STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 23, 2009
v	No. 281047 Lapeer Circuit Court
ANDREW JAY BOYLE, JR., Defendant-Appellant.	LC No. 06-008986-FH

Before: Jansen, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of two counts of assault with intent to commit criminal sexual penetration, MCL 750.520g(1). The trial court sentenced him as a third-offense habitual offender, MCL 769.11, to concurrent sentences of seven to 20 years on each count. We affirm defendant's convictions and sentences, vacate the imposition of attorney fees, and remand this case for a determination of defendant's present and future ability to reimburse costs for his appointed counsel and for amendment of the judgment of sentence and correction of the presentence investigation report.

Defendant's convictions arose from his April 12, 2006, encounters with two females living in his neighborhood. On both occasions defendant approached the victims while they were alone at home. Defendant attempted to gain entry to the homes, but was denied in both instances. Defendant later told police officers investigating the incidents that he was having trouble with sexual urges and intended to have forcible sex with the victims if he had gained entry to their homes.

Defendant first argues that the court erred in denying his motion for a directed verdict. We disagree.

> This Court reviews de novo a trial court's decision on a motion for [a] directed verdict to determine whether the prosecutor's evidence, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime were proven beyond a reasonable doubt. [*People v Martin*, 271 Mich App 280, 319-320; 721 NW2d 815 (2006).]

The prosecution, in order to obtain valid convictions in this case, was required to prove that (1) assaults occurred and (2) defendant acted with the intent to commit criminal sexual conduct involving penetration. *People v Starks*, 473 Mich 227, 234-235; 701 NW2d 136 (2005). An assault is either "an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery." *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995) (internal citation and quotation marks omitted).

Here, we conclude that the evidence was sufficient to establish the elements of assault with intent to commit criminal sexual conduct involving penetration, MCL 750.520g(1). Two assaults were established because defendant, in both instances, attempted to commit a battery.

In the first incident, he approached the home of the woman in question, asked to speak to someone named "Sonny," and asked about the name of the road on which the house is located. Then, after turning to leave, defendant turned back, told the woman that he had forgotten to give her something, and suddenly attempted to open the screen door. The woman testified that he "yanked very hard on the screen door." The woman testified that she was "very frightened" by the encounter, which is circumstantial evidence that defendant did not have a benign state of mind when he attempted to enter the home. If defendant's purpose had been truly benign, it is reasonable to expect that such a large degree of fright would not have occurred. The woman also testified that she telephoned her husband because she was so distressed about the incident and that she telephoned the police after her husband advised her to do so.

In the second incident, defendant approached the home of the second woman, asked to come inside to use the telephone, and then, after the woman shut the door, persisted in knocking on the door. The woman testified that she was "very scared" by the incident and that it made her cry, which, again, is circumstantial evidence that defendant did not have a benign state of mind when attempting to enter the home. She also testified that she hid in a bathroom while defendant was still present on her premises, that defendant continued knocking for about five minutes, and that she telephoned friends as a result of her distress.

Defendant admitted to the police that he intended to have forcible sex with the women if he had gained entrance to either home.

The above evidence was sufficient to establish that defendant attempted to commit a battery. The dissent states that there was a lack of evidence that defendant ever attempted to actually inflict a battery or bodily touching, but, in our opinion, this is simply not true, given that defendant approached the women's homes and aggressively tried to get inside the homes, in a manner which greatly frightened both women.

Also, defendant had the "present ability" to commit the batteries. See *People v Reeves*, 458 Mich 236, 243; 580 NW2d 433 (1998). The pertinent question is whether the acts had proceeded far enough "towards a consummation . . . ." *Id.* (internal citations and quotation marks omitted). "[A]ssault with intent to commit criminal sexual conduct involving sexual penetration can be distinguished from attempted third-degree criminal sexual conduct by the proximity of the defendant to the completed act." *Starks*, *supra* 236 (internal citation and quotation marks omitted). "Attempted-battery" assaults must "evince an assailant's actual ability to inflict injury on the victim." *Reeves*, *supra* at 244. Here, defendant was present at the women's homes, was physically very close to the women, and had taken significant steps

towards the "consummation" of the batteries. Although he was thwarted from completing the battery, in the second incident, by the woman's closing and locking the door, he came in close proximity to completion of it and had, for a time, the present ability to complete it. In the first incident, he was thwarted merely by a *screen* door; it is certainly reasonable to conclude that, despite the screen door's being locked, he nonetheless had the present ability to complete the assault but essentially "lost his momentum" when the door did not immediately open.

