# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>October 25, 2018 |
| v | No. 340846<br>Kent Circuit Court |
| BRENT LEE TIMMER,<br><br>Defendant-Appellant. | LC No. 17-002931-FH |

Before: BOONSTRA, P.J., and O'CONNELL and TUKEL, JJ.

PER CURIAM.

Defendant appeals by right his convictions and sentences for assault with a dangerous weapon (felonious assault), MCL 750.82, reckless use of a firearm, MCL 752.863a, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant as a second-offense habitual offender, MCL 769.10, to two years' imprisonment for the felony-firearm conviction and three to six years' imprisonment for the felonious assault conviction. Defendant was assessed fines and costs for his reckless use of a firearm conviction. We affirm.

This case involves an altercation between defendant and his wife ("the victim"), where after a night of drinking, defendant pointed a gun at her, threatened her, and ended up shooting the gun over the roof of a neighbor's house.

## I. SUFFICIENCY OF THE EVIDENCE

Defendant argues that there was insufficient evidence for the jury to find that he was guilty of assault with a dangerous weapon, reckless use of a firearm, and felony-firearm. Defendant's argument is based on the position that there was insufficient evidence to show that he possessed a gun at any time during the altercation. We disagree.

A challenge to the sufficiency of the evidence is reviewed de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). To sustain a conviction, due process requires sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt. *People v Breck*, 230 Mich App 450, 456; 584 NW2d 602 (1998). In deciding challenges to the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime

were proved beyond a reasonable doubt. *People v Bennett*, 290 Mich App 465, 471-472; 802 NW2d 627 (2010). "[C]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v McKinney*, 258 Mich App 157, 165; 670 NW2d 254 (2003) (quotation marks and citation omitted; alteration in original). Further, "[a]ll conflicts in the evidence must be resolved in favor of the prosecution." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

Defendant properly recognizes that all of his convictions share a common element—that, under these circumstances, he possessed a firearm. See *People v Chambers*, 277 Mich App 1, 8; 742 NW2d 610 (2007) (stating that for felonious assault, the defendant needs to have committed an assault with a dangerous weapon); *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999) (stating that felony-firearm requires the possession of a firearm during the commission of a felony); MCL 752.863a ("Any person who shall recklessly or heedlessly or willfully or wantonly use, carry, handle or discharge any firearm without due caution and circumspection for the rights, safety or property of others shall be guilty of a misdemeanor.").

Defendant frames the issue as a credibility contest. Defendant's argument centers on the premise that the victim made up the entire event to gain an advantage in their impending divorce. However, an appellate court will not resolve anew the issue of witness credibility. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). As such, questions of credibility should be resolved by the trier of fact and not revisited on appeal. See *People v Carll*, 322 Mich App 690, 696; 915 NW2d 387 (2018).

The jury was in the best position to assess defendant's claim that the entire episode was fabricated by the victim in a plot for financial gain. The jury in this case found the testimony of the victim more credible than defendant's. Here, the victim testified that defendant pointed a gun at her, threatened to shoot her with it, and in fact fired it in the direction of a neighbor's roof. We defer to the jury's credibility determination, and through her testimony, there was sufficient evidence to allow the jury to conclude that defendant possessed a firearm and discharged it during the altercation. We also note that there was other physical evidence to support her testimony. In addition to recovering a nine-millimeter gun from the house, the police also recovered a spent shell casing right where the victim said defendant had been standing when he fired the gun in the direction of the neighbor's house. And there was evidence that the shell casing was "consistent" with the cartridges that were recovered from the firearm. Finally, there was testimony that the gun had a capacity to hold a total of 17 rounds, but only 16 rounds were in the firearm right after the incident. Therefore, a jury could reasonably conclude that not only did defendant possess a gun that night, but that he also fired one shot.

Defendant's argument that the evidence showed that the victim had to have been lying is not persuasive. He argues that he could not have used the gun to threaten his wife because it was found locked in a safe in the home. However, just because the gun was located in the safe by the time the police arrived does not preclude a finding that he possessed it earlier, during the time of the altercation. Also, the fact that the police did not conduct any firearm residue testing is not compelling. Defendant cites no caselaw that requires the admission of such testing in order to convict a defendant.

## II. SENTENCING

Defendant next argues that the sentence departure from the sentencing guidelines was disproportionate and both procedurally and substantively unreasonable and that he is entitled to resentencing. Specifically, defendant claims that the sentence was procedurally flawed because the trial court improperly scored offense variable 3 and because the court "fabricated" facts. And defendant claims that the sentence was substantively unreasonable because it did not comport with the seriousness of the crime.

