STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 16, 2018
v	No. 340387 Marquette Circuit Court
STEVEN MIKEL DEVALLE, Defendant-Appellant.	LC No. 16-054814-FC

Before: MURPHY, P.J., and SAWYER and SWARTZLE, JJ.

PER CURIAM.

A jury convicted defendant of assault by strangulation, MCL 750.84(1)(b), and interference with an electronic communication device causing injury, MCL 750.540(5)(b). He was acquitted of attempted murder, MCL 750.91, and fourth-degree criminal sexual conduct, MCL 750.520e. Defendant was sentenced to concurrent prison terms of 3 to 10 years for the assault conviction and 390 days for the communication-device conviction. He appeals as of right, and we affirm.

The victim and defendant had an on-again, off-again relationship, and they had lived together for a period of time. The victim testified that shortly before the assault, which occurred late into the night, defendant began speaking in an angry and anxious manner, so she sent text messages to a police officer whom she knew worked in the area, hoping that he would drive by to ensure that everything was okay. Defendant noticed that the victim was using her phone and confronted her about ruining his life by leaving him and calling the police. The victim indicated that defendant grabbed her and attempted to wrestle the phone away, hoping to prevent her from calling 911.

According to the victim, she ended up on the floor screaming, with defendant on top of her, placing one hand over her mouth and the other hand on her throat. She testified that she tried to bite defendant's hand and attempted to push him off of her. The victim stated that she then felt an intense pain in her shoulder and her arm went numb, as defendant continued reaching for her cell phone. The victim testified that defendant remarked that he was going to do something that would make the news and that if she called 911 she would not wake up. The victim claimed that defendant, while having a knee on her chest and his hands on her mouth and neck, told her that she should just go to sleep. The victim testified that defendant removed her shirt and bra and touched her breasts and legs, trying to force her legs apart. She felt pain in her

neck, asserting that she was certain that she was going to die when her vision became impaired, defendant's voice sounded distant, and when she sensed being disconnected from her body. The victim maintained that she attempted to remain conscious so that defendant could not pry away her phone.

The victim, noting that her recollection was fuzzy, could not precisely recall how she escaped defendant's clutches, indicating that either she kicked defendant or he simply fled. The victim testified that defendant disappeared as she was getting a shirt; she believed that he had gone to throw her keys into the woods. The victim ran into the street toward her parent's home, calling 911, as defendant sped away in his truck. The victim reported suffering a substantial bite mark on her shoulder with missing skin, along with a bite mark on her hip. Photographs of the victim revealed bruises and injuries to her neck, shoulder, chest, face, hands, arms, a thigh, and an eye. Defendant testified that he did not know how the victim became bruised and injured. He stated that the bite mark on her shoulder was worse than the one that he had given her a few days earlier as part of rough sex. Defendant, who was apprehended by police the following morning after driving his vehicle into a ditch and falling asleep inside the vehicle, claimed to have no memory of the assault. He was taking an anti-depressant, Paxil, and was drinking alcohol at the time of the assault. Defendant had a bodily alcohol level of .7 the morning after the assault, as tested in the emergency room shortly after being transported there by an officer upon defendant making suicidal statements. Defendant was described as being distraught, agitated, and frustrated. He was subsequently convicted in part and acquitted in part as set forth above.

On appeal, defendant first argues that he was denied the effective assistance of counsel when his attorney failed to raise the defense of voluntary intoxication to the specific intent crime of assault by strangulation. "It is an affirmative defense to a specific intent crime, for which the defendant has the burden of proof by a preponderance of the evidence, that he or she voluntarily consumed a legally obtained and properly used medication or other substance and did not know and reasonably should not have known that he or she would become intoxicated or impaired." MCL 768.37(2).[1] Assuming for the sake of argument that assault by strangulation is a specific intent crime, the evidence did not support the invocation of a voluntary intoxication defense, as trial counsel astutely recognized at a pretrial hearing. See *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007) (a defendant is entitled to have a jury instructed on a defense but only if supported by the evidence).