There was sufficient evidence of two assaults in this case, and defendant's admissions established that he acted with the intent to commit criminal sexual conduct involving penetration. Therefore, the prosecution sufficiently established the elements of the charged crimes. *Starks*, *supra* at 234-235.

Moreover, contrary to the dissent's conclusion, we do not believe that the corpus delicti rule prohibits defendant's convictions. First, we note that defendant does not even raise this rule as an issue on appeal. Also, in *People v Cotton*, 191 Mich App 377, 394; 478 NW2d 681 (1991), this Court stated:

> [W]e hold that the corpus delicti rule is satisfied and a defendant's confession may be admitted into evidence when the prosecutor presents direct or circumstantial evidence, independent of the confession, establishing (1) the occurrence of the specific injury and (2) some criminal agency as the source of the injury. Once this showing is made, a defendant's confession may be used to establish identity, intent, or aggravating circumstances.

The Court also stated:

> As previously discussed, the historical purpose of the corpus delicti rule was to prevent a defendant from being convicted of murder solely on the basis of his confession when no death had occurred. As applied to other crimes then, the purpose of the rule is to prevent a defendant's confession from being used to convict him of a crime that never happened. In most prosecutions for crimes other than murder, the danger that a defendant's confession will result in conviction of a crime that did not occur is obviated by the fact that the victim of the crime can testify about the circumstances that establish that the injury occurred as the result of some criminal agency. Thus, the dilemma that originally led to the development of the corpus delicti rule does not exist in many of these cases. [*Id*. at 389-390.]

Under the unique circumstances of this case, we conclude that the women's testimony that defendant approached their homes and aggressively attempted to enter their homes in a manner that greatly frightened them was sufficient to establish injuries that occurred as the result of some criminal agency. Defendant's statements could then be properly used to "establish . . . intent" or other circumstances. *Id*. at 394. There was sufficient evidence for defendant's convictions.

Defendant next contends that the trial court erred in allowing the introduction of character evidence in contravention of MRE 404(b). We disagree. At issue is evidence that defendant followed and approached a third woman the day after approaching the two victims of the crimes for which he stands convicted. Because defendant failed to adequately object[1] to the introduction of this evidence at trial, his current challenge is an unpreserved challenge to the admission of evidence that we review for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). For reversal to be warranted, there must have been a clear or obvious error that affected the outcome of the proceedings. *Id*.

MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Evidence of other crimes, wrongs, or acts is admissible under MRE 404(b)(1) if such evidence is offered for a proper purpose and relevant under MRE 402 to a fact of consequence at trial, and if the danger of unfair prejudice does not substantially outweigh the probative value of the evidence. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

The prosecution argued that evidence of defendant's encounter with the third woman would help to establish "intent, motive, scheme, plan or system in doing an act and/or absence of mistake or accident." Accordingly, the first element of admissibility was established.

The court instructed the jurors that they could "only think about whether the evidence tends to show that the [d]efendant had a reason and/or motive to commit the crimes." In part, the prosecution had argued in its motion to admit the evidence that it was relevant because it showed that "[d]efendant cannot contain his sexual urges."

Evidence of defendant's encounter with the third woman was relevant to the establishment of a pattern of behavior over consecutive days in which defendant approached apparently isolated females. In all three incidents, the evidence showed that defendant acted with some persistence. This was at a time when, as he admitted to police, he was struggling with sexual urges. Indeed, he admitted to police that he was having sexual urges when he approached both of his victims and would have forced each woman to have sex with him if he had gained entry to their homes. Citing a 2002 science fiction movie, and asserting that men and women are "wired differently" with respect how often they think about sex, defense counsel argued in closing at trial that "just thinking about committing a crime is not enough." The other-acts

[1] Defendant simply did not make any arguments *specifically directed towards* the third woman's testimony.

evidence, however, helped to show that defendant was doing more than thinking about his sexual urges. Rather, he was engaging in behavior motivated by, and designed to satisfy, his urges.

Moreover, any danger that the other-acts evidence would be unfairly applied by the jury was effectively alleviated by the trial court's limiting instruction. See *People v Sabin* (*After Remand*), 463 Mich 43, 56; 614 NW2d 888 (2000) (indicating that a court may provide a limiting instruction concerning other-acts evidence). "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Therefore, the trial court did not commit error, plain or otherwise, in admitting the evidence.

