

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
February 23, 2012

v

CHARLES LEE BROWN,

Defendant-Appellant.

No. 299459
Saginaw Circuit Court
LC No. 09-032310-FH

Before: HOEKSTRA, P.J., and CAVANAGH and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant was sentenced as an habitual offender, second offense, MCL 769.10, to 95 months to 15 years' imprisonment, with 496 days of jail credit. For the reasons stated in this opinion, we affirm defendant's conviction, but remand for resentencing.

Defendant's conviction is the result of a January 2009 assault involving his girlfriend, Ella Toney. Toney and defendant began their romantic relationship in 2008. After about four or five months, defendant moved into Toney's home. Their relationship was punctuated by heated arguments that often turned physically violent. In August 2008, defendant hit Toney with a clothing iron during an argument, breaking her right jaw in two places. Toney underwent surgery to repair the damage, and had a metal plate placed in the bottom of her right jaw.

On January 29, 2009, defendant and Toney got into an argument because Toney and her daughter ate some of defendant's candy. Toney spent the night on the couch. The next morning, defendant and Toney continued to argue, and defendant told Toney he was going to hurt her and hit her in the face, striking her jaw. After defendant hit Toney, Toney instructed her daughter to call 911, but defendant would not give Toney's daughter the phone. Toney told her daughter to go to the neighbor's house to call the police.

Police responded to the scene, and transported Toney to the hospital. At the hospital Toney was informed that her jaw was broken for a second time. Toney eventually underwent surgery and her jaw was wired together. Defendant fled the scene of the assault before police arrived, but was eventually arrested. Defendant was charged with assault with intent to do great bodily harm, MCL 750.84, aggravated stalking, MCL 750.411i, and interfering with electronic communications, MCL 750.540 (5)(a). After a jury trial, defendant was found guilty of assault

with intent to do great bodily harm, but acquitted of aggravated stalking and interfering with electronic communications.

I. SUFFICIENCY OF THE EVIDENCE

On appeal, defendant argues that there was insufficient evidence to support the jury's verdict because insufficient evidence was adduced to show that he acted with the requisite intent.

We review sufficiency of the evidence issues de novo, examining the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that every essential element was proved beyond a reasonable doubt. *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010).

To prove a defendant is guilty of assault with the intent to do great bodily harm less than murder, the prosecutor must prove two elements: "(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder." *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005). The specific intent to do great bodily harm less than murder is the intent to cause an aggravated injury. *Id.* Because it is difficult to prove intent, minimal circumstantial evidence is sufficient to prove an actor's state of mind. *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008).

In this case, plaintiff presented evidence that defendant previously broke Toney's jaw, which required surgery and the placement of a metal plate in the bottom, right side of her jaw. The prosecutor also presented evidence that defendant told Toney he was going to hurt her when he struck her during the charged assault. Although Toney could not remember for sure how many times defendant punched her when she testified during trial, there was testimony that she told police defendant struck her three times. The surgeon who twice repaired Toney's jaw testified that her lower jaw was pushed back, and that he had to wire her jaw shut. While the surgeon did testify that the first jaw fractures had completely healed before the assault at issue in this case, that does not necessarily demonstrate that defendant had knowledge that Toney's jaw was stable. In fact, Toney had been complaining to defendant about numbness and lack of feeling in her mouth.

Considering defendant's statement to Toney that he was going to hurt her, the number of blows to Toney's face, the seriousness of the injury based on the extent of the required surgery, and the fact that defendant broke Toney's jaw before and Toney was continuing to complain to defendant about mouth problems resulting from that injury, a reasonable jury could infer defendant had the intent to inflict an aggravated injury. See *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Accordingly, we find that there was sufficient evidence to support defendant's conviction beyond a reasonable doubt.

II. OTHER ACTS EVIDENCE

Defendant argues that MCL 768.27b¹ conflicts with MRE 404(b),² and is accordingly a violation of the Michigan Supreme Court's constitutional power to regulate practice and procedure.

In *People v Schultz*, 278 Mich App 776, 779; 754 NW2d 925 (2008), this Court addressed and rejected the same argument defendant presents on appeal. In *Schultz*, this Court specifically held that the statute does not interfere with the Supreme Court's constitutional authority to make rules that govern the administration of the judiciary and its process. *Id.* Not only are we bound by that decision, MCR 7.215(C), there is nothing in defendant's argument that causes us to question the analysis set forth in *Schultz*. We also reject defendant's request that we urge our Supreme Court to revisit *McDougall v Schanz*, 461 Mich 15, 31-32, 36-37; 597 NW2d 148 (1999).