### A. OFFENSE VARIABLE 3

Defendant argues that he is entitled to resentencing because the trial court clearly erred in finding a factual basis for scoring offense variable (OV) 3 at five points. We disagree.

When calculating the sentencing guidelines, a trial court may consider all record evidence, including the contents of a PSIR, plea admissions, and testimony presented at a preliminary examination. *People v McChester*, 310 Mich App 354, 358; 873 NW2d 646 (2015). We review the trial court's findings of fact for clear error, which must be supported by a preponderance of the evidence. *Id.* "Clear error is present when the reviewing court is left with a definite and firm conviction that an error occurred." *Id.* (quotation marks and citation omitted). However, "[w]hether 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).[1]

OV 3 addresses physical injury to a victim. MCL 777.33(1). Five points is properly scored if the victim sustained bodily injury which did not require medical treatment. MCL 777.33(1)(e). Bodily injury is "physical damage to a person's body." *People v Cathey*, 261 Mich App 506, 514; 681 NW2d 661 (2004). Bodily injury includes "anything that the victim would, under the circumstances, perceive as some unwanted physically damaging consequence." *People v McDonald*, 293 Mich App 292, 298; 811 NW2d 507 (2011). The victim testified that defendant punched her in the face multiple times and pulled her hair. Defendant argues that the victim's testimony is insufficient to support a score of five points because there was no visible evidence of the victim's bodily injury. However, there is no requirement that the bodily injury be readily "visible" for purposes of OV 3. Moreover, even if an injury were required to be "visible," there was evidence in the record supporting the fact that there was an injury. Plaintiff's Exhibits 1-4 show redness on the victim's face, which she testified was a bruise. And plaintiff's Exhibit 5 shows a cut on the victim's thumb, which she testified was from defendant grabbing her.

[1] These standards of review remain viable after our Supreme Court's decision in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015). *People v Steanhouse*, 500 Mich 453, 471-475; 902 NW2d 327 (2017).

## B. "FABRICATED" FACTS

Defendant also argues that the trial court erred during sentencing because it "fabricated facts on the spot." We disagree.

Defendant takes exception to the following comments by the trial court:

> You controlled this woman for years. You – you threatened her with the loss of her children, loss of money, all these different various things. You – you committed such outrageous acts over such a long period of time that it – that it's just not acceptable in any way, shape or form.

A trial court can consider only record evidence during sentencing, including the contents of a PSIR, plea admissions, and testimony presented at a preliminary examination. *McChester*, 310 Mich App at 358. Here, the trial court's characterization of how defendant treated the victim was supported by the record. The record shows that victim testified that defendant on numerous occasions threatened her life, the loss of her children, and financial loss. The record further shows that defendant forced the victim to sleep in the garage and that defendant kept video cameras throughout the home to watch her. Defendant even admitted to these things at trial or to police officers who testified at trial. Accordingly, we find no merit to defendant's assertion that the trial court relied on "fabricated facts" when it sentenced defendant.

## C. PROPORTIONALITY

Defendant further argues that the trial court's minimum sentence of three years, which exceeded the minimum sentencing guidelines range of 2 to 21 months, was disproportionate to the crime. We disagree.

Challenges to the proportionality of a defendant's sentence are reviewed for reasonableness. *People v Lockridge*, 498 Mich 358, 365; 870 NW2d 502 (2015). And the reasonableness of a sentence is reviewed for an abuse of discretion. *People v Steanhouse*, 500 Mich 453, 471; 902 NW2d 327 (2017). An abuse of discretion exists if the results fall outside the range of reasoned and principled outcomes. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010).

In *Lockridge*, 498 Mich at 364, our Supreme Court severed "MCL 769.34(2) to the extent that it makes the sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt mandatory." The Court also struck "down the requirement in MCL 769.34(3) that a sentencing court that departs from the applicable guidelines range must articulate a substantial and compelling reason for that departure." *Id*. at 364-365. Instead, the Court held, "A sentence that departs from the applicable guidelines range will be reviewed by an appellate Court for reasonableness." *Id*. at 392.

In *Steanhouse*, 500 Mich 453, the Court reaffirmed "that the legislative sentencing guidelines are advisory *in all applications*." *Id*. at 459. The Court also held that "the proper inquiry when reviewing a sentence for reasonableness is whether the trial court abused its discretion by violating the 'principle of proportionality' set forth in *People v Milbourn*, 435 Mich

630, 636; 461 NW2d 1 (1990), 'which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender.' " *Steanhouse*, 500 Mich at 459. Therefore, "[u]nder this principle, 'the key test is whether the sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines' recommended range.' " *People v Dixon-Bey*, 321 Mich App 490, 520; 909 NW2d 458 (2017),[2] quoting *Steanhouse*, 500 Mich at 472 (one citation and set of quotation marks omitted).

Finally, "[w]hen making this determination and sentencing a defendant, a trial court must justify the sentence imposed in order to facilitate appellate review, which includes an explanation of why the sentence imposed is more proportionate to the offense and the offender than a different sentence [i.e., one within the guidelines,] would have been." *Dixon-Bey*, 321 Mich App at 525 (quotation marks and citations omitted). "However, this is not to say that the trial court must explain why it chose a twelve-month departure as opposed to an eleven-month departure (or indeed as opposed to any one of countless other potential departures). Rather, the trial court must simply explain why the actual departure that it imposed is justified." *People v Babcock*, 469 Mich 247, 260 n 14; 666 NW2d 231 (2003); see also *People v Smith*, 482 Mich 292, 311; 754 NW2d 284 (2008). Further, when making such an articulation, "the trial court is not required to use any formulaic or 'magic' words in doing so." *Babcock*, 469 Mich at 259.[3]

Defendant's argument primarily rests on the assertion that the trial court failed to explain why it utilized a departure sentence. But this argument is not supported by the record. The trial court went on at length as to why it was imposing a sentence outside the guidelines. As already noted, the court did not need to utilize any particular or "magic" words to justify its departure sentence. *Id.*

In sentencing defendant to a minimum prison term of three years, the trial court explained that this "was one of the worst and most egregious situations" that it has ever seen. The court then described the relationship between the victim and defendant and defendant's long-standing appalling conduct. The trial court noted that defendant threatened the victim for years with "the loss of her children, the loss of money, [and] all these different various things." The trial court labeled defendant's conduct toward the victim in the days preceding the incident as "outrageous." It noted that defendant had been making the victim sleep in the garage in February with no heat source. The trial court illustrated the outrageous nature of this act by comparison, stating that "[i]f somebody treated a dog like that, it would be considered animal cruelty." It noted that the shocking behavior had been going on for years, during which defendant placed video cameras in nearly every room in the home, when the situation culminated

[2] The Supreme Court currently is considering whether to grant leave in *Dixon-Bey*. See *People v Dixon-Bey*, 501 Mich 1066 (2018).

[3] *Babcock* was decided prior to *Lockridge*, when a sentence within the guidelines was mandatory absent a "substantial and compelling reason." Given that the guidelines are now advisory, current law provides even less justification for requiring a trial court to use "magic" or "formulaic" words to justify a sentencing decision.

with defendant coming home drunk and beating on his wife before retrieving a gun and threatening her with it.

In *Smith*, 482 Mich at 301, the Michigan Supreme Court recognized that where a victim had undergone repeated sexual abuse over a 15-month period, the trial court correctly concluded "that the long period of abuse" warranted an upward departure. This case is comparable because the abuse was over a period of years, although specific aspects of it may have lasted shorter periods, and the abuse was similarly shocking and offensive. Defendant even admitted that he was using the video cameras to watch the victim. As a result, the trial court properly considered the relationship between defendant and the victim when it sentenced defendant.

Here, the trial court's minimum sentence of three years' imprisonment was 15 months higher than the 21 months at the top of defendant's guidelines range. Given defendant's extensive behavior and his criminal history, we cannot say that the sentence was not proportionate. Therefore, we hold that the trial court did not abuse its discretion when it imposed such a sentence.

Additionally, the trial court commented during sentencing on a misdemeanor plea offer that defendant refused, which would have likely resulted in a lesser sentence. Defendant argues that the trial court improperly considered the fact that defendant exercised his right to a trial in imposing his sentence. We disagree.

Although defendant correctly points out that a sentencing court may not take into account "factors that violate a defendant's constitutional rights," *People v Godbold*, 230 Mich App 508, 512; 585 NW2d 13 (1998), there is no indication in the record that the trial court's upward departure from the sentencing guidelines was based on defendant's exercise of his right to trial. Indeed, after commenting on the misdemeanor plea that defendant was offered, the trial court stated, "My sentence does not—is not affected by that in any way." The trial court gave its opinion that defendant made a "poor choice. Now [he has] to live with the consequences." Accordingly, we discern no error, as the record establishes that the trial court's sentence was not based on defendant's decision to go to trial on the felony charges.

Affirmed.[4]

/s/ Mark T. Boonstra
/s/ Peter D. O'Connell
/s/ Jonathan Tukel

[4] Defendant also argues that in the event this Court orders a remand, any further proceedings should be handled before a different judge in light of the prior judge's alleged bias. Given that we have concluded that defendant is not entitled to relief on his other claims and have not ordered a remand, we need not address this issue further.