Defendant also contends that he is entitled to resentencing because the trial court failed to exercise its discretion in setting the maximum sentence. Again, we disagree. Because defendant failed to object to the trial court's handling of this issue below, this is an unpreserved claim of sentencing error that we review for plain error affecting substantial rights. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002).

MCL 769.11(1)(a) states that a person convicted of two or more felonies shall be sentenced as follows for a subsequent felony:

> If the subsequent felony is punishable upon a first conviction by imprisonment for a term less than life, the court, except as otherwise provided in this section or section 1 of chapter XI, may sentence the person to imprisonment for a maximum term that is not more than twice the longest term prescribed by law for a first conviction of that offense or for a lesser term.

There is no error requiring reversal if the court fails to articulate the reasons for its maximum sentence under an habitual offender statute, as long as the court does not make the erroneous statement that it has no discretion in setting the maximum sentence. See, e.g., *People v Beneson*, 192 Mich App 469, 471; 481 NW2d 799 (1992). Indeed, there is a presumption that the trial court applied the valid law if there is no evidence that the court incorrectly believed that it lacked discretion. See *People v Knapp*, 244 Mich App 361, 389; 624 NW2d 227 (2001).

In the instant case, the trial court sentenced defendant to "a minimum period of seven years as set by this court, to a maximum period of 20 years as set by statute," on each charge. Defendant argues that this language indicates that the trial court failed to recognize and exercise its discretion in setting the maximum sentence. However, the trial court had previously noted that defendant's status as a third-offense habitual offender resulted in a "maximum sentence in this matter on both Count 1 and 2 [of] *up to* 20 years in prison" (emphasis added). The reference to the maximum being "set by statute" should be understood as the court simply drawing attention to its role in determining the minimum sentence under the Legislative sentencing guidelines versus its role in determining the maximum sentence. As such, defendant is not entitled to resentencing.

In addition, defendant contends that he is entitled to resentencing because the trial court improperly scored multiple offense variables (OVs). A defendant can preserve an issue challenging the scoring of the guidelines or challenging the accuracy of the information relied on in determining a sentence by raising an objection at sentencing. *People v Kimble*, 470 Mich 305,

309; 684 NW2d 669 (2004). Defendant's counsel objected to the scoring of OV 4, OV 10, and OV 13. There was no objection to the scoring of OV 9, nor did defendant preserve the OV 9 issue in any other fashion. See *id*. at 310-311. Thus, defendant's claims of error relating to the scoring of OV 4, OV 10, and OV 13 are preserved, but defendant's claim of error relating to the scoring of OV 9 is unpreserved.

We review a trial court's scoring decisions 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 35 (2005). An abuse of discretion occurs when the trial court chooses an outcome that falls outside the principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Defendant first argues that the trial court erred in assessing ten points under OV 4 for each count where there was no evidence that either victim may need psychological treatment. MCL 777.34 calls for the assessment of ten points if there is serious psychological injury that *may* require treatment. In addition, MCL 777.34(2) specifically states that "the fact that treatment has not been sought is not conclusive." That neither victim had sought psychological treatment as of the date of sentencing, which was admittedly more than 15 months after the incidents, did not preclude assessing ten points under OV 4. Both victims testified that they were frightened by their respective encounters with defendant. Moreover, both victims provided victim-impact statements to the trial court that indicated that both suffered psychological injury as a result of defendant's conduct. One victim stated "yes!" when asked if she feared retaliation from defendant and also stated that she does not "want to get off school bus alone or be home alone." The second victim indicated that her family had "lost [its] sense of security . . . ." Accordingly, the trial court did not err in assessing ten points for OV 4.

Defendant also argues that the trial court erred in assessing 15 points under OV 10 because there was no preoffense predatory conduct. Under MCL 777.40(1)(a), the trial court must assess 15 points if "predatory conduct was involved." Predatory conduct is defined as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). When the facts show that an assault was timed to take place when no other person was around and in a location that was secluded and isolated, there is a sufficient basis to find predatory conduct. See *People v Witherspoon*, 257 Mich App 329, 336; 670 NW2d 434 (2003). Here, defendant approached both victims when they were home alone. The fact that defendant was a member of the neighborhood implies that he was familiar with his neighbors' schedules and could therefore have timed his approach to each with the purpose of getting them alone. In addition, the first victim's testimony that her dogs were barking excessively for a period of 20 to 30 minutes before she locked them up and that defendant knocked on her door shortly thereafter supports the inference that defendant observed her home in an attempt to verify if she was alone. Therefore, the trial court did not err in assessing 15 points for predatory conduct.