Defendant also argues that even pursuant to MCL 768.27b, the trial court erred in admitting the evidence because its relevance was substantially outweighed by its potential to unfairly prejudice the trial contrary to MRE 403.

We review decisions regarding the admission of evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). An abuse of discretion occurs when the decision falls beyond the range of principled results. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010). When the admission of evidence involves a preliminary question of law such as whether a rule of evidence or statute governs admissibility of the evidence, we review the question of law de novo. *Lukity*, 460 Mich at 488.

Admission of evidence regarding a defendant's other acts of domestic violence is conditioned upon relevancy and whether it is "otherwise excluded under Michigan rule of evidence 403." MCL 768.27b(1). MRE 403 provides that relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." While the evidence regarding defendant's previous violent behavior toward Toney is certainly prejudicial, all evidence introduced in a criminal trial is prejudicial to the defendant. *People v Fisher*, 449 Mich 441, 451-452; 537 NW2d 577 (1995). MRE 403 only requires the exclusion of evidence that is unfairly prejudicial. *People v Schaw*, 288 Mich App 231, 237; 791 NW2d 743 (2010). Evidence tends to be unfairly prejudicial when it is marginally probative but will be given undue weight by the jury. *Id.* We recognize that the determination whether the probative value of evidence outweighs prejudicial effect is best left to the trial court. *People v Waclawski*, 286 Mich App 634, 670; 780 NW2d 321 (2009).

¹ MCL 768.27b(1) provides in pertinent part that "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."

² MRE 404(b) provides in pertinent part 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."

In this case, the prosecution argued that evidence of defendant's previous violence toward Toney was necessary to establish defendant's intent, particularly in light of the fact that defendant's defense was that he did not act with the requisite intent. The trial court determined that evidence of defendant's previous acts was material and relevant. The trial court allowed admission of the other acts evidence because there was substantial evidence that defendant committed the other acts, which were similar to the charged act, and which occurred within a short amount of time before the January 2009 assault. We cannot say that the trial court's reasoning and decision regarding admission of defendant's other acts of domestic violence toward Toney was an abuse of discretion.

Moreover, the relevance of the evidence was not "substantially outweighed by the danger of unfair prejudice," MRE 403, in light of the trial court's clear instruction to the jury explaining that it may only consider whether the other acts evidence "tends to show that the defendant acted purposefully, that is not by accident or mistake because he misjudged the situation." The trial court further instructed the jury that it could not consider the evidence for any other purpose, and that it could not convict the defendant upon a finding that he was guilty of other "bad conduct." "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

III. PROSECUTORIAL MISCONDUCT

Defendant argues that the prosecutor committed misconduct by repeatedly mischaracterizing the evidence during closing argument.

We review defendant's unpreserved allegation of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Defendant must show that an error occurred, the error was plain, and the plain error affected his substantial rights. *People v Carines*, 460 Mich 750, 752-753, 764; 597 NW2d 130 (1999). Substantial rights are affected when the defendant is prejudiced, meaning the error affected the outcome of the trial. *Id.* at 763. Further, reversal is warranted only if the plain error resulted in the conviction of an actually innocent person or seriously affected the integrity of the judicial proceedings. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

Claims of prosecutorial misconduct must be evaluated on a case-by-case basis. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). The test to determine whether there was prosecutorial misconduct is whether defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 723 NW2d 546 (2007). Comments and arguments made by the prosecutor must be considered in light of all the facts and arguments made, including the arguments made by the defense and how the comments relate to the evidence presented. *Brown*, 279 Mich App at 135. Although the prosecution is permitted great latitude in its arguments, it is impermissible to make a statement of fact to the jury that is not supported by the evidence. *Unger*, 278 Mich App at 236, 241.

Defendant claims that the prosecutor committed misconduct during closing arguments when the prosecutor continually referred to Toney's jaw being weak or susceptible to damage. Specifically, defendant cites to when the prosecutor said, "[h]e hits her in the face. Why? Because that's where she's the most vulnerable." The prosecutor continued:

Well, who would know that? Maybe the person that broke her jaw before. Maybe the person that sat across the kitchen table from her and she complained all the time about how it still hurt, about how she was still having a problem chewing. Maybe that's the person that knows that's the place where she's the most vulnerable, in her face. So where does he punch her? In her face.

Defendant maintains that the prosecutor's reference to the vulnerability of Toney's jaw misstated the evidence and denied him a fair and impartial trial because Toney's surgeon testified that her jaw was fully healed and was no more vulnerable than an average jaw before it was broken the second time.

