STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 18, 2016
v	No. 327970 Antrim Circuit Court
DANIEL WADE SHAW, Defendant-Appellant.	LC No. 13-004606-FC

Before: RIORDAN, P.J., and METER and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of domestic violence, third offense, MCL 750.81(4),[1] interfering with electronic communications, MCL 750.540(5)(a), malicious destruction of property greater than or equal to $200 but less than $1,000, MCL 750.377a(1)(c)(*i*), and possession of marijuana, MCL 333.7403(2)(d). He was sentenced, as a third habitual offender, to 4 to 10 years' imprisonment for the domestic violence conviction, one to four years' imprisonment for the interfering with electronic communications conviction, six months' imprisonment for the destruction of property conviction, and three months' imprisonment for the marijuana conviction. We affirm defendant's convictions, but remand for resentencing.

I. FACTUAL BACKGROUND

This case arises from an altercation between defendant and his live-in girlfriend on November 15, 2013. According to the victim, she returned home from work at approximately 9:20 p.m. to find defendant asleep in the basement. She believed that he had been drinking, so she went upstairs to watch television. When defendant woke up, he found her and began to argue with the victim. During the fight, he picked up an approximately 26-pound portable heater by the cord and swung it around, causing the complainant to fear that he intended to hit her with it. Ultimately, he put it down. The victim grabbed her purse and tried to leave the house, but

[1] MCL 750.81 was amended by 2016 PA 87, effective July 25, 2016. In addition to other substantive changes to the text of the statute, domestic assault, third offense, is now codified under MCL 750.81(5).

defendant blocked her path. She then attempted to leave through the garage and enter her car, but defendant pushed her down several times and flipped over a riding lawn mower during the confrontation.

The victim asked defendant to let her leave as she threatened to call 911. However, defendant grabbed her phone, demanded money, and took her purse as she attempted to get into her car again. She then followed him into the house because her car keys and money were inside the purse. While inside, defendant shoved the victim with a box of car parts, but the victim was able to reclaim her purse, leave the house, and successfully enter her vehicle. After she locked the car doors, defendant jumped on the roof of her car, so that his feet and legs were "dangling down" the windshield, and remained on the car despite the victim's attempts to remove him by moving the steering wheel back and forth as she exited the driveway. After driving a short distance, the victim stopped and "laid on the horn" in a renewed attempt to make defendant get off the car. While stopped, she noticed a yellow liquid dripping down the windshield, which she believed was defendant's urine. Defendant then stood on the hood of the vehicle, stomped on the windshield, caused it to shatter, and jumped off the car.

The victim drove away and called the police, who later found defendant highly intoxicated at his home. The arresting officer also discovered a baggie of marijuana concealed in defendant's pocket.

II. PRIOR CONVICTION

Defendant first argues that the trial court erred in admitting evidence of his 1996 domestic violence conviction. We disagree.

A. STANDARD OF REVIEW

We "review[] for an abuse of discretion the trial court's decision to admit or exclude evidence." *People v Lane*, 308 Mich App 38, 51; 862 NW2d 446 (2014). "[A] trial court abuses its discretion when its decision falls outside the range of principled outcomes or when it erroneously interprets or applies the law." *Id*. (footnotes omitted). However, "[w]e review de novo the preliminary questions of law surrounding the admission of evidence, such as whether a rule of evidence bars admitting it." *Id*.

B. ANALYSIS

Under MCL 768.27b, "prior-bad-acts evidence of domestic violence can be admitted at trial because a full and complete picture of a defendant's history . . . tend[s] to shed light on the likelihood that a given crime was committed." *People v Cameron*, 291 Mich App 599, 610; 806 NW2d 371 (2011) (quotation marks and citation omitted; alterations in original). In relevant part, MCL 768.27b provides:

> (1) Except as provided in subsection (4), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403.

* * *

> (4) Evidence of an act occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that admitting this evidence is in the interest of justice. [MCL 768.27b(1), (4).]

Thus, in cases where a defendant faces a domestic violence charge, the trial court may admit evidence of prior acts of domestic violence, which occurred more than 10 years before the charged offense, for any relevant purpose as long as its admission is in the interest of justice and the probative value of the evidence "is not substantially outweighed by the danger of unfair prejudice" under MRE 403.