Additionally, defendant argues that the trial court erred in assessing 25 points for OV 13 because there was no evidence of three crimes against a person. A court must assess 25 points under OV 13 if the offense was part of a continuing pattern of felonious criminal activity involving three or more crimes against a person. MCL 777.43(1)(c). In determining the number of points to assess, all crimes within a five-year period, including the sentencing offense, must be counted regardless of whether the offense resulted in a conviction. MCL 777.43(2)(a); *People v Francisco*, 474 Mich 82, 85; 711 NW2d 44 (2006). The trial court assessed 25 points based on

defendant's conduct for each of the convictions in the instant case as well as defendant's conduct in following the third woman. Defendant argues that the trial court could not include this latter incident under OV 13, given that one officer testified that charges were not pursued against defendant related to this incident because the police did not feel they had sufficient evidence to obtain a conviction. However, as noted above, a conviction is not required in order for an incident to be included as a former crime under this offense variable. Nor is there any indication that a defendant must be charged in order for criminal behavior to be considered under this offense variable. In addition, defendant's argument that he did nothing more than ask directions of the third woman is not supported by the evidence. We conclude that the trial court did not err in its scoring of OV 13.

We agree that the trial court did err in its assessment of ten points under OV 9. However, defendant is not entitled to resentencing as a result of this error. If the trial court had correctly scored OV 9 at zero points, defendant's total OV score would be reduced from 60 points to 50 points. This reduction would not change the recommended range for the minimum sentence under the sentencing guidelines, MCL 777.21(3)(b); MCL 777.65, and defendant was sentenced within these guidelines. Appellate relief is unwarranted. *Kimble*, *supra* at 310-311 (indicating that if a defendant may not appeal an unpreserved scoring decision if the sentence was within the appropriate guidelines range). Even if this issue were reviewed under the plain-error standard of *Carines*, *supra* at 763, there would be no basis for relief, because defendant's substantial rights were not affected by the error.

Additionally, because the range for the minimum sentence would remain the same even if the OV 9 score were adjusted, defendant cannot establish the requisite prejudice to sustain his claim of ineffective assistance of counsel. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Finally, defendant contends that the trial court erred in ordering him to reimburse attorney fees for his appointed counsel without making a record determination of defendant's present or future ability to pay. We agree. In *People v Dunbar*, 264 Mich App 240, 255-256; 690 NW2d 476 (2004), this Court held that a trial court must indicate on the sentencing record that is has considered a defendant's present and future ability to pay before assessing fees for the reimbursement of attorney fees. When record evidence of such consideration is lacking, a remand is required. *Id*. at 256. We thus remand this case.

Defendant also takes issue with the fact that the assessed attorney fees were included as part of the judgment of sentence. *Dunbar*, *supra* at 256 n 15, had held that attorney-fee reimbursement could not be included as part of the judgment of sentence because "Michigan currently lacks a statutory scheme which authorizes repayment of court-appointed attorney fees." The Legislature subsequently enacted MCL 769.1k(1)(b)(*iii*), which does authorize the court to impose the reimbursement of attorney fees. In *People v Trapp*, 280 Mich App 598, 602; 760 NW2d 791 (2008), this Court held that, in light of MCL 769.1k(1)(b)(*iii*), an order for the reimbursement of attorney fees could be included as part of the judgment of sentence. However, the Supreme Court, notwithstanding MCL 769.1d(1)(b)(*iii*), has confirmed the ruling in *Dunbar*

that the reimbursement order must be separate from the judgment of sentence.[2] See *People v Ransom*, 481 Mich 926, 997; 751 NW2d 35 (2008), and *People v Rounsoville*, 481 Mich 932; 751 NW2d 25 (2008); see also *People v Edgett*, 220 Mich App 686; 560 NW2d 360 (1996) ("Supreme Court . . . orders are binding precedent when they can be understood"). We obviously are bound to follow Supreme Court precedent. Therefore, any reimbursement order shall be issued separately from the judgment of sentence.

Affirmed in part, vacated in part, and remanded for a determination of defendant's present and future ability to reimburse costs for his appointed counsel, and for amendment of the judgment of sentence and correction of the presentence investigation report. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Karen M. Fort Hood

[2] This may have been a simple oversight on the part of the Supreme Court, but we nonetheless feel obligated to follow Supreme Court precedent.