STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 19, 2010
v	No. 286690 Oakland Circuit Court
ROY OWEN YARYAN, Defendant-Appellant.	LC No. 2007-215573-FH

Before: Meter, P.J., and Borrello and Shapiro, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of making a false report of terrorism, MCL 750.543m, and two counts of using a computer to commit a crime, MCL 752.797(3)(f). Defendant was sentenced to serve concurrent prison terms of 6 to 20 years on each charge. Defendant appeals as of right. For the reasons set forth in this opinion, we affirm defendant's convictions, but remand for resentencing.

Defendant's convictions arose as a result of two e-mails that he authored and sent under an assumed name to several people, including members of his church, the media, and a police department. The first e-mail contained the subject line: "WE are going on a killing rampage – WOW!" Included in the e-mail were statements that the writer intended to "have a Columbine or Virginia killing this Sunday at church." Two church services were cancelled as a result of the e-mail. Defendant reported receiving the e-mail to police and said that the reason he contacted police was because the text of the e-mail had frightened him.

A second e-mail was sent on April 28, 2007, from the same e-mail address. The subject line stated: "Killing Order Changed and Time Extended." The second e-mail identified 13 targets chosen for execution, including defendant and his wife. The e-mail also stated, "As you closed church down I am still intend (sic) to do a mass killing anytime the doors are open." Several church members elected to stay the night away from their homes as a result of the second e-mail. Defendant also reported receipt of the second e-mail to police, stated that he was afraid that someone was watching his house, and indicated his belief as to who had authored the e-mails. Eventually, however, defendant admitted sending the e-mails.

On appeal, defendant first argues that MCL 750.543m is unconstitutional on its face and as applied in the instant case. Whether a statute is constitutional is a question of law that this Court reviews de novo. *Phillips v Mirac, Inc*, 470 Mich 415, 422; 685 NW2d 174 (2004). A

statute may be found to be unconstitutionally vague where: (1) it is overbroad, impinging on First Amendment[1] freedoms, (2) it fails to provide adequate notice of the conduct proscribed, or (3) it is so indefinite that it confers unlimited and unfettered discretion on the trier of fact to determine whether an offense has occurred. *People v Hrlic*, 277 Mich App 260, 262-263; 744 NW2d 221 (2007). This Court must examine the entire statute and give the words their ordinary meanings. *Id*. "Further, a presumption exists that a statute is constitutionally sound, and this Court will construe it as such unless its unconstitutionality is 'clearly apparent.'" *People v Newton*, 257 Mich App 61, 65; 665 NW2d 504 (2003), quoting *People v Hubbard* (*After Remand*), 217 Mich App 459, 483-484; 552 NW2d 493 (1996).

All of defendant's arguments challenging the constitutionality of the statute have been previously addressed and rejected by this Court in *People v Osantowski*, 274 Mich App 593; 736 NW2d 289 (2007), reversed on other grounds 481 Mich 103 (2008). While our Supreme Court granted review of that decision related to the specific issue of the proper scoring of OV 20, and ultimately reversed on that issue, it specifically declined to review the remaining issues, *People v Osantowski*, 481 Mich 103, 105; 748 NW2d 799 (2008), leaving intact that portion of the opinion which upheld the constitutional validity of MCL 750.754m. Consequently, pursuant to MCR 7.215(C)(2), we are bound by the decision of this Court regarding the constitutionality of MCL 750.754m as stated in *Osantowski*. In *Osantowsk*, this Court held:

> It is a recognized principle of statutory construction that the words contained in a statute are not to be construed in a void, but rather are meant to be read together to harmonize the meaning and give effect to the act as a whole. 'Accordingly, statutory language should be read in the context of the entire act.' *People v Conley*, 270 Mich App 301, 317; 715 NW2d 377 (2006). The language of MCL 750.543m, in conjunction with the statutory definitions contained within MCL 750.543b(a), serve to preclude '[i]ntimidation in the constitutionally proscribable sense of the word' consistent with the communication of a 'true threat.' (Internal citation omitted). Specifically, MCL 750.543m(1)(a) criminalizes the 'making [of] a terrorist threat' by threatening to 'commit an act of terrorism' and the communication of that 'threat to any other person.' An 'act of terrorism' is defined as a 'willful and deliberate act' that would comprise a 'violent felony,' known to be 'dangerous to human life,' and that 'is intended to intimidate or coerce a civilian population or influence or affect the conduct of government . . . through intimidation or coercion.' MCL 750.543b(a). Given the plain and ordinary meaning of these terms, we are satisfied that the statutory provisions, when read together, prohibit only 'true threats,' as they encompass the communication of a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. (Internal citation omitted). Further, because the statutes require the existence of an intent to 'intimidate or coerce,' they extend beyond the type of speech or expressive conduct that is afforded protection by the First Amendment. As such, the statutes are neither unconstitutionally vague nor overbroad. *Id.* at 602-603.

[1] US Const, Am I.

