STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 20, 2012
v	No. 305859 Macomb Circuit Court
JOSEPH KEITH HOWARD, Defendant-Appellant.	LC No. 2011-000052-FH

Before: JANSEN, P.J., and BORRELLO and BECKERING, JJ.

PER CURIAM.

Defendant was convicted by a jury of aggravated domestic assault, second offense,[1] and was sentenced as a fourth habitual offender,[2] to a prison term of 3 to 15 years. Defendant appeals by right. We affirm.

Aggravated domestic assault, second offense, is a Class G felony subject to the sentencing guidelines.[3] As scored by the trial court, defendant received a total prior record variable (PRV) score of 50 points and a total offense variable (OV) score of 40 points, which was comprised of 15 points for OV 1, five points for OV 2, and 10 points each for OV 3 and OV 4. Those scores placed defendant in the E-III cell of the applicable sentencing grid, for which the minimum sentence range is 5 to 23 months.[4] For a fourth habitual offender, the upper limit is doubled,[5] making the minimum sentence range 5 to 46 months. Defendant argues on appeal that each of the four offense variables should have been scored at zero points. We disagree.

[1] MCL 750.81a(2) and (3).

[2] MCL 769.12.

[3] MCL 777.16d.

[4] MCL 777.68.

[5] MCL 777.21(3)(c).

"The proper interpretation and application of the legislative sentencing guidelines are questions of law, which this Court reviews de novo."[6] "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score" and "[s]coring decisions for which there is any evidence in support will be upheld."[7] "This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score."[8]

OV 1 concerns "aggravated use of a weapon,"[9] and is to be scored at 15 points if "the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon."[10] OV 2 concerns the "lethal potential of the weapon possessed or used,"[11] and is to be scored at five points if the defendant "possessed or used a . . . knife or other cutting or stabbing weapon."[12] The victim's testimony that defendant used a knife to stab at a cushion she was holding over her head for protection was sufficient to establish that defendant possessed a knife or other stabbing weapon and that the victim was threatened with the object and was reasonably apprehensive of an immediate battery. Accordingly, we conclude that the trial court properly scored 15 points for OV 1 and five points for OV 2.

Defendant argues that the victim's testimony regarding defendant's use of a knife should not have been admitted at trial because it was irrelevant and unfairly prejudicial; defendant further argues that the lower court erred by relying on the testimony regarding defendant's use of a knife for purposes of sentencing. We disagree. Defendant's challenge to the admissibility of the testimony was not preserved with an objection. Therefore, defendant bears the burden of showing a plain error affecting his substantial rights.[13]

Aggravated domestic abuse requires evidence that the defendant assaulted the victim "without a weapon and inflict[ed] serious or aggravated injury without intending to commit murder or to inflict great bodily harm less than murder."[14] An "assault" is "either an attempt to commit a battery or an unlawful act that placed another in reasonable apprehension of receiving

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[6] *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008) (citations omitted).

[7] *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006) (citations omitted).

[8] *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003) (citations omitted).

[9] MCL 777.31(1).

[10] MCL 777.31(1)(c).

[11] MCL 777.32(1).

[12] MCL 777.32(1)(d).

[13] *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007).

[14] MCL 750.81a(2).

an immediate battery."[15] "Battery" is "an intentional, unconsented and harmful or offensive touching of the person of another."[16]

Evidence must be relevant to be admissible.[17] Relevant evidence is that "evidence having 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."[18] Although use of a weapon is not a necessary element of the charged offense, defendant's use of a weapon occurred during the beating that gave rise to the offense and "the facts and circumstances surrounding the commission of a crime are properly admissible as part of the res gestae."[19] Evidence of a criminal act that occurred substantially contemporaneously with the charged offense is admissible as part of the res gestae of the offense where the crime "is so blended or connected with" the charged offense "that proof of one incidentally involves the other or explains the circumstances" of the charged offense.[20] Such evidence is admissible irrespective of MRE 404(b).[21] Here, evidence that defendant attempted to stab the victim and broke picture frames over her head was relevant because it provided a rational explanation for the source of the "point mark" wounds as something other than the "needle marks" described in defendant's testimony.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.[22] Evidence is unfairly prejudicial if there is a danger that marginally probative evidence will be given undue weight by the jury,[23] or when it threatens accuracy and fairness in that it would lead the jury to conclude that the evidence "is more probative of a fact than it actually is"[24] or to decide the case on an improper basis such as emotion.[25] Defendant claims that evidence that he used a weapon was prejudicial because "it paint[ed] him as a bad guy," but has not shown that it was unfairly prejudicial or that any

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[15] *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005).

