STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH LEE WILLIAMS,

Defendant-Appellant.

UNPUBLISHED
December 17, 2020

No. 350166
Macomb Circuit Court
LC No. 2018-003567-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH LEE WILLIAMS,

Defendant-Appellant.

No. 350167
Macomb Circuit Court
LC No. 2018-000457-FH

Before: LETICA, P.J., and RIORDAN and CAMERON, JJ.

PER CURIAM.

In these consolidated appeals,[1] in Docket No. 350166, defendant appeals as of right his jury trial convictions of first-degree home invasion, MCL 750.110a(2), domestic violence, second offense, MCL 750.81(2), and two counts of resisting or obstructing a police officer, MCL 750.81d(1). Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to 84 to 240 months of imprisonment for the first-degree home invasion conviction, 267 days in jail for the domestic violence conviction, and 84 to 180 months of imprisonment for each of the resisting or obstructing a police officer convictions. In Docket No. 350167, defendant appeals as of right

[1] *People v Williams*, unpublished order of the Court of Appeals, entered August 28, 2019 (Docket Nos. 350166 and 350167).

his jury trial conviction of assault by strangulation, MCL 750.84(1)(b). Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to 84 to 240 months of imprisonment for the assault by strangulation conviction. We affirm defendant's convictions and sentences, but we remand solely for the ministerial task of correcting a clerical error on defendant's judgment of sentence in LC No. 2018-003567-FH (Docket No. 350166).[2]

I. FACTS & PROCEDURAL HISTORY

These cases arise out of two domestic disputes that occurred between defendant and the victim, who was defendant's girlfriend and the mother of his child. On September 28, 2017, defendant became angry with the victim, believing she was having an affair. Inside their apartment, defendant choked the victim and punched her in the stomach multiple times. Defendant fled when a neighbor called police after the victim ran out of the apartment screaming for help.

On November 18, 2017, the victim called police after she received threatening text messages and pictures from defendant. Police were called back later that same evening after the victim told police dispatch that defendant kicked down her front door and entered her apartment without her permission. Inside the apartment, defendant found the victim in her bathroom, took her cellular telephone, disconnected the call with police dispatch, and hit her in the face with his fist. Officers responded to the apartment and observed defendant confronting the victim with a knife. Officers removed the victim from the apartment and ordered defendant to drop the knife. Defendant refused to comply, and barricaded himself in an upstairs bathroom. Officers kicked the bathroom door off of its hinges and took defendant into custody after a struggle on the bathroom floor.

The victim appeared under subpoena for the first day of defendant's trial, but she was not called to testify. Although she was instructed to return the following day, she did not appear for any of the remaining trial dates. After officers were unable to locate the victim, the trial court allowed her preliminary examination testimony to be read into the record. The jury convicted defendant of first degree home invasion, domestic violence, two counts of resisting or obstructing a police officer, and assault by strangulation.[3] Defendant now appeals.

II. ANALYSIS

[2] The judgment of sentence states defendant is to serve 267 months for the domestic violence conviction; however, as the sentencing transcript demonstrates, the trial court sentenced defendant to "267 days in Macomb County Jail, credit for 267 days served." We remand this case solely for the ministerial duty of correcting the judgment of sentence in 2018-003567-FH (Docket No. 350166).

[3] The jury found defendant not guilty of one count of larceny in a building, MCL 750.360, one count of interfering with a crime report, MCL 750.483a, and two counts of resisting or obstructing a police officer, MCL 750.81d(1).

Defendant first argues that the trial court's decision to allow the victim's preliminary examination testimony to be read during trial was an abuse of discretion and violated his constitutional right to confront the witness. We disagree.

"The decision to admit or exclude evidence is reviewed for a clear abuse of discretion." *People v Jones*, 270 Mich App 208, 211; 714 NW2d 362 (2006). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Grant*, 329 Mich App 626, 634; 944 NW2d 172 (2019) (quotation marks and citation omitted). Factual findings by the trial court are reviewed for clear error. *People v Garland*, 286 Mich App 1, 7; 777 NW2d 732 (2009). "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made." *People v Blevins*, 314 Mich App 339, 348-349; 886 NW2d 456 (2016). Whether a defendant was denied his Sixth Amendment right of confrontation is a question of constitutional law that we review de novo. *People v Bruner*, 501 Mich 220, 226; 912 NW2d 514 (2018).

Defendant contends that admission of the victim's testimony was improper because defendant did not have an opportunity to develop her testimony through cross-examination. Specifically, defendant argues that he changed attorneys between the preliminary examination and trial, and that his former attorney did not have a similar motive to develop the victim's testimony as his trial counsel.