Review of the record evidence presented in this case clearly demonstrates that defendant's statements extended well beyond the type of speech or "expressive conduct that is afforded protection by the First Amendment." *Id*. We also reject defendant's argument that his actions in the instant case did not constitute a "true threat." As stated above, a "true threat" is the communication of a "serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Osantowski*, 274 Mich App at 602, quoting *Virginia v Black*, 538 US 343, 359; 123 S Ct 1536; 155 L Ed2d 535 (2003).

As previously noted, the first e-mail contained a reference to "a Columbine or Virginia killing," two nationally recognized incidents of mass killings. The second e-mail included a "hit list" identifying 13 people for execution. Regardless of defendant's assertions to the contrary,[2] the threats conveyed by defendant can only be construed as communicating "true threats." Indeed, the evidence compels a finding that defendant's threats were taken very seriously by several of the recipients of the e-mails. The extent to which defendant's threats were construed as "true threats" was clearly demonstrated by the introduction of evidence that as a result of the threats, church services were cancelled, and some church members felt compelled to flee their homes.

Defendant next argues that the trial court erred in denying his motion for directed verdict. "This Court reviews de novo a trial court's decision on a motion for directed verdict." *People v Martin*, 271 Mich App 280, 319; 721 NW2d 815 (2006), aff'd 482 Mich 851 (2008).

When a defendant brings a motion for directed verdict, the trial court must "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." *Martin*, 271 Mich App at 319.

MCL 750.543m provides:

> (1) A person is guilty of making a terrorist threat or making a false report of terrorism if the person does either of the following:
>
> (a) Threatens to commit an act of terrorism and communicates the threat to any other person.
>
> (b) Knowingly makes a false report of an act of terrorism and communicates the false report to any other person, knowing the report is false.

[2] Defendant's assertion that, if his conviction is allowed to stand, a person could be convicted of violating the statute by shouting "kill them" in reference to an opposing team at a high school football game is without merit. A reasonable person would not find such a phrase serious in that context. As such, the statement would not qualify as a "true threat." It would be absurd to conclude that the opposing team would cancel its next game and the members of the opposing team would flee their homes after hearing such a statement.

In addition, the statute specifically states that lack of intent or capability of carrying out the threatened act of terrorism is no defense. MCL 750.543m(2). An "act of terrorism" is defined, in pertinent part, as "a willful and deliberate act" that (1) would constitute a violent felony, (2) that the defendant would have reason to know is dangerous to human life, and (3) is intended to intimidate or coerce a civilian population or affect the conduct of government or a unit of government through intimidation or coercion. MCL 750.534b(a).

Defendant appears to argue that because the prosecution failed to prove that defendant used intimidation or coercion against any governmental unit, his conviction cannot stand. This argument fails to recognize the importance of the Legislature's choice of the word "or" in the final prong of the definition of an act of terrorism. The word "or" is a disjunctive. Therefore, the third prong of the definition of an act of terrorism can be met by showing either that the defendant intended to "intimidate or coerce a civilian population" or that the defendant intended to "affect the conduct of government or a unit of government through intimidation or coercion." Accordingly, even if we were to assume, *arguendo*, that the prosecution failed to prove that defendant used intimidation or coercion against any governmental unit, defendant's conviction would stand so long as the prosecution produced evidence that defendant intended to "intimidate or coerce a civilian population."

The prosecution presented evidence that defendant authored and sent two e-mails to various individuals, including church members, and members of the media. The e-mails indicated that the author intended to engage in a killing spree, and even provided a list of targets in his second e-mail. This evidence, viewed in the light most favorable to the prosecution, was sufficient to lead a rational trier of fact to the conclusion that the essential elements of the crime were proven beyond a reasonable doubt. *Martin*, 271 Mich App at 319. Therefore, defendant's directed verdict motion was properly denied.

Defendant also argues the trial court improperly instructed the jury on an essential element of the crime. Generally, we review claims of instructional error de novo. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). However, the determination whether an instruction is accurate and applicable to a case rests within the sound discretion of the trial court. *Stevens v Veenstra*, 226 Mich App 441, 443; 573 NW2d 341 (1997).

During deliberations, the jury requested a legal definition for the phrase "civilian population." The trial court responded by providing the following answer:

> Members of the jury, the word "civilian" and "population" are words of ordinary meaning. The definition of civilian is one not on active duty in the armed forces or not a police or fire-fighting force. The definition of population is a group of people.

Defendant argues that the definition of population was incorrect and "misled the jury on the important defense issue regarding the essential element of population required by the

statute." Defendant maintains that a more appropriate definition for "population" would have been "the whole number of people or inhabitants in a county[3] or region." Defendant has provided no citation to authority to support his position, nor has he even identified the source for this definition. An appellant may not merely announce his position and then leave it to this Court to discover and rationalize the basis for his claims, nor may he give issues cursory treatment with little or no citation of supporting authority. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

Nonetheless, defendant's argument is both misplaced and illogical. If we were to follow defendant's definition, a person would have to act on such a scale that the whole number of people in an area are threatened, i.e. poisoning a water supply, or releasing a biological agent, in order for the statute to apply. This is contrary to what the Legislature intended, particularly considering the fact that the Legislature purposely chose to criminalize both terrorist threats and terrorist acts. See MCL 750.543m and MCL 750.543f.