[16] *People v Reeves*, 458 Mich 236, 240 n 4; 580 NW2d 433 (1998).

[17] MRE 402.

[18] MRE 401.

[19] *People v Shannon*, 88 Mich App 138, 146; 276 NW2d 546 (1979).

[20] *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996) (citation and quotations omitted).

[21] *People v Coleman*, 210 Mich App 1, 5; 532 NW2d 885 (1995).

[22] MRE 403.

[23] *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001) (citations and quotations omitted).

[24] *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995).

[25] *People v Meadows*, 175 Mich App 355, 361; 437 NW2d 405 (1989) (citations and quotations omitted).

prejudicial effect substantially outweighed its probative value. Therefore, defendant has not shown a plain error in the admission of the evidence.

We also find no merit to defendant's argument that the prosecution somehow lowered its burden of proof by not charging him with a more serious offense such as felonious assault or assault with intent to do great bodily harm. Defendant was not convicted of either of these more serious offenses and he does not contend that the prosecution was not required to prove beyond a reasonable doubt each element of the offense of which he was convicted. Further, the fact that defendant was not charged with felonious assault or assault with intent to do great bodily harm did not relieve the prosecution of any burden in establishing defendant's use of a weapon for purposes of sentencing. "A trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence."[26] The fact that an offense or element of a crime is not proven beyond a reasonable doubt for conviction purposes does not preclude a court from finding that the offense or element has been established by a preponderance of the evidence for sentencing purposes.[27] Indeed, even if defendant had been charged with and acquitted of either felonious assault or assault with intent to do great bodily harm, and convicted only of the less serious offense of aggravated domestic violence, that would not have precluded the court from finding for purposes of sentencing that he used a weapon and from scoring OV 1 and OV 2 consistent with that finding. Accordingly, for the foregoing reasons, we detect no error in the trial court's reliance on the victim's trial testimony concerning defendant's use of a stabbing weapon for purposes of scoring OV 1 and OV 2.

OV 3 considers physical injury to a victim.[28] OV 3 is to be scored at 10 points if the victim suffered bodily injury requiring medical treatment,[29] and at five points if the victim suffered bodily injury not requiring medical treatment.[30] Contrary to defendant's argument, the instructions do not state that OV 3 is not to be scored at all when bodily injury is an element of the sentencing offense. Rather, five points are not to be assessed when bodily injury is an element of the sentencing offense and the victim suffered bodily injury not requiring medical treatment.[31] Evidence that the victim sustained injuries and was treated at the hospital established that she sustained a bodily injury requiring medical treatment. Because the trial court

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[26] *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008) (citations and quotations omitted).

[27] *People v Ratkov (After Remand)*, 201 Mich App 123, 126; 505 NW2d 886 (1993).

[28] MCL 777.33(1).

[29] MCL 777.33(1)(d).

[30] MCL 777.33(1)(e).

[31] MCL 777.33(2)(d). See also *People v Houston*, 473 Mich 399, 406 n 14; 702 NW2d 530 (2005).

is to "assign the number of points attributable to the one that has the highest number of points,"[32] it properly scored OV 3 at 10 points.

OV 4 considers "psychological injury to a victim."[33] A score of 10 points is authorized when "[s]erious psychological injury requiring professional treatment occurred to a victim."[34] The instructions provide that 10 points are to be scored "if the serious psychological injury may require professional treatment[,]" and "the fact that treatment has not been sought is not conclusive."[35] The victim's testimony that the offense left her with post-traumatic stress disorder (PTSD) for which she received counseling established that she incurred a "[s]erious psychological injury requiring professional treatment." Although defendant argues that the PTSD diagnosis was not supported by medical evidence, the victim's testimony that she was "very fearful" during the offense and "scared that he was going to kill me," that she was in "shock and horror and disbelief" at seeing defendant cut his own face, and that she attended counseling because of the offense was alone sufficient to support a 10-point score.[36] Therefore, the trial court properly scored OV 4 at 10 points.

Affirmed.

/s/ Kathleen Jansen
/s/ Stephen L. Borrello
/s/ Jane M. Beckering

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[32] MCL 777.33(1).

[33] MCL 777.34(1).

[34] MCL 777.34(1)(a).

[35] MCL 777.34(2).

[36] See *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004) (10 point score on OV 4 appropriate where the "victim testified that she was fearful during the encounter with defendant").