

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
December 20, 2016

v

ARTHUR JAMES TURNER, JR.,
Defendant-Appellant.

No. 329090
Cass Circuit Court
LC No. 14-010292-FH

Before: WILDER, P.J., and MURPHY and O'BRIEN, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault by strangulation, MCL 750.84(1)(b), interference with an electronic communications device causing injury, MCL 750.540(5)(b), aggravated domestic violence, second offense, MCL 750.81a(3), and bribing, threatening, or intimidating a witness, MCL 750.122(7)(a). The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to 5 to 20 years' imprisonment for the conviction on assault by strangulation, 2 to 15 years' imprisonment for the communications device conviction, 2 to 20 years' imprisonment for the domestic violence conviction, and 2 to 15 years' imprisonment for the witness tampering conviction. On appeal, defendant does not challenge his convictions, so they stand. Defendant solely argues that the trial court erred in assessing 15 points for offense variable (OV) 8, MCL 777.38, contending that there was inadequate evidence of asportation or captivity and that the reduction of 15 points from his total OV score would lower the guidelines minimum sentence range. We affirm defendant's sentences.

In *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013), our Supreme Court recited the standards of review governing sentencing, observing:

Under the sentencing guidelines, the 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. [Citations omitted.]

“Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made.” *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008) (citation and quotation marks omitted). In addition, “the standards of review traditionally applied to the trial

court's scoring of the variables remain viable after [*People v*] *Lockridge*[, 498 Mich 358; 870 NW2d 502 (2015)].” *People v Steanhouse*, 313 Mich App 1, 38; 880 NW2d 297 (2015). Thus, the *Hardy* review principles continue to govern post *Lockridge*. If a sentencing error results in an alteration of the guidelines range, a defendant is entitled to resentencing. *People v Francisco*, 474 Mich 82, 89; 711 NW2d 44 (2006).

An assessment of 15 points is proper for purposes of scoring OV 8 when “[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) (emphasis added). A score of zero points is the only alternative in scoring OV 8. MCL 777.38(1)(b). Although guidelines were scored below for each of the crimes upon which defendant was convicted, the offense of assault by strangulation has the highest crime classification, class D, MCL 777.16d, and defendant’s sentences run concurrently; therefore, assault by strangulation is the pertinent offense to examine for purposes of resolving this scoring issue. MCL 777.21(2); MCL 777.14(2)(e)(ii); *People v Lopez*, 305 Mich App 686, 690; 854 NW2d 205 (2014) (“the trial court was not required to independently score the guidelines for and sentence the defendant on each of his concurrent convictions if the court properly scored and sentenced the defendant on the conviction with the highest crime classification”).

There was evidence that defendant choked the victim, his ex-girlfriend, while on the back porch of her house after she had fled to the porch following an assault against the victim inside the home. According to the victim, the defendant stopped choking her on the porch and then dragged her back into the house, closing the door. We are uncertain whether this evidence satisfied the asportation phrase relative to scoring OV 8, where the victim was choked or strangled – the offense at issue – *and then moved* to a place of greater danger, i.e., inside the house behind closed doors. See *People v Steele*, 283 Mich App 472, 491; 769 NW2d 256 (2009) (the phrase “a place of greater danger” is any place “where others [are] less likely to see defendant committing crimes”).¹ However, we need not resolve that question, considering that there was an abundance of evidence showing that defendant held the victim captive beyond the time necessary to commit the offense of assault by strangulation.² Before and after the time of the choking assault, defendant forcefully prevented the victim from leaving her home, effectively holding her captive. The victim testified that defendant initially grabbed her as she attempted to escape out the front door, that he then converged on her in a bathroom and pushed her into the shower, causing her to hit her head, that defendant next grabbed her and threw her to the floor after she tried to run out the back door of the house, that she was then able to make her way to the back porch area before defendant grabbed her yet again, that he then committed the offense

¹ Compare *People v Bosca*, 310 Mich App 1, 52; 871 NW2d 307 (2015), where victims were feloniously assaulted *after* being moved from a porch to the basement of the defendant’s residence, thereby making the 15-point assessment for OV 8 proper.

² We also note that the trial court did not rely on the asportation language in OV 8; rather, on the basis of how long the victim was held and defendant’s conduct in choking and grabbing her, the court concluded that “there was clear evidence to support that she was kept longer than necessary to commit this offense [strangulation], and was held captive.”

of assault by strangulation, and that finally he proceeded to drag her back into the house, continuing to hold her or prevent her flight until police arrived. Under these circumstances, the score of 15 points for OV 8 was proper, and there certainly was no error, clear or otherwise, by the trial court in assessing 15 points. Resentencing is unwarranted.

Affirmed.

/s/ Kurtis T. Wilder
/s/ William B. Murphy
/s/ Colleen A. O'Brien