Finally, defendant argues that his sentences are invalid due to improper scoring under the guidelines. Defendant preserved this issue by raising an objection at sentencing to his guidelines scoring. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). We review a sentencing court's decision 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 permissible principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Questions of statutory interpretation are reviewed de novo. *People v Schaub*, 254 Mich App 110, 114-115; 656 NW2d 824 (2002).

Michigan's sentencing guidelines generally require a sentencing court to impose a minimum sentence within the appropriate sentence range as determined by the offense variable (OV) and the prior record variable points assigned to the defendant. MCL 769.34(2); *People v McCuller*, 479 Mich 672, 684-685; 739 NW2d 563 (2007). "A sentencing court may consider all record evidence before it when calculating the guidelines, including, but not limited to, the contents of a presentence investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial." *People v Ratkov* (*After Remand*), 201 Mich App 123, 125; 505 NW2d 886 (1993), remanded 447 Mich 984 (1994). Scoring decisions for which there is any evidence in support will be upheld. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Defendant specifically challenges the assessment of 25 points under OV 9 (persons placed in danger), 15 points under OV 10 (predatory conduct), and 10 points under OV 19 (interference with the administration of justice). The trial court agreed with defendant's argument related to the scoring of OV 10 and reduced the points to zero.

[3] For purposes of deciding this appeal, we presume defendant intended "country" instead of "county." However, even if defendant intended the use of the word "county" our conclusions would be the same.

OV 9 requires that 25 points be assessed when 10 or more people were placed in danger of physical injury or loss of life, or where 20 or more victims were placed in danger of property loss. MCL 777.39. Under this OV, the only people to be considered are those who were placed in danger of physical injury or loss of life when the sentencing offense was committed. MCL 777.39(2)(a); *People v Sargent*, 481 Mich 346, 350; 750 NW2d 161 (2008). Arguably, there were more than 10 victims of defendant's actions, as more than 10 people were affected by defendant's conduct. However, the statute requires more than a tally of those affected by the defendant's actions. In order for the points to be properly assessed, there must be a showing that the victims were also placed in danger of physical injury or property loss. Here, there was no danger of physical injury from defendant's threats, despite the fact that his victims were undoubtedly subjected to fear. This Court, in *People v Melton*, 271 Mich App 590, 594; 722 NW2d 698 (2006), stated that when considering what constitutes an "injury" under OV 9 there was a lack of legislative direction ". . . to include 'psychological' injuries . . . ." Accordingly, we are compelled to hold that the trial court erred in assessing 25 points for OV 9.

OV 19 requires that 10 points be assessed when an offender interferes or attempts to interfere with the administration of justice. MCL 777.49(c). Defendant's challenge of the trial court's assessment of 10 points for OV19 is based on the fact that defendant did not provide a false name to police, as was the case in *People v Barbee*, 470 Mich 283, 288; 681 NW2d 348 (2004). Defendant fails to recognize that conduct other than providing a false name to police, such as running from police in order to escape apprehension, has been held to constitute interference with the administration of justice, thereby justifying assessment of points. See *People v Cook*, 254 Mich App 635, 641; 658 NW2d 184 (2003).

However, the trial court did err in assessing points under OV 19 in the instant case, given our Supreme Court's recent holding in *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009), which the trial court did not have access to at the time of sentencing. *McGraw* held that "a defendant's conduct after an offense is completed does not relate back to the sentencing offense for purposes of scoring offense variables unless a variable specifically instructs otherwise." *McGraw*, 484 Mich at 122. Applying *McGraw* to this case, it appears that the points were assessed because defendant ran and tried to hide his computer from police who were attempting to execute a search warrant. This conduct occurred after the offense was completed. Therefore, following the reasoning set forth by our Supreme Court in *McGraw*, the trial court should not have assessed points based on this behavior.

Plaintiff also points out that defendant "sent the police on a wild goose chase every time he falsely reported the e-mail threats." Plaintiff asserts that such conduct would serve as an alternate basis for the assessment of 10 points under OV 19. On remand, the trial court may consider an assessment of 10 points under OV 19 if the trial court finds that the conduct was committed during, and not after completion of the acts for which defendant was found guilty. *McGraw*, 484 Mich at 122.

We are cognizant of the fact that the offense variables were difficult for the trial court to properly ascertain given our Supreme Court's recent ruling in *McGraw*, 484 Mich 120. Therefore, while we remand to the trial court for resentencing, we express no opinion as to whether the trial court may justifiably depart from the guidelines.

Affirmed in part, remanded for resentencing. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Stephen L. Borrello
/s/ Douglas B. Shapiro