STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 11, 2016
v DONALD EBRAHIMI, Defendant-Appellant.	No. 324551 Shiawassee Circuit Court LC No. 13-004667-FH

Before: BOONSTRA, P.J., and K. F. KELLY and MURRAY, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of assault with intent to do great bodily harm less than murder, MCL 750.84, three counts of assault with a dangerous weapon, MCL 750.82, and one count of interference with an electronic communication device, MCL 750.540. Defendant was sentenced to serve 57 to 120 months for the two greater assault convictions, 24 to 48 months for the three lesser assault convictions, and 550 days for the interference conviction. He appeals of right. We affirm defendant's assault convictions, vacate his conviction for interference with an electronic communication device, and remand for further proceedings consistent with *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015).

I. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that there was insufficient evidence to support his assault with intent to do great bodily harm less than murder, assault with a dangerous weapon, and interference with a communication device convictions.

When reviewing a sufficiency challenge, "evidence is reviewed de novo, in a light most favorable to the prosecution, to determine whether the evidence would justify a rational jury's finding that the defendant was guilty beyond a reasonable doubt." *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005).

A. ASSAULT WITH INTENT TO DO GREAT BODILY HARM LESS THAN MURDER

In *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005), this Court explained the following regarding assault with intent to do great bodily harm less than murder:

> The elements of assault with intent to do great bodily harm less than murder are: (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. This Court has defined the intent to do great bodily harm as an intent to do serious injury of an aggravated nature. [Citations, quotation marks, and emphasis removed.]

We reject defendant's argument that there was insufficient evidence to support a finding that he intended to inflict serious injury of an aggravated nature. "An actor's intent may be inferred from all of the facts and circumstances, and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998) (citations omitted). "Intent may be inferred from a defendant's use of physical violence." *People v Dillard*, 303 Mich App 372, 377; 845 NW2d 518 (2013). While an actual injury is not required, "the extent of any injury and the presumption that one intends the natural consequences of one's acts are both proper considerations for the jury." *Id*. at 378.

At trial, defendant's wife Rebecca testified that after defendant coaxed her into returning to the house, he said "perfect, you're such a f______ idiot," and then attacked her. Once isolated, defendant grabbed and twisted Rebecca's left wrist, turned her around, grabbed her by her shirt, threw her to the ground, ripped off her shirt, got on top of her, and began choking her. He only stopped when a third person entered the room. From defendant's statements and his use of significant physical violence, a reasonable jury could conclude that defendant intended to do serious injury of an aggravated nature to Rebecca.

We also concluded that defendant's argument relative to the twelve-year-old victim, which is actually nothing more than an attack on the victim's credibility, is without merit. At trial, the twelve-year-old read the statement she had hand-written for the police on the day of the incident. In that statement, she said that defendant attacked her and hit her. At trial, she could no longer remember defendant hitting her that day but explained the circumstances surrounding the creation of the handwritten letter. Defendant even conducted a voir dire examination with regard to the letter, and he questioned her during cross-examination about it and her memory of the incident. Viewing the evidence in the light most favorable to the prosecution, a rational jury could infer that when defendant intentionally hit this 12-year-old girl, he intended to do serious injury of an aggravated nature.

B. ASSAULT WITH A DANGEROUS WEAPON

The elements of assault with a dangerous weapon are: (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery. *People v Chambers*, 277 Mich App 1, 8; 742 NW2d 610 (2007). Here, there was ample evidence to support the jury's verdict. Defendant committed an assault when he smashed the window. He used the hammer as a dangerous weapon to commit the assault. Rebecca, who was inside the van, testified to the circumstances and what occurred from the perspective of the occupants of the van. And, given the testimony regarding everything that happened during that day, a reasonable jury could infer that defendant intended to injure or place the victims in reasonable apprehension of an immediate battery. Defendant's argument that proof is somehow lacking because none of the young children testified that they were in "apprehension" of a battery is wrong. The children's testimony that they actually experienced apprehension was not necessary, as it could be inferred by the jury.

Defendant argues that he intended to harm the vehicle, as opposed to the occupants, and was just attempting to get inside the locked vehicle. However, defendant knew the victims were in the van, and a reasonable jury could conclude that defendant intended to harm the occupants of the van when he smashed the van window with the hammer. Viewing the evidence in the light most favorable to the prosecution, a rational jury could find defendant guilty beyond a reasonable doubt of the assault with a dangerous weapon charges.

C. INTERFERENCE WITH A COMMUNICATION DEVICE

On appeal, plaintiff has conceded that it did not present sufficient evidence at trial to support defendant's conviction for interference with a communication device. Accordingly, we vacate this conviction.