Preliminary examination testimony "is admissible at trial under both MRE 804(b)(1) and the Confrontation Clause as long as the witness is unavailable for trial and was subject to cross-examination during the prior testimony." *Garland*, 286 Mich App at 7.[4] "Whether a party had a similar motive to develop the testimony depends on the similarity of the issues for which the testimony was presented at each proceeding." *People v Farquharson*, 274 Mich App 268, 275; 731 NW2d 797 (2007). When determining whether the party against whom the evidence is offered

[4] The trial court properly concluded that the victim was unavailable. "The test for whether a witness is 'unavailable' as envisioned by MRE 804(a)(5) is that the prosecution must have made a diligent good-faith effort in its attempt to locate a witness for trial." *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). "The test is one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." *Id.* The victim was served with the subpoena and appeared for the first day of trial. Moreover, the victim was told while at trial that she needed to appear the next day. When the victim did not appear, a police detective attempted to contact the victim multiple times on her cell phone. The detective also sent uniformed officers to the victim's apartment and employer's address in an attempt to find her. Although defendant states on appeal that "more effort should have been made to locate [the victim]," he does not elaborate on what additional measures he believes were required to fulfill the prosecution's duty to exercise due diligence to secure the victim's testimony at trial. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Green*, 313 Mich App 526, 535; 884 NW2d 838 (2015) (citation omitted). Accordingly, to the extent that defendant raises a due-diligence challenge, we consider this issue abandoned.

"had an opportunity and similar motive to develop the testimony" we consider the following factors:

> (1) whether the party opposing the testimony had at a prior proceeding an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue; (2) the nature of the two proceedings—both what is at stake and the applicable burden of proof; and (3) whether the party opposing the testimony in fact undertook to cross-examine the witness (both the employed and available but forgone opportunities). [*Id*. at 278 (quotation marks and citation omitted).]

Here, each of the factors weighs in favor of admission of the victim's testimony. Defendant had a strong interest in defeating plaintiff's arguments that there was probable cause to believe defendant committed the crimes for which he was charged. *People v Taylor*, 316 Mich App 52, 58; 890 NW2d 891 (2016). Thus, defendant had a "an interest of substantially similar intensity" to disprove the victim's testimony at the preliminary examinations as he did at trial. *Farquharson*, 274 Mich App at 278. Although the burden of proof at a preliminary examination is different than the burden of proof at trial, defendant's motive to cross-examine the victim was similar during the proceedings because in both proceedings, defendant was motivated to demonstrate he did not commit the crimes charged. See *id*. Additionally, defendant's former attorney cross-examined the victim and elicited inconsistent testimony from her. See *id*. Accordingly, the victim's prior testimony was properly admitted at trial and defendant's right to confrontation was not violated.

Defendant next argues that his sentencing guidelines were incorrectly calculated because the trial court did not properly assess the scores for his offense variables ("OV") during sentencing. Specifically, defendant challenges the trial court's assessment of points for OVs 2, 9, 10, and 19. We disagree.

"When reviewing the trial court's scoring of the sentencing guidelines, we consider whether the trial court's factual findings were clearly erroneous, and we review de novo its legal conclusions." *People v Savage*, 327 Mich App 604, 617; 935 NW2d 69 (2019). "A trial court may consider all record evidence when calculating the sentencing-guidelines range." *Id*. "Scoring decisions for which there is any evidence in support will be upheld." *People v Elliot*, 215 Mich App 259, 260; 544 NW2d 748 (1996). When calculating the sentencing guidelines, a court may consider all record evidence, including the contents of a presentence investigation report (PSIR), plea admissions, and testimony presented at a preliminary examination. *People v McChester*, 310 Mich App 354, 358; 873 NW2d 646 (2015). The trial court may also "consider a victim impact statement in a PSIR or other statement or letter submitted to the court for consideration on sentencing." *People v McFarlane*, 325 Mich App 507, 532; 926 NW2d 339 (2018). In addition, "the trial court may rely on inferences that arise from the record evidence when making the findings underlying its scoring of offense variables." *Id*.

The trial court concluded that even though defendant did not use the knife against the victim or the police officers on November 18, 2017, he possessed the knife during the commission of the offenses. Defendant argues that OV 2 should have been assessed zero points because he did not use the knife against anyone except himself and the knife was unrelated to the crime of home invasion.

Under MCL 777.32(1)(d), OV 2 is assessed five points if "[t]he offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon." See also *People v Harverson*, 291 Mich App 171, 182; 804 NW2d 757 (2010). Trial testimony indicated that defendant possessed a knife when the officers arrived at the victim's apartment on November 18, 2017, until officers subdued and restrained him. Thus, the trial court properly concluded defendant "possessed" a "knife or other cutting or stabbing weapon" during the commission of the crime of resisting or obstructing an officer and did not err when it assessed 5 points for OV 2.

Defendant next argues that the trial court improperly assessed 10 points for OV 9 because there was no evidence presented at trial to conclude there was more than one victim during the events of September 28, 2017. We disagree.

Under MCL 777.39(1)(c), OV 9 is assessed 10 points if "[t]here were 2 to 9 victims who were placed in danger of physical injury or death, or 4 to 19 victims who were placed in danger of property loss." For purposes of MCL 777.39, "each person who was placed in danger of physical injury or loss of life or property" is counted as a victim. MCL 777.39(2)(a); *People v Ambrose*, 317 Mich App 556, 563; 895 NW2d 198 (2016).

According to testimony adduced at trial, defendant strangled the victim and punched her in the stomach. A neighbor witnessed the victim run out of her apartment, followed shortly by defendant holding their son. Defendant handed their son to the victim and the victim left in her car with the child. While neither the victim nor the neighbor testified that defendant harmed or placed their son in any danger, the trial court was could reasonably infer that the son was endangered by being present in the home while defendant attacked the victim. See *McFarlane*, 325 Mich App at 532. Moreover, the PSIR states defendant "picked up their one-year old son and tossed him on some pillows that were on the floor." Although it is not clear under what basis the trial court assessed 10 points for OV 9, defendant's decision to "toss[]" a small child during a domestic dispute is an additional basis for affirmance. Defendant contends that this fact never was presented at trial. However, the trial court was entitled to rely on the PSIR to calculate defendant's sentencing guidelines as long as the information is accurate. *McChester*, 310 Mich App at 358; *People v Anderson*, 322 Mich App 622, 636; 912 NW2d 607 (2018). Defendant has not challenged the accuracy of the PSIR. Accordingly, we discern no error in the trial court's scoring 10 points for OV 9.

Defendant next argues that the trial court erred when it assessed five points for OV 10 because there was no evidence that defendant exploited the victim by his superior size or strength. We disagree.

Under MCL 777.40(1)(c), the trial court properly assesses 5 points under OV 10 if "[t]he offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious." See also *People v Huston*, 489 Mich 451, 460; 802 NW2d 261 (2011). The term "exploit" is defined as "manipulat[ing] a victim for selfish or unethical purposes." MCL 777.40(3)(b). "Vulnerability" is the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation. MCL 777.40(3)(c).

> Factors to be considered in deciding whether a victim was vulnerable include (1) the victim's physical disability, (2) the victim's mental disability, (3) the victim's youth or agedness, (4) the existence of a domestic relationship, (5) whether the offender abused his or her authority status, (6) whether the offender exploited a victim by his or her difference in size or strength or both, (7) whether the victim was intoxicated or under the influence of drugs, or (8) whether the victim was asleep or unconscious. [*People v Cannon*, 481 Mich 152, 157; 749 NW2d 257 (2008).]

The mere existence of one or more of the factors described does not automatically establish victim vulnerability, nor does the absence of a factor preclude a finding of vulnerability. *Huston*, 489 Mich at 466.

The testimony at trial indicates that defendant strangled the victim while standing and while on top of her after she fell on the floor, and that he punched her repeatedly in the stomach. Evidence was presented that the victim was small and petite, while defendant was aggressive and strong. Additionally, the PSIR indicates that before defendant strangled the victim, he "thr[ew] her around the room and down to the ground." It was reasonable for the trial court to infer that defendant took advantage of this difference in size and strength for unethical purposes and the trial court did not clearly err when it concluded that defendant exploited the victim by using his size and strength.

Defendant next argues that the trial court erred when it assessed 15 points for OV 19 because there is no evidence he interfered with the administration of justice. We disagree.

Under MCL 777.49(1)(b), the trial court may assess 15 points for OV 19 if "[t]he offender used force or the threat of force against another person or the property of another person to interfere with, attempt to interfere with, or that results in the interference with the administration of justice or the rendering of emergency services." "OV 19 is generally scored for conduct that constitutes an attempt to avoid being caught and held accountable for the sentencing offense." *People v Sours*, 315 Mich App 346, 349; 890 NW2d 401 (2016).

The victim testified that she called 911 after defendant kicked in her door and entered her apartment without her permission. Defendant repeatedly failed to comply with officers' commands, and barricaded himself in the bathroom with a knife. Officers kicked down the bathroom door and subdued defendant with a taser before they were able to take defendant into custody. There was sufficient evidence, therefore, for the trial court to conclude defendant interfered with the administration of justice on November 18, 2017. See *People v Smith*, 318 Mich App 281, 286; 897 NW2d 743 (2016) ("Hiding from the police constituted an interference with the administration of justice because it was done for the purpose of hindering or hampering the police investigation."); *People v Ratcliff*, 299 Mich App 625, 633; 831 NW2d 474, judgment vacated in part on another ground 495 Mich 876; 838 NW2d 687 (2013) (concluding that a 10-point score was proper for OV 19 where the "[d]efendant fled from the police contrary to an order to freeze").

III. CONCLUSION

We affirm defendant's convictions and sentences, but remand for the ministerial task of correcting defendant's judgment of sentence in LC No. 2018-003567-FH (Docket No. 350166). We do not retain jurisdiction.

/s/ Anica Letica
/s/ Michael J. Riordan
/s/ Thomas C. Cameron