

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVEON DONTE WRIGHT,

Defendant-Appellant.

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UNPUBLISHED  
December 9, 2021

No. 353161  
Kalamazoo Circuit Court  
LC No. 2019-001770-FH

Before: CAVANAGH, P.J., and SHAPIRO and GADOLA, JJ.

PER CURIAM.

Defendant, Daveon Donte Wright, was convicted after a jury trial of first-degree home invasion, MCL 750.110a(2), assault and battery, MCL 750.81, and domestic assault, MCL 750.81(2). The trial court sentenced defendant as a third-offense habitual offender, MCL 769.11, to 57 months to 40 years in prison. Defendant appeals as of right, challenging his convictions and sentence. We affirm defendant's convictions, but vacate his sentence and remand for further proceedings.

I. FACTS

On August 17, 2019, defendant attacked his former girlfriend, Taija Campbell, at her apartment. Campbell testified that when she left her apartment that day to retrieve her mail, defendant was lying in wait; he grabbed Campbell from behind, pushed her into the apartment, dragged her by her hair into her bedroom, and began choking her. Campbell testified that she lost consciousness; when she regained consciousness, she saw defendant run from the apartment. She locked the door and called the police. The sheriff's deputy responding to Campbell's call testified that Campbell appeared scared, was talking fast, and her hands were shaking. Campbell's neck and one of her arms were red, and some of her hair was missing.

Campbell testified that defendant had assaulted her on two previous occasions. She testified that the couple had been living together on September 16, 2017, when they quarreled, and defendant threw her against a wall and punched her in the face. When she attempted to run, he dragged her back into the apartment by her hair and choked her, breaking her wrist during the

attack. The sheriff's deputy responding to the call testified that Campbell had bruising around her neck, broken and bleeding fingernails, and complained of head pain.

Campbell testified that after she ended the relationship with defendant, he again attacked her on December 7, 2018, after kicking in her apartment door. She testified that on that occasion, defendant threw her phone through the wall, then choked her. The sheriff's deputy responding to Campbell's call testified that the door to Campbell's apartment was broken, consistent with having been forced open. The interior of the apartment showed signs of a struggle, and there was a hole in the wall consistent with a phone being thrown into the wall.

With respect to the August 17, 2019 attack, defendant was convicted of first-degree home invasion, MCL 750.110a(2), assault and battery, MCL 750.81, and domestic assault, MCL 750.81(2). Defendant was sentenced as a third-offense habitual offender, MCL 769.11, to 57 months to 40 years in prison. Defendant now appeals.

## II. DISCUSSION

### A. OTHER-ACTS EVIDENCE

Defendant contends that the trial court erred by admitting evidence that he assaulted Campbell on two prior occasions. Defendant argues that the other-acts evidence was so unfairly prejudicial that it warranted exclusion under MRE 403, and that he therefore is entitled to a new trial. We disagree.

We will not disturb a trial court's decision to admit evidence absent an abuse of the trial court's discretion. *People v Denson*, 500 Mich 385, 396; 902 NW2d 306 (2017). A trial court abuses its discretion when its decision falls outside the range of principled outcomes, *People v Thorpe*, 504 Mich 230, 251-252; 934 NW2d 693 (2019), or when it admits evidence that was inadmissible as a matter of law. *Denson*, 500 Mich at 396. Whether a rule or statute precludes the admission of evidence is a preliminary question of law that we review de novo. *Id.* We also observe that under MCL 769.26, “[n]o judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.”

The admissibility of evidence that a defendant committed other acts generally is governed by MRE 404(b), which provides that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” MRE 404(b)(1). Thus, evidence of a defendant's other acts generally is not admissible to demonstrate the defendant's propensity to commit similar acts. *People v Railer*, 288 Mich App 213, 219; 792 NW2d 776 (2010). However, in cases alleging domestic violence, MCL 768.27b permits the admission of evidence of prior domestic violence for any relevant purpose including showing a defendant's propensity to commit domestic violence. *Id.* MCL 768.27b(1) provides:

(1) 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 otherwise excluded under Michigan rule of evidence 403.

The purpose of the statute is to broaden the range of evidence admissible in such cases because “a full and complete picture of a defendant’s history . . . tend[s] to shed light on the likelihood that a given crime was committed.” *People v Cameron*, 291 Mich App 599, 609-610; 806 NW2d 371 (2011) (quotation marks and citation omitted). But although MCL 768.27b permits the admission of evidence of other domestic assaults for any relevant purpose, the statute also provides that such evidence is not admissible if excluded under MRE 403. MRE 403 provides, in pertinent part, that relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” “Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.” *People v Musser*, 494 Mich 337, 357; 835 NW2d 319 (2013) (quotation marks and citation omitted). Although all relevant evidence is prejudicial to some extent, the risk of prejudice renders the evidence inadmissible only when the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995).

In this case, defendant argues that evidence of his two previous attacks on Campbell was inadmissible because it was overly prejudicial, and that the trial court incorrectly interpreted MCL 768.27b as taking priority over the protections of MRE 403 against unfairly prejudicial evidence. Defendant argues that the other-acts evidence was unduly prejudicial because the asserted other-acts are virtually identical to the crimes alleged in this case, and the lack of corroboration of Campbell’s most recent accusations necessitated the other acts evidence to bolster her allegations. We disagree. By enacting MCL 768.27b, our Legislature determined that in cases of domestic violence, other similar acts of domestic violence are admissible when relevant for any purpose, including for the purpose of showing the defendant’s propensity to commit the same act. *Railer*, 288 Mich App at 219-220. Here, although the evidence that defendant had engaged in other similar acts of domestic violence against Campbell was no doubt prejudicial to defendant’s case, there was nothing to suggest that the evidence was so unduly prejudicial that it outweighed the probative value of the evidence. The trial court therefore did not abuse its discretion by admitting the other-acts evidence.

## B. OV 12

Defendant contends that he is entitled to resentencing because the trial court erroneously assessed five points under Offense Variable (OV) 12, MCL 777.42(1). We agree.

We review the trial court’s factual determinations when scoring the sentencing guidelines for clear error. *People v Calloway*, 500 Mich 180, 184; 895 NW2d 165 (2017). The trial court’s factual determinations must be supported by a preponderance of the evidence. *Id.* A preponderance of the evidence is evidence that when weighed against the opposing evidence has more convincing force and the greater probability of truth. *People v Cross*, 281 Mich App 737, 740; 760 NW2d 314 (2008). A finding of fact is clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made. *People v McChester*, 310 Mich App 354, 358; 873 NW2d 646 (2015). Whether the factual findings satisfy the scoring conditions

prescribed by statute is a question of statutory interpretation that we review de novo. *Calloway*, 500 Mich at 184.

Although the sentencing guidelines are advisory only, *People v Lockridge*, 498 Mich 358, 365; 870 NW2d 502 (2015), a criminal defendant nonetheless has the right to a sentence that is based upon accurate information and accurate scoring of the sentencing guidelines. *People v McGraw*, 484 Mich 120, 131; 771 NW2d 655 (2009). So although a sentencing court is not required to sentence a defendant within the sentencing guidelines, the sentencing court must determine the applicable minimum sentence range under the sentencing guidelines and take those calculations into account when imposing a sentence. *Lockridge*, 498 Mich at 365. If there is a scoring error that alters the defendant's recommended minimum sentence range under the guidelines, the defendant is entitled to resentencing. *People v Francisco*, 474 Mich 82, 89; 711 NW2d 44 (2006).

OV 12 concerns a defendant's sentencing score for "contemporaneous felonious criminal acts." MCL 777.42(1); *People v Light*, 290 Mich App 717, 724; 803 NW2d 720 (2010). A felonious criminal act is contemporaneous if the act "occurred within 24 hours of the sentencing offense" and it "has not and will not result in a separate conviction." MCL 777.42(2)(a). In scoring OV 12, the sentencing court is required to assess 5 points when the defendant committed "[o]ne contemporaneous felonious criminal act involving a crime against a person" or "[t]wo contemporaneous felonious criminal acts involving other crimes." MCL 777.42(1)(d), (e). To properly assign points for OV 12, the trial court is required to "look beyond the sentencing offense and consider only those separate acts or behavior that did not establish the sentencing offense." *Light*, 290 Mich App at 723. A sentencing court is prohibited from considering acquitted conduct as a contemporaneous felonious criminal act. See *People v Beck*, 504 Mich 605, 629-630; 939 NW2d 213 (2019).

In this case, defendant argues that OV 12 was incorrectly scored because there is no record evidence of scoreable contemporaneous felonious conduct. On appeal, the prosecution agrees that no such supporting evidence exists in the record.<sup>1</sup> Our examination of the record also uncovers no evidence of contemporaneous crimes that could justify scoring OV 12 at 5 points. We therefore vacate defendant's sentence and remand to the trial court for resentencing after considering guidelines calculated upon accurate scoring.

### C. PRV 5

Defendant also contends that the trial court erred by assessing 15 points for prior record variable (PRV) 5 and in finding that defendant was a third-offense habitual offender, because it relied on a previous felony conviction of attempted assault of an officer, MCL 750.81d(1), which

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<sup>1</sup> The prosecution suggests that the trial court might have found that defendant committed the contemporaneous felony of assault by strangulation, MCL 750.84, when assessing OV 12 at five points. However, the prosecution charged assault by strangulation, MCL 750.84, and the jury acquitted defendant of that crime and instead convicted him of the lesser crime of assault, MCL 750.81. Once acquitted of that crime, defendant could not be sentenced as having committed that crime. *Beck*, 504 Mich at 629-630.

defendant argues was obtained in violation of the requirement that a defendant receive assistance of counsel at criminal proceedings.

Defendant's presentence investigation report (PSIR) indicates a 2016 conviction of attempted assault of an officer. A PSIR is presumed to be accurate and may be relied upon by the sentencing court unless effectively challenged by the defendant. *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003). Defendant argues, however, that the 2016 conviction was obtained without defendant having counsel, and that defendant's PRV score and third-offense habitual offender status, which rely on that conviction, therefore are unsupported. On appeal, the prosecution provided this Court with a copy of defendant's advice of rights form from that conviction, which the prosecution argues indicates that defendant effectively waived his right to counsel in the 2016 case. Generally, a party may not expand the record on appeal. *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (199). However, upon remand, we direct the trial court to entertain a motion by defendant raising this issue should defendant choose to pursue this challenge.<sup>2</sup> See *People v Waclawski*, 286 Mich App 634, 689-690; 780 NW2d 321 (2009) (when the accuracy of a PSIR is challenged, the trial court must allow the parties to be heard and make a finding regarding the challenge).

We affirm defendant's convictions, but vacate defendant's sentence and remand this matter to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh  
/s/ Douglas B. Shapiro  
/s/ Michael F. Gadola

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<sup>2</sup> Because we vacate defendant's sentence and remand for further proceedings, we decline to reach defendant's assertion on appeal that defense counsel at trial was ineffective for failing to raise these issues before the trial court.