II. WITNESS SCREENING

At trial, over defendant's objection, the twelve-year-old victim was allowed to testify from behind a small (two feet by two feet), one-way screen, which prevented her from seeing defendant but still allowed defendant, the judge, and the jury to see the victim. We conclude that this use of the screen did not deny defendant his right to confrontation or his right to due process of law.

Defendant preserved these issues in the trial court.[1] This Court reviews de novo questions of constitutional law, such as whether the screening violated defendant's rights to confrontation or due process. *People v Rose*, 289 Mich App 499, 505; 808 NW2d 301 (2010). "However, this Court reviews for clear error the trial court's findings of fact underlying the application of constitutional law." *Id*.

A. CONFRONTATION CLAUSE

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." US Const Am VI; Const 1963, art 1, § 20; see also MCL 763.1. Generally, the Confrontation Clause guarantees that a criminal defendant will meet the witnesses appearing before the jury face-to-face. *Coy v Iowa*, 487 US 1012, 1016; 108 S Ct 2798; 101 L

---

[1] Defendant did not waive this confrontation clause argument when he unilaterally stated at trial "I don't care if I see her or not. I don't want her going through this," because waiver requires the intentional relinquishment or abandonment of a known right, and there is no indication that he made the statement with the intent to abandon or relinquish his right to confront a witness. Rather, viewed in context, it appears that defendant made the statement because he was frustrated with the process of his daughter testifying and was concerned that it would further damage his relationship with her. Accordingly, we consider the confrontation clause argument preserved. As for defendant's due-process argument, although neither he nor his counsel ever mentioned the phrase "due process" before the trial court, his counsel did argue that the use of the screen was highly prejudicial and made defendant appear guilty, and the issue was decided by the trial court pursuant to due process jurisprudence relative to the screening of witnesses. Accordingly, the due process argument is also preserved.

Ed 2d (1988) ("We have never doubted . . . that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact."). However, the right to face-to-face confrontation of adverse witnesses is not absolute. *Maryland v Craig*, 497 US 836, 850; 110 S Ct 3157; 111 L Ed 2d 666 (1990). In *Craig*, the Supreme Court determined that an exception to face-to-face confrontation may arise when it "is necessary to further an important public policy and where reliability of the testimony is otherwise assured." *Id*. at 850. The reliability of the testimony is required to otherwise be assured by other confrontation safeguards such as the taking of an oath, the availability of cross-examination, and the observation of the witness by the jury. *Id*. at 851, 857. The Court made clear that the exception exists to protect child witnesses from trauma due to the defendant's presence, not from courtroom trauma generally. *Id*. at 856.

In *Rose*, a child sexual abuse case, the prosecution wanted to use a witness screen for the eight-year-old witness. *Rose*, 289 Mich App at 501, 505. The screen was the same style as the one at issue here, where the witness cannot see the defendant but the defendant and everyone else can see the witness. *Id*. at 505. In *Rose*, the child's therapist testified that there would be a high potential for harm and regression if the witness was forced to testify face-to-face without the screen. *Id*. at 506. The trial court allowed the screen, finding that there was a high likelihood that face-to-face testimony would cause the child to regress in her therapy and have psychological damage, and could cause her to possibly not testify. *Id*. at 508. The trial court concluded that it was necessary to use a screen to protect the welfare of the child, and that the defendant's rights would be adequately protected because he would be able to see the child, as would the jury, and he would be able to cross-examine her. *Id*. The defendant argued that permitting the witness to testify behind the screen violated his right to confrontation. *Id*. at 517. Applying the test stated in *Craig*, we set forth the following criteria to be used if the prosecution seeks to screen a witness:

> In order to warrant the use of a procedure that limits a defendant's right to confront his accusers face to face, the trial court must first determine that the procedure is necessary to further an important state interest. The trial court must then hear evidence and determine whether the use of the procedure is necessary to protect the witness. In order to find that the procedure is necessary, the court must find that the witness would be traumatized by the presence of the defendant and that the emotional distress would be more than *de minimis*. [*Id*. at 516 (citations omitted).]

Applying this standard, this Court held that the decision to permit the child to testify with the screen did not violate the defendant's right to confront the witnesses against him. *Id*. at 517.

Defendant argues that the *Rose* standard was not met because the trial court never found that the use of a screen was necessary to further an important state interest. Although the trial court never specifically stated what the "important state interest" was, the transcript makes clear that the trial court and the parties were well aware when discussing this issue that the important state interest was protecting the child from the trauma of testifying. The trial court and parties

discussed the *Rose* decision and its criteria extensively.[2] We have no doubt that the trial court was aware that the important state interest at issue was protecting the child witness from the trauma of testifying, even if the trial court did not expressly "find" or state as much on the record.