Defendant's argument that the prosecution's comments misstated the evidence ignores Toney's testimony that she told defendant her jaw was still sore and numb, and that her lip was numb and the surgeon told her she may never regain the feeling in her jaw. Toney also testified that she "kept telling [defendant] about it, and he said that he was going to send me to another surgeon." Accordingly, defendant may not have known that Toney's jaw was fully healed at the time of the charged assault, and he may have believed it was more vulnerable to injury. Thus, the evidence permitted the inference that defendant intended to hit Toney in the jaw because he thought it was weak and vulnerable to injury. Consequently, the prosecutor's statements were reasonable inferences based on the evidence and the prosecutor's theory of the case. *Id.* at 236. Therefore, defendant has failed to demonstrate plain error.

Moreover, the jury was instructed that it alone was the arbiter of the facts of the case and that it "should only accept things the lawyers say that are supported by the evidence or by your own common sense and general knowledge." Jurors are presumed to follow their instructions; accordingly, defendant cannot demonstrate that any error affected his substantial rights. *Graves*, 458 Mich at 486; *Carines*, 460 Mich at 763.

Defendant also argues that defense counsel was ineffective for failing to object to the prosecutor's misconduct. In light of our conclusion that the prosecutor did not mischaracterize the evidence, defendant's claim that defense counsel provided ineffective assistance on the matter is without merit. Defense counsel cannot be deemed ineffective for failing to raise a meritless objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

IV. SCORING OF OV 7

Defendant argues that the trial court erred in scoring 50 points for offense variable (OV) 7 because defendant did not treat Toney with sadism, torture, or excessive brutality; nor did he do anything to substantially increase Toney's fear and anxiety. We agree.

We review the application of sentencing guidelines de novo. *People v Bulger*, 291 Mich App 1, 4; 804 NW2d 341 (2010). We review the trial court's findings of fact for clear error. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Johnson*, 466 Mich 491, 497-498; 647 NW2d 480 (2002).

MCL 777.37(1)(a) indicates that OV 7 is to be scored at 50 points when "[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.” “Sadism” is defined as “conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender’s gratification.” MCL 777.37(3).

This Court has upheld a trial court’s decision to assess 50 points only in cases that involve wanton criminal behavior. For example in *People v Wilson*, 265 Mich App 386, 387-388; 695 NW2d 351 (2005), the defendant was convicted of assault with the intent to do great bodily harm. In *Wilson*, the defendant assaulted his wife over several hours by slapping, punching, choking, and threatening her. *Id.* at 388. The defendant also attacked his wife with several different weapons, dragged her around, and cut her with a knife. *Id.* at 396. As a result, the victim was confined for almost three weeks to a wheelchair, and thereafter had to walk with a cane for two months. *Id.* at 398. Based on the facts of the particular case, this Court determined that the trial court did not abuse its discretion in assessing OV 7 at 50 points. *Id.* Similarly, in *People v James*, 267 Mich App 675, 680; 705 NW2d 724 (2005), the defendant was assessed 50 points for OV 7 and this Court affirmed. In *James*, the defendant repeatedly stomped on the victim after the victim had lost consciousness. *Id.* The victim was deprived of oxygen for four to six minutes resulting in brain damage. *Id.* This Court concluded that based on the evidence a score of 50 points was justified. *Id.* at 681.

In this case, the trial court did not specifically articulate the facts it was relying on to support its score of 50 points for OV 7. Based on the trial court’s limited comments on the record, it appears that it based its score on the fact that Toney may have been struck by defendant as many as three times. Unlike both of the cases cited where this Court upheld a trial court’s assessment of 50 points for OV 7, defendant’s assault in this case was not excessive or depraved. Defendant did not repeatedly assault Toney over an extended period of time, nor were the blows inflicted with multiple weapons. Toney was not continually assaulted after becoming unconscious. While we do not minimize the seriousness and brutal nature of defendant’s conduct, we are mindful of our duty to be guided by the Legislature’s intent as expressed by the plain language of the statute, *People v Bonilla-Machado*, 489 Mich 412, 421-422; 803 NW2d 217 (2011). In this case, defendant’s conduct did not justify a score of 50 points for OV 7 based on the plain language of the statute. Accordingly, OV 7 should have been scored at zero points. MCL 777.37(1)(b).

When properly scored, defendant’s sentencing guideline range would be 34 to 83 months’ imprisonment instead of 43 to 95 months’ imprisonment. MCL 777.65; MCL 777.21(3)(a). Accordingly, defendant is entitled to resentencing because correction of the trial court’s scoring error will alter defendant’s guidelines range. *People v Davis*, 468 Mich 77, 83; 658 NW2d 800 (2003).

We affirm defendant’s conviction but remand for resentencing in accordance with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello