STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC THOMAS CAULFIELD,

Defendant-Appellant.

UNPUBLISHED
November 24, 2020

No. 350318
Wayne Circuit Court
LC No. 19-002486-01-FC

Before: GLEICHER, P.J., and K. F. KELLY and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals his convictions following a jury trial of two counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b, first-degree home invasion, MCL 750.110a(2), aggravated stalking, MCL 750.411i, and domestic violence, MCL 750.81(2). Defendant was sentenced to concurrent terms of 15 to 25 years' imprisonment for each of his CSC-I convictions, 2 to 20 years' imprisonment for his first-degree home invasion conviction, 1 to 5 years' imprisonment for aggravated stalking, and 90 days in jail for the domestic violence conviction. We affirm defendant's convictions but remand for resentencing.

I. FACTS

This case concerns defendant's alleged sexual assault of his now ex-wife. In November 2018, complainant and defendant had separated, with complainant remaining in the couple's rental property with their three children. After defendant was hospitalized for suicidal ideation, complainant obtained a personal protection order (PPO) against defendant. Although the PPO was not personally served on defendant, statements made by defendant in voicemail messages played for the jury indicated that he knew about the PPO. Further, Dearborn Police Officer John Neisluchowski testified that he told defendant about the existence of the PPO after Neisluchowski and his partner responded to a call regarding a possible home invasion at complainant's residence about two weeks before the assault at issue.

The alleged assault occurred on December 2, 2018. The day before, complainant took the children to defendant at his brother's house. Complainant then went out with a friend, but told defendant she was at work. Defendant learned that complainant was not at work and went to her

home. When she returned home the next morning, complainant found the side door unlocked despite locking it when she left the prior day. Complainant found defendant in their eldest daughter's bedroom. Defendant lunged at complainant and began yelling, calling her derogatory names and reaching for her cellular telephone in her purse. Defendant took complainant's phone and broke it. Defendant continued arguing with complainant and questioning her activities the night before, convinced that complainant was cheating on him.

According to complainant, defendant had a knife and was threatening to kill her and himself. Complainant testified that she tried to escape but defendant blocked her path and began pushing, throwing, and slapping her. Defendant continued to accuse complainant of cheating on him. Complainant insisted that she did not have sex with anyone and told defendant he could look at her genital area to verify. Complainant testified that defendant then grabbed her and threw her onto the bed. She said defendant then stood behind her, held her down, took off her pants and underwear and penetrated her anus with his penis. Complaint told defendant "it hurts," and defendant then penetrated her vagina. Complainant said that she told defendant to stop but he did not do so until he ejaculated.

Per her testimony, after the assault complainant attempted to get away from him by saying she needed some water. However, defendant followed her to the kitchen and prevented her from leaving the house by standing in front of her and threatening to kill her with a knife. Eventually, defendant said he was going out to the garage and instructed complainant to go to the neighbor's house and call the police. The police arrived a short time later, spoke with complainant about what happened, and arrested defendant.

Defendant testified at trial that he entered complainant's apartment through the front door with his key at 6:00 a.m. on December 2, 2018, for the purposes of letting the dogs outside. Defendant admitted he was not "thinking properly" and was "very angry," so he wrote some things on the wall and ceiling, including expletives directed at complainant. Defendant also admitted that he lunged at complainant when she returned home, broke her phone, and blocked her when she tried to leave their daughter's room. He asserted that he became physical with complainant only after she tried to push him out of the way. He denied having a knife or threatening complainant with one. He maintained that the sex he had with complainant was consensual. In a recorded interview with the police that was played for the jury, however, he denied having sex with complainant on the day of the alleged assault. Defendant stated that when he was talking with complainant in the kitchen, he reached into drawer and pulled out a knife sharpener, and began sharpening a knife as "something to do to fiddle with [his] hands." Defendant said he told complainant