Defendant also argues that the trial court's finding that the screen was necessary to protect the victim from emotional distress was erroneous because it was based solely on representations made by the prosecutor. We acknowledge that in *Rose* the screened-witness's therapist testified that there would be emotional distress, whereas here the prosecutor stated facts supporting that conclusion. However, defendant never questioned the veracity of the assertion that the twelve-year-old would be in emotional distress, and never asked the court to require the prosecutor to call a witness to provide evidence regarding the distress, despite the prosecutor's offer to call the twelve-year-old's mother and take her testimony on the issue. Further, defendant's counsel conceded this point in making his arguments, stating "[o]bviously she's a young girl who is stressed out." Indeed, even defendant's own "outburst" during the discussion of the screen (where he stated "I don't care if I see her or not. I don't want her going through this") evidences that not using the screen would have been traumatic for the twelve-year-old. Given the above, we cannot say the trial court clearly erred in finding that the twelve-year-old would suffer emotional distress without the screen.

B. DUE PROCESS

Due process includes the right to be presumed innocent. *Estelle v Williams*, 425 US 501, 503; 96 S Ct 1691; 48 L Ed 2d 126 (1976). For presumption of innocence claims, courts "look at the scene presented to jurors and determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial; if the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over." *Holbrook v Flynn*, 475 US 560, 572; 106 S Ct 1340; 89 L Ed 2d 525 (1986). If a procedure is inherently prejudicial, then the procedure must be necessary to further an essential state interest specific to that trial. *Id*. at 568-569.

> When determining whether a particular procedure is inherently prejudicial, courts examine whether there is an unacceptable risk that impermissible factors will come into play. One important factor in determining whether a particular practice is inherently prejudicial is whether the practice gives rise primarily to prejudicial inferences or whether it is possible for the jury to make a wider range of inferences from the use of the procedure. If a particular procedure is not inherently prejudicial, the defendant bears the burden of showing that the procedure actually prejudiced the trial. However, when the procedure is inherently prejudicial, it will not be upheld if the procedure was not necessary to

---

[2] As this Court noted in *Rose*, the United States Supreme Court "has already held that the state has a compelling interest in protecting child witnesses from the trauma of testifying when the trauma would be the result of the defendant's presence and would impair the child's ability to testify." *Rose*, 289 Mich App at 522.

> further an essential state interest. [*Rose*, 289 Mich App at 518 (citations omitted).]

In *Rose*, after an extensive discussion of the contrasting authority as to whether the use of a screen for a child witness was inherently prejudicial, this Court held that it was not. *Id*. at 517-521 ("Accordingly, we cannot conclude that the use of a screen—no matter what its size or composition may be and no matter how it was employed at trial—must in every case be presumed to prejudice the defendant."). Accordingly, defendant must show actual prejudice. *Id*. at 521.

Here, as in *Rose*, defendant has not shown actual prejudice from the use of the screen. He asserts only that it "could only aggravate his ability to remain focused and assists his attorney," but this conclusory assertion does not demonstrate actual prejudice. Further, there is no indication that the screen used in the instant case was any different than the one found proper in *Rose*. Given the above, we reject defendant's argument that the screening violated his right to due process of law.

IV. SENTENCING

Defendant challenges the scoring of certain OVs and argues that judicial fact-finding occurred in all the scoring. In light of the judicial fact-finding, plaintiff agrees that a remand is required by *Lockridge*. We agree in part, and will briefly discuss each OV.

While defendant objected to the scoring of OVs 1, 2, 4, 7, 8, and 13, he did not claim below that the OVs were scored in violation of his Sixth Amendment right to a jury trial. Thus, that claim is unpreserved and is reviewed for plain error affecting substantial rights. *Lockridge*, 498 Mich at 392.

Defendant was scored 10 points for OV 1, which covers "aggravated use of a weapon." Ten points is appropriate if "the victim was touched by any other type of weapon." MCL 777.31(1)(d). The record reflects that no weapon was used in commission of the scored offense of assault with intent to do great bodily harm less than murder, (the use of the hammer relating instead to the unscored offense of assault with a dangerous weapon). Moreover, in finding defendant guilty of assault with intent to do great bodily harm, the jury was not required to find that a victim was touched by a weapon. Thus, this scoring was both erroneous and the subject of judicial fact-finding.