Defendant asserts that the trial court did not articulate any reason for why it was in the interest of justice to admit evidence of his 1996 domestic violence conviction. We disagree. The court plainly expressed its agreement with the prosecution's position that admission of the prior conviction was in the interest of justice because it further demonstrated defendant's lengthy and ongoing history of abuse, which was continuous except for a several-year period of incarceration.

Additionally, defendant contends that admission of the 1996 conviction was not in the interest of justice because it gave the prosecution a platform to attack his character. In so arguing, defendant fails to recognize that MCL 768.27b "allows trial courts to admit relevant evidence of other domestic assaults to prove any issue, even the character of the accused, if the evidence meets the standard of MRE 403." *People v Pattison*, 276 Mich App 613, 615; 741 NW2d 558 (2007); see also *Cameron*, 291 Mich App at 612 (demonstrating that evidence may be admitted under MCL 768.27b to show a defendant's propensity to commit acts of domestic violence). The trial court did not abuse its discretion in allowing the statute to operate as intended by the Legislature. See *Lane*, 308 Mich App at 51; *Pattison*, 276 Mich App at 615-616.

Defendant also argues that the 1996 conviction, which involved domestic violence against a different woman, had no probative value because the trial court allowed evidence of defendant's 2010 domestic violence conviction, which involved the same victim as in this case. However, in making this claim, defendant again ignores the trial court's reason for admitting the 1996 conviction—*i.e.*, because that conviction was probative of defendant's extensive history of, and propensity for, abuse—which was permissible under MCL 768.27b given the conviction's relevance to the charge of domestic violence at issue in this case.

Defendant is not entitled to a new trial based on the trial court's admission of his 1996 domestic violence conviction.[2]

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[2] Defendant also raises a claim of prosecutorial misconduct under this issue, asserting that the prosecutor improperly remarked, while questioning defendant about the 1996 conviction, that the victim of that assault did not think that her child was safe with defendant. This claim is not properly presented for our "review because it is not within the scope of the questions presented."

III. OFFENSE VARIABLE ("OV") SCORING

Defendant argues that the trial court improperly assessed 50 points for OV 7 and 25 points for OV 13. We disagree that the trial court's scoring of OV 7 was improper, but agree that resentencing is required because the trial court improperly scored OV 13.

A. STANDARD OF REVIEW

Defendant preserved these challenges by objecting to the trial court's scoring of OV 7 and 13 at sentencing. See MCL 769.34(10); *Jackson*, 487 Mich at 796.

> [T]he circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo. [*People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013) (footnotes omitted).]

B. OV 7

OV 7 addresses aggravated physical abuse. MCL 777.37(1). The trial court shall assess 50 points under MCL 777.37(1)(a) if "[a] victim was treated with sadism, torture, excessive brutality, or similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." At issue here is whether defendant's conduct satisfies the last category of conduct listed under MCL 777.27(1)(a). The Michigan Supreme Court has acknowledged that all crimes against a person involve some infliction of fear and anxiety. *Hardy*, 494 Mich at 442. As such, the Court identified the following inquiries for a court to determine whether a defendant treated a victim with " 'conduct designed to substantially increase the fear and anxiety a victim suffered during the offense' ": "(1) whether the defendant engaged in conduct beyond the minimum required to commit the offense; and, if so, (2) whether the conduct was intended to make a victim's fear or anxiety greater by a considerable amount." *Id*. at 440, 443-444, quoting MCL 777.27(1)(a). "To make this determination, a court should consider the severity of the crime, the elements of the offense, and the different ways in which those elements can be satisfied." *Id*. at 443.

People v Albers, 258 Mich App 578, 584; 672 NW2d 336 (2003). See MCR 7.212(C)(5). Nonetheless, the prosecutor's brief and isolated remark did not violate defendant's right to a fair and impartial trial, see *People v Brown*, 294 Mich App 377, 382; 811 NW2d 531 (2011), especially given the fact that defense counsel immediately objected, the trial court sustained the objection, and the court later instructed the jury (1) that it must decide the case based on the evidence presented, and (2) that "[t]he attorneys['] statements and arguments are not evidence," see *People v Unger*, 278 Mich App 210, 238; 749 NW2d 272 (2008). See also *People v Mosko*, 441 Mich 496, 503; 495 NW2d 534 (1992) (stating that a criminal defendant is entitled to a fair trial, but not necessarily a perfect one).

In this case, the trial court agreed with the prosecution's argument that swinging a portable heater, shoving the complainant to the ground several times, taking away her purse and phone, and jumping on her windshield were acts intended to heighten fear and apprehension. The sentencing offense was domestic violence, which consists of an assault, or an assault and battery, of a person sharing a household or having a dating relationship with the offender. See MCL 750.81(2). "A battery is an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person." *People v Reeves*, 458 Mich 236, 240 n 4; 580 NW2d 433 (1998). An assault is "either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery." *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005).

Pushing the victim down and seizing her purse and cell phone arguably were not acts beyond the minimum required to commit domestic violence. However, defendant's acts of (1) swinging a portable heater by its cord, in a manner that caused the victim to fear that it would strike her;[3] (2) jumping on top of the victim's car; and (3) stomping on her windshield amount to conduct greater than that required for the offense of domestic violence and conduct that was intended to increase the complainant's fear or anxiety by a considerable amount. See *Hardy*, 494 Mich at 443-444.

Thus, the trial court properly assessed 50 points for OV 7.

C. OV 13

OV 13 pertains to a "continuing pattern of criminal behavior." MCL 777.43. The trial court shall assess 25 points under MCL 777.43(1)(c) if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." When scoring OV 13, "all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a).

Here, in addition to the sentencing offense, *i.e.*, the domestic violence conviction, the trial court took into account defendant's contemporaneous felony conviction of interfering with electronic communications and his 2010 domestic violence conviction. However, interference with electronic communication is a crime against public order, not a crime against a person. See MCL 777.16aa. Additionally, the presentence investigation report indicates that defendant's 2010 domestic violence conviction was a misdemeanor, not a felony. Because one of the offenses counted by the court was not a crime against a person and another was not a felony, the facts, as found by the trial court, are inadequate to support the scoring conditions prescribed by MCL 777.43. See *Hardy*, 494 Mich at 438. Thus, the trial court erred in assessing 25 points for OV 7.

We note that the prosecutor urged the trial court to also consider, in scoring OV 13, the several uncharged assaults and batteries to which the victim and her two daughters testified. The

[3] Notably, the evidence admitted at trial shows that the heater was large and bulky, weighing approximately 26 pounds.

trial court agreed that "[t]here certainly were other ones testified to," but did not expressly adopt the prosecutor's position and did not make any factual findings with regard to these uncharged assaults, including whether they actually occurred. Thus, we decline to consider these miscellaneous, uncharged assaults.[4] See *id*.

Without the 25 points assessed for OV 13, defendant's OV score would have been 66 points instead of 91 points. This point reduction places him in OV Level V instead of OV Level VI and changes the minimum range calculated under the sentencing guidelines from 19 to 57 months to 14 to 43 months. See MCL 777.66; MCL 777.21. Because the scoring error altered the minimum range calculated under the sentencing guidelines, defendant is entitled to resentencing. See *People v Francisco*, 474 Mich 82, 89-91, 91 n 8; 711 NW2d 44 (2006).

Thus, we vacate defendant's sentences and remand this case to the trial court for resentencing.[5]

IV. CONCLUSION

The trial court did not abuse its discretion when it admitted evidence of defendant's 1996 domestic violence conviction under MCL 768.27b. However, the trial court's improper scoring of OV 13 requires resentencing.

We affirm defendant's convictions, vacate his sentences, and remand for resentencing. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Patrick M. Meter
/s/ Donald S. Owens

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[4] We express no opinion as to whether the trial court may rehabilitate its scoring of OV 13 at resentencing by referring to the uncharged assaults or batteries described by the victim and her daughters, or by any other evidence in the record.

[5] Defendant also argues that he is entitled to a *Crosby* remand on the basis of judicial fact-finding that increased the minimum range calculated under the sentencing guidelines before the Michigan Supreme Court's decision in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015). The prosecution has stipulated on appeal that defendant is entitled to a *Crosby* remand on that basis. However, given our conclusion that defendant is entitled to resentencing because OV 13 was scored improperly, this issue is moot. See *People v Biddles*, ___ Mich App ___, ___; ___ NW2d ___ (2016) (Docket No. 326140); slip op at 5, 7-8; *People v Sours*, ___ Mich App ___, ___; ___ NW2d ___ (2016) (Docket No. 326291), slip op at 3.