Defendant had been prescribed Paxil for over a year when the assault occurred, taking it on a daily basis. He acknowledged that he knew and had been informed that Paxil was not to be used with alcohol, and a clinical pharmacist testified that Paxil and alcohol should not be taken together. Defendant claimed that he had not previously experienced difficulty when smoking marijuana or drinking alcohol while taking Paxil. He asserted that he was drinking his third beer

[1] Otherwise, generally "it is not a defense to any crime that the defendant was, at that time, under the influence of or impaired by a voluntarily and knowingly consumed alcoholic liquor, drug, including a controlled substance, other substance or compound, or combination of alcoholic liquor, drug, or other substance or compound." MCL 768.37(1).

of the night when he lost all awareness of transpiring events, failing to regain an awareness of his surroundings until the police woke him in his vehicle the next morning.

Assuming that defendant truly had no memory of the assault, and assuming that his blackout was not solely or chiefly attributable to his voluntary consumption of alcohol, the Paxil was not being "properly used" and he knew or reasonably should have known that combining alcohol with his Paxil would lead to his intoxication or impairment. Voluntary intoxication was not an available defense under the circumstances and upon examination of the evidence. Accordingly, trial counsel's performance in not pursuing such a defense did not fall below an objective standard of reasonableness, *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000), and failing to pursue a futile or meritless position cannot constitute ineffective assistance of counsel, *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). Reversal is unwarranted.

Defendant next argues that the trial court abused its discretion in refusing to allow defense counsel to voir dire prospective jurors regarding whether hearing evidence of rough sex would render them unable to act as impartial jurors. MCR 6.412(C)(1) provides:

> The scope of voir dire examination of prospective jurors is within the discretion of the court.[2] It should be conducted for the purposes of discovering grounds for challenges for cause and of gaining knowledge to facilitate an intelligent exercise of peremptory challenges. The court should confine the examination to these purposes and prevent abuse of the examination process.

In *People v Tyburski*, 445 Mich 606, 618; 518 NW2d 441 (1994), our Supreme Court observed:

> A defendant who chooses a jury trial has an absolute right to a fair and impartial jury. The purpose of voir dire is to elicit enough information for development of a rational basis for excluding those who are not impartial from the jury. In voir dire, meaning "to speak the truth," potential jurors are questioned in an effort to uncover any bias they may have that could prevent them from fairly deciding the case. It is the only mechanism, and the only safeguard a defendant has, for ensuring the right to an impartial jury. [Citations omitted.]

The Supreme Court "has long recognized the importance of a voir dire that allows the court and the parties to discover hidden bias that would render a potential juror incompetent." *Id.* at 619. Determining what constitutes unacceptable voir dire practice does not lend itself to any fast and hard rules; instead, a court is afforded wide discretion in achieving the goal of an impartial jury. *People v Sawyer*, 215 Mich App 183, 186-187; 545 NW2d 6 (1996).

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[2] And the court's "decision will not be set aside absent an abuse of that discretion." *People v Harrell*, 398 Mich 384, 388; 247 NW2d 829 (1976).

The trial court explained that it excluded the questioning because it "delved too far into the evidence and argument." We cannot conclude that the trial court abused its discretion in refusing to allow voir dire on the issue regarding whether hearing evidence of participation in rough sex would bias a juror against defendant. We do not agree with the apparent premise or theory of defendant's argument, which is that defendant would incur the bias if indeed a juror was biased based on the subject matter of rough sex. The evidence involved defendant *and the victim* engaging in rough sex, which she denied, and it is just as likely that a juror would hold any assumed bias against the victim and the prosecution's case as the juror would against defendant if the juror believed that rough sex had occurred. Therefore, for purposes of determining bias or partiality against defendant, we cannot conclude that the proposed line of questioning would be particularly relevant or insightful. And we find that the trial court's determination that the questioning delved too far into the evidence and argument did not fall outside the spectrum of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Indeed, by attempting to interject the matter of rough sex as early as voir dire, it is not unreasonable to conclude that defense counsel may have been attempting to jump start the defense by showing the victim in a negative light.

