

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH LLOYD EDWARDS,

Defendant-Appellant.

UNPUBLISHED

October 22, 2009

No. 288037

Dickinson Circuit Court

LC No. 07-003890-FC

Before: Hoekstra, P.J., and Bandstra and Servitto, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84. The trial court sentenced defendant as an habitual offender, second offense, MCL 769.10, to six years and 11 months to 15 years' imprisonment. Defendant appeals as of right. Because we conclude that the trial court committed no evidentiary, instructional, or scoring error, we affirm defendant's conviction and sentence.

On September 28, 2007, defendant struck his neighbor, Brian Marentette, several times with a child's aluminum baseball bat. A female witness interfered in the assault and called 911. Defendant ran to the residence of James Miller, a friend, and asked Miller to hide him. Miller refused. Defendant then asked Miller's son to drive him away from the area. The son refused. Defendant was arrested without incident shortly thereafter. The prosecutor charged defendant with assault with intent to commit murder, MCL 750.83. At trial, defendant claimed he struck Marentette in self-defense. The jury rejected defendant's claim and found him guilty of the lesser included offense of assault with intent to do great bodily harm.

I

Defendant argues that the trial court erred by excluding as irrelevant the testimony of a 12-year-old girl that Marentette had touched her in a sexual manner while tickling her. According to defendant, the evidence was relevant to his self-defense claim because the incident influenced his perception of the risks he faced from defendant. We review a preserved claim of evidentiary error for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). Defendant also claims that the evidence was admissible under MRE 405(b) and that the exclusion of the evidence violated his constitutional right to present a defense. We review these unpreserved claims of error for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

Relevant evidence, which is evidence that has “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,” is generally admissible. MRE 401; MRE 402. Defendant maintains that the evidence was relevant to the issue whether he honestly believed that he was in danger from Marentette, an element of a self-defense claim. See *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990). However, defendant fails to explain how Marentette’s alleged inappropriate behavior with the girl contributed to his fear of danger. The record contains no reference to establish the date of the alleged inappropriate touching. Moreover, defendant acknowledged that the alleged incident involved no violence between him and Marentette. Under these circumstances, the trial court was within its discretion to find the evidence irrelevant. Cf. *People v Rockwell*, 188 Mich App 405, 410-411; 470 NW2d 673 (1991). Because the evidence was not relevant, the evidence was not admissible. MRE 402.¹

In addition, the exclusion of the evidence did not violate defendant’s constitutional right to present a defense. The exclusion of irrelevant evidence does not infringe on a defendant’s right to present a defense. *People v Unger*, 278 Mich App 210, 250; 749 NW2d 272 (2008).

II

Defendant next argues that the trial court erred in failing to instruct the jury to disregard gestures made by Officer Edwin Mattson during trial. We review claims of instructional error de novo. *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). We review jury instructions in their entirety, and “there is no error requiring reversal if the instructions sufficiently protected the rights of the defendant and fairly presented the triable issues to the jury.” *Id.*

The trial court found Mattson’s gestures unseemly, but it chose not to instruct the jury regarding the gestures because it did not want to draw further attention to them. The trial court did instruct the jury that it was to consider only properly admitted evidence, which only included the sworn testimony of witnesses and the admitted exhibits. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). The trial court’s instructions as a whole were sufficient to protect defendant’s rights.

III

Finally, defendant argues that the trial court erred in scoring 50 points for offense variable (OV) 7, MCL 777.37, and ten points for OV 19, MCL 777.49. A trial court has discretion in scoring the sentencing guidelines, and we will affirm scoring decisions for which

¹ Even if the evidence was relevant, defendant has not shown that the trial court plainly erred in not admitting the evidence pursuant to MRE 405(b). Defendant concedes that, because he was not charged with homicide, MRE 404(a)(2) does not apply. MRE 405 does not provide an independent basis for admission of character evidence; rather, it establishes the method for proving character after it has been determined that character evidence is admissible under MRE 404. Dubin, Weissenberger & Stephani, *Michigan Evidence Courtroom Manual*, (2009 ed), Chapter 405, p 101.

there is any evidence in support. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2004).

Fifty points may be scored for OV 7 if “[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.” MCL 777.37(1)(a). At trial, Marentette and witnesses to the assault described defendant repeatedly pounding Marentette with a baseball bat. Marentette suffered serious injuries, including facial fractures. The trial court’s scoring of 50 points for OV 7 is supported by record evidence.

Ten points may be scored for OV 19 if the defendant “interfered with or attempted to interfere with the administration of justice.” MCL 777.49(c). Knowing the police had been called, defendant ran to Miller’s residence and asked Miller to hide him, but Miller refused. He then asked Miller’s son to drive him away from the area, but the son also refused. Defendant then hid in a dark crevice, where eventually the police located and arrested him. Defendant’s actions support the trial court’s scoring of OV 19.²

Affirmed.

/s/ Joel P. Hoekstra
/s/ Richard A. Bandstra
/s/ Deborah A. Servitto

² Even if we were to conclude that the trial court abused its discretion in scoring OV 19, defendant would not be entitled to be resentenced because a ten-point reduction in defendant’s OV score would not alter the appropriate guidelines range. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).