but not limited to, the contents of a presentence investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial.” *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993), remanded 447 Mich 984 (1994). Scoring decisions for which there is any evidence in support will be upheld. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Defendant specifically challenges the assessment of 5 points for Offense Variable (OV) 3 (injury to victim), 50 points for OV 7 (aggravated physical abuse), 5 points for OV 10 (exploitation of vulnerable victim), and 15 points for OV 19 (interference with the administration of justice). He did not challenge the scoring of OV 10 below. Although he attempted to raise it in a motion to remand, this Court denied the motion for failure to meet the requirements of MCR 7.211(C)(1)(a). Because it was not a proper motion, defendant may not raise this issue. MCL 769.34(10).

OV 3 is scored for the degree of physical injury to a victim and calls for the assessment of 5 points when there was bodily injury not requiring medical attention. MCL 777.33(1)(e). Defendant argues that the only basis for scoring these points was a scratch Zimmer received from the cat when she and defendant were struggling over it, and that because he did not cause the cat to scratch Zimmer, the points should not have been assessed. It is not necessary for defendant to have directly inflicted the injury on Zimmer. The injury arose as a result of and during the commission of defendant’s crime. Zimmer received the scratch as a direct result of defendant’s criminal conduct. Moreover, Zimmer testified that she suffered bruises as a result of defendant’s handling of her during the incident in question. Numerous photographs of these bruises were introduced as evidence at trial. Further, the police officer that investigated the incident confirmed that Zimmer had bruises that appeared to be fresh. Even without the evidence of the cat scratch, this is sufficient to uphold the scoring decision. *Hornsby, supra* at 468.

OV 7 requires the assessment of 50 points when a victim has been treated with sadism, torture, excessive brutality, or conduct designed to substantially increase fear or anxiety. MCL 777.37(1)(a). Defendant argues that his behavior was not depraved or extreme enough to warrant the imposition of points. Defendant attempts to characterize the incident as a mere “domestic affray that was to some extent mutual.” However, defendant’s conduct toward Zimmer over the 12 to 15 hour period, including physical intimidation and contact, attempts to tie her up, confining her to the bathroom, and maiming her cat, qualifies as conduct intended to substantially increase her fear or anxiety. MCL 777.37(1)(a). We are not persuaded by defendant’s claim that it is necessary to show physical abuse. This Court has previously held that physical abuse is not required to score 50 points under OV 7 because “conduct” other than physical abuse can cause pain or humiliation. *People v Mattoon*, 271 Mich App 275, 277-278; 721 NW2d 269 (2006). Further, we do not agree that our Supreme Court’s decision in *People v Cannon*, 481 Mich 152; 749 NW2d 257 (2008), alters this result.

In *Cannon*, our Supreme Court determined that the phrase “predatory conduct” in MCL 777.40(1)(a) must be understood in light of the statute as a whole. *Id.* at 157. It then noted that the focus of the statute, based on the language used in subsection 1, was on exploitation of a vulnerable victim. *Id.* The Court then concluded that predatory conduct must involve preoffense conduct directed at exploiting a victim’s vulnerability. *Id.* at 162. Although we agree that

Cannon requires this Court to construe MCL 777.37 as a whole, we do not agree that this necessarily requires the conclusion that MCL 777.37 can only be scored if there is proof of aggravated physical abuse.

MCL 777.37(1) states that OV 7 is “aggravated physical abuse” and refers to sadism, torture, or excessive brutality, each of which plainly encompasses physical contact. However, one can physically abuse another without making physical contact and without causing physical injury. Indeed, deliberately starving another does not require physical contact and, at least in the early stages, might not cause physical injury. Nevertheless, starving someone could amount to aggravated physical abuse. Furthermore, MCL 777.37 also encompasses acts that do not amount to physical abuse; OV 7 should be scored if the defendant engaged in “conduct designed to substantially increase the fear and anxiety of a victim.” MCL 777.37(1)(a). By referring to “conduct” rather than “physical abuse” the legislature clearly indicated its intent to include conduct that did not result in physical contact with the victim, but was nevertheless directed at the victim. MCL 777.37(2) and MCL 777.37(3) further support this conclusion. MCL 777.37(2) requires the court to “[c]ount each person who was placed in danger of injury” and MCL 777.37(3) defines sadism to include conduct that subjects a victim to “humiliation.” By referring to conduct that subjects a victim to “humiliation” and indicating that the court should count victims who were placed in danger of injury—as opposed to victims who were actually injured—it is clear that the legislature intended OV 7 to encompass both physical abuse and psychological abuse—that is, OV 7 includes both abuse caused by physical contact and abuse caused by conduct that did not result in physical contact, but nevertheless was designed to terrorize or humiliate the victim. Finally, even if we were to conclude that OV 7 required aggravated physical abuse, we would conclude that defendant’s actions during the commission of the crimes, which include physically striking Zimmer, forcing her into a bathroom and locking it, and attempting to tie her with a telephone cord, were sufficient to warrant 50 points under OV 7. Therefore, the trial court did not err in scoring this variable.

OV 19 calls for the assessment of 15 points where the offender’s use of force or the threat of force results in interference with the administration of justice or the rendering of emergency services. MCL 777.49(b). It is not necessary to show that the defendant intended that his conduct would cause such a result. *People v Endres*, 269 Mich App 414, 420-422; 711 NW2d 398 (2006). Defendant prevented Zimmer from leaving and prevented her from using the phone, which interfered with her ability to summon the police or emergency services. Therefore, there was evidence to support this scoring decision. *Hornsby*, *supra* at 468.

Finally, defendant argues, and the prosecution agrees, that his judgment of sentence erroneously indicates that he was convicted of possession of a controlled substance (morphine), MCL 333.7403(2)(a)(v), rather than use of a controlled substance (morphine), MCL 333.7404(2). Defendant was charged with possession of a controlled substance, but the jury convicted him of the lesser-included offense of use of a controlled substance. For this reason, this case must be remanded to amend the judgment of sentence to accurately reflect defendant’s conviction. We do not, however, agree with defendant’s contention that he must be resentenced because the sentence exceeds the one-year maximum provided under MCL 333.7404(2).

Because defendant had a prior drug conviction, the prosecution charged defendant as a second offender under MCL 333.7413(2). Under MCL 333.7413(2), the trial court could properly sentence defendant to twice the maximum term—24 months. Likewise, with regard to

this sentence, the trial court apparently adopted the recommendation made in the presentence investigation report, which recommended a minimum sentence of 16 months and a maximum sentence of 24 months. The investigator who drafted the report and recommendation correctly noted that the jury convicted defendant of violating MCL 333.7404(2) and that defendant had been charged as a habitual offender under MCL 333.7413(2). The recommendation also clearly applied the maximum applicable to MCL 333.7404(2), which is two years, rather than the maximum applicable to MCL 333.7403(2)(a)(v), which would have been 8 years for a habitual offender. Thus, although the judgment of sentence misidentifies the controlled substance conviction, the trial court's sentence was properly based on MCL 333.7404 and MCL 333.7413. Hence, this error does not warrant resentencing.

Defendant also argues that he should be resentenced for his other charges based on the trial court's mistaken statement that defendant had committed seven felonies, rather than the true number of six. We do not agree that defendant is entitled to be resentenced based on the trial court's misstatement. It is clear from the record that the trial court intended to sentence defendant to the highest possible minimum sentences for the current offenses based on the totality of the circumstances including defendant's prior conduct and the nature of the facts in the present case. The trial court noted that defendant was on parole at the time he committed the current offense, was unproductive, and had a long criminal history. In addition, the trial court expressed its opinion that the facts of this case warranted an upward departure, but concluded that the top end of the guidelines would be sufficient. Under these facts, the trial court's misstatement about the number of felonies does not warrant resentencing. See *People v Schaafsma*, 267 Mich App 184, 186; 704 NW2d 115 (2005).

Because there were no errors warranting reversal of defendant's convictions or resentencing, we affirm defendant's convictions and sentences. However, we agree that defendant's judgment of sentence should be corrected to accurately reflect his conviction for use of a controlled substance in violation of MCL 333.7404(2) rather than possession in violation of MCL 333.7403(2)(a)(v). Therefore, we remand this case for the ministerial task of correcting the judgment of sentence.

Affirmed, but remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ William C. Whitbeck
/s/ Michael J. Kelly