OV 2 covers "lethal potential of the weapon possessed or used," and 1 point is appropriate if "[t]he offender possessed or used any other potentially lethal weapon." MCL 777.32(1)(e). Again, and for the same reasons, the scoring of this OV, relative to the scored offense of assault with intent to do great bodily harm, was both erroneous and the subject of judicial fact-finding.

Defendant was scored 10 points for OV 4, which covers "psychological injury to a victim," and 10 points is appropriate if there is evidence that a "serious psychological injury" that "may require professional treatment" occurred to a victim. MCL 777.34(1). We find no error in the trial court's scoring of this OV. However, the jury found defendant guilty of assault with intent to do great bodily harm, which did not require a finding that defendant caused a

psychological injury to any victim. Thus, the facts necessary to support a 10-point score for OV 4 were not found by the jury beyond a reasonable doubt.

OV 7 covers "aggravated physical abuse," and provides that a score of 50 points is appropriate 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). Defendant does not contest the scoring of this OV, and we find no error in the scoring. However, the jury found defendant guilty of assault with intent to do great bodily harm less than murder, which did not require a finding that the victim was treated with sadism, torture, excessive brutality, or conduct designed to substantially increase the fear and anxiety the victim suffered during the offense. In other words, the jury need not make any conclusions about the fear and anxiety of the victim to convict defendant of assault with intent to do great bodily harm less than murder. Thus, the facts necessary to support defendant's 50-point score for OV 7 were not found by the jury beyond a reasonable doubt.

Defendant was scored 15 points for OV 8, which covers "victim asportation or captivity," and a 15-point score is appropriate if "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." MCL 777.38(1)(a). We find no error in the trial court's scoring of this OV. However, the jury found defendant guilty of assault with intent to do great bodily harm, which did not require a finding that defendant asported a victim or held a victim captive. Thus, the facts necessary to support a 15-point score for OV 8 were not found by the jury beyond a reasonable doubt.

OV 13 is a "continuing pattern of criminal behavior," and 25-points is appropriate if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c). Here, because the jury also found defendant guilty of three other assaults, all occurring contemporaneously with the scored offense, the facts necessary to support a 25-point score for OV 8 were found by the jury beyond a reasonable doubt.

With 10 points scored for OV 1, one point for OV 2, 10 points for OV 4, 50 points for OV 7, and 15 points for OV 8, defendant had 141 total OV points, giving him an OV level of VI, and 20 total PRV points, giving him a PRV level of C. MCL 777.65. This made defendant's minimum guidelines range 29 to 57 months' imprisonment. MCL 777.65. If OVs 1 and 2 were properly assessed at zero points each, defendant would have a total OV score of 130, and his minimum guidelines would be unchanged. If, however, for the purpose of a *Lockridge* analysis, we were to remove the points scored for OVs 4, 7, and 8 (which were the subject of judicial fact-finding), defendant would have a total of 55 OV points. With a corrected total score of 55 OV points, defendant's OV level would change from level VI to level V. MCL 777.65. As such, defendant's minimum guidelines would change to 19 to 38 months' imprisonment. MCL 777.65. Therefore, defendant has made a threshold showing of plain error and is entitled to resentencing. See *Lockridge*, 498 Mich at 399 ("To make a threshold showing of plain error that could require resentencing, a defendant must demonstrate that his or her OV level was calculated using facts beyond those found by the jury or admitted by the defendant and that a corresponding reduction in the defendant's OV score to account for the error would change the

applicable guidelines minimum sentence range."). Accordingly, we remand this case to the trial court for a *Crosby*[3] hearing to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in part VI of our Supreme Court's decision in *Lockridge*, 498 Mich at 395-399. Under these procedures, defendant faces the possibility of a more sever sentence, meaning that he must be given the opportunity to inform the trial court that resentencing will not be sought. *Id.* at 398. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. *Id*. at 396-399. However, if the court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, the trial court shall resentence defendant. *Id*.

Finally, defendant also provides the following "argument" in the sentencing portion of his brief on appeal:

> The last sentencing issue is the trial court's grant of the prosecutor's request and the trial court order that Defendant have no contact with his now ex-wife or the children. Sentence, 32. This is clearly unconstitutional and is outside the scope of the authority granted in MCL 769.8 et seq.

Given that this is the entirety of defendant's argument on this issue, we consider the issue abandoned. See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) ("It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.").

We affirm defendant's assault convictions, vacate defendant's conviction for interference with an electronic communication device, and remand for further proceedings regarding defendant's sentences in accordance with *Lockridge*. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray

[3] *United States v Crosby*, 397 F3d 103 (CA 2, 2005).