Moreover, jurors are presumed to be impartial until shown otherwise, and the burden is on the defendant to establish that a juror was not impartial or that a juror's impartiality is in reasonable doubt. *People v Miller*, 482 Mich 540, 550; 759 NW2d 850 (2008). And here, there was no indication of bias against defendant, especially considering that the jury acquitted him of criminal sexual conduct, as well as attempted murder. Further, jurors are presumed to follow their instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), and the trial court instructed the jury in this case to render a verdict based exclusively on the evidence presented, not on sympathy or bias. Reversal is unwarranted.

Defendant next contends that the trial court erred in refusing to instruct the jury on the lesser charge of simple assault and battery, where under the facts of the case it was impossible to commit assault by strangulation without first committing assault and battery. "We review de novo claims of instructional error and determinations whether an offense is a necessarily included lesser offense." *People v Apgar*, 264 Mich App 321, 326; 690 NW2d 312 (2004), overruled in part on other grounds by *People v White*, 501 Mich 160; 905 NW2d 228 (2017). However, we review for an abuse of discretion a trial court's "determination whether a jury instruction is applicable to the facts of the case." *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002).

In analyzing defendant's request for an instruction on assault and battery, the trial court applied the five-part test from *People v Stephens*, 416 Mich 252, 261-265; 330 NW2d 675 (1982); however, *Stephens* was overruled in *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002). In *Cornell*, the Michigan Supreme Court, construing MCL 768.32, held "that a requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included

offense and a rational view of the evidence would support it." *Id.* at 357.[3] The Court ruled that "MCL 768.32(1) does not permit cognate lesser instructions." *Id.* at 359. Although the trial court erred in applying *Stephens*, part of the five-part test included determining whether a rational view of the evidence would support the requested instruction, which remains a consideration under *Cornell*, and the court found that the evidence did not support a misdemeanor instruction on assault and battery. We agree, and we additionally conclude that any assumed error was harmless.

We shall begin with the assumption that assault and battery is a necessarily included lesser offense of assault by strangulation. A "battery is an intentional, unconsented and harmful or offensive touching of the person of another," and an "assault" is either an attempt to commit a battery or an unlawful act that places another person in reasonable apprehension of an immediate battery. *People v Nickens*, 470 Mich 622, 628; 685 NW2d 657 (2004) (citation and quotation marks omitted). As noted in *People v Johnson*, 407 Mich 196, 218; 284 NW2d 718 (1979), Chapter XI of the Penal Code, which covers assaults, MCL 750.81 *et seq.*, "lists a series of assaults punishable as either misdemeanors or felonies depending on the severity of the offense." And the least severe offense is simple assault and battery under MCL 750.81(1), which is a 93-day misdemeanor and does not require any injury to have been inflicted. Assault by strangulation is a felony and of course requires proof that the assault entailed strangulation or suffocation. MCL 750.84(1)(b). Strangulation or suffocation is defined as "intentionally impeding normal breathing or circulation of the blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person." MCL 750.84(2).

In general, a rational view of the evidence will support an instruction on a necessarily included lesser offense when the evidence reflects an actual and sufficient dispute regarding a factual element that differentiates the greater offense from the lesser offense. *Cornell*, 466 Mich at 352, 361. The evidence must be sufficient, "more than a modicum," to show that defendant could have been convicted of the lesser offense. *People v Cheeks*, 216 Mich App 470, 479-480; 549 NW2d 584 (1996). Considering the nature and extent of the victim's injuries and her description of the assault, as discussed earlier and will later be elaborated upon in addressing a scoring issue, this case did not involve a simple misdemeanor assault and battery; there certainly was not more than a modicum of evidence showing a mere assault and battery. And there was strong evidence that the assault entailed defendant impeding the victim's normal breathing or blood circulation by applying pressure to her throat and by blocking her mouth with his hand. Although the intensity and duration of the strangulation or suffocation may have been reasonably in dispute, which likely explains the acquittal on the attempted murder charge, the evidence clearly showed that the assault involved some level of strangulation or suffocation.

Moreover, even if an instruction on assault and battery should have been given, any error was harmless. See *Cornell,* 466 Mich at 361-362. In order to reverse the conviction, defendant must demonstrate that it is more probable than not that the error was outcome determinative, i.e.,

[3] We note that this test applies even if the greater charge is a felony and the necessarily included lesser offense is a misdemeanor. See *Cornell*, 466 Mich at 360-361.

that it undermined the reliability of the verdict. *Id.* at 363-364. Regardless of the acquittals for attempted murder and criminal sexual conduct, the evidence, once again, simply did not reflect the commission of a misdemeanor assault and battery. We are confident that, had the jury been instructed on assault and battery, it would nonetheless have convicted defendant of assault by strangulation given the evidence presented at trial. Reversal is unwarranted.

Finally, defendant maintains that the trial court erred in assessing five points for offense variable (OV) 10, MCL 777.40 (exploitation of vulnerable victim), and erred in assessing 25 points for OV 3, MCL 777.33 (physical injury to victim). Under the sentencing guidelines, the trial court's findings of fact are reviewed for clear error and must be supported by a preponderance of the evidence. *People v Hardy,* 494 Mich 430, 438; 835 NW2d 340 (2013); *People v Rhodes (On Remand)*, 305 Mich App 85, 88; 849 NW2d 417 (2014). Clear error arises when the appellate court is left with a firm and definite conviction that an error occurred. *People v Fawaz,* 299 Mich App 55, 60; 829 NW2d 259 (2012). This Court reviews de novo "[w]hether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute . . . ." *Hardy,* 494 Mich at 438; see also *Rhodes*, 305 Mich App at 88. In scoring OVs, a court may consider all record evidence, including the contents of a PSIR, plea admissions, and testimony presented at a preliminary examination. *People v Johnson*, 298 Mich App 128, 131; 826 NW2d 170 (2012).

We decline to substantively review the five-point score for OV 10. Assuming that the trial court erred in assessing five points for OV 10, and given that we conclude below that the court did not err in scoring OV 3, the presumed error does not alter the minimum sentence guidelines range of 19 to 38 months, as defendant remains at OV level V. See MCL 777.65. Therefore, resentencing is unwarranted. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006) ("Where a scoring error does not alter the appropriate guidelines range, resentencing is not required.").

With respect to OV 3, 25 points is the appropriate score when a "[l]ife threatening or permanent incapacitating injury occurred to a victim." MCL 777.33(1)(c). The trial court did not err in assessing 25 points for OV 3. There was evidence that the victim suffered neck pain, bruises and marks around her neck, limited range of neck motion, a hemorrhage in her left eye, impaired vision, clouded memory, and a feeling of disconnect from her body. The victim told one treating doctor that she had passed out, and the victim testified that defendant's voice became distant as he was choking her. A forensic nurse testified that the report of impaired or tunnel vision, bruising and red marks around the neck, and hemorrhaging in the eye are consistent with strangulation. She also stated that loss of oxygen to the brain commonly inhibits memory, and the victim had testified that her memory was fuzzy in regard to how she escaped from defendant. The forensic nurse opined that strangulation can cause unconsciousness after seven seconds and that death can occur in as little as a minute. While there was also evidence that the victim's injuries may not have been life threatening and the jury acquitted defendant of attempted murder, we cannot conclude, on the existing record, that the trial court clearly erred in its underlying findings of fact, and said facts were adequate to show a life threatening injury for purposes of OV 3. See *People v Rosa*, 322 Mich App 726, 747; 913 NW2d 392 (2018)

("[W]hen the evidence shows that the strangulation was severe enough and continued long enough such that the victim lost consciousness or control over bodily functions—albeit temporarily—it demonstrates that the anoxic injury was severe enough to be life-threatening.").[4]

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Brock A. Swartzle

[4] In holding that there was no error in assessing 25 points for OV 3, the panel in *Rosa* noted, in part, that the victim had petechiae (small spots of blood) around her eyes and that she had extensive bruising to her throat. *Rosa*, 322 Mich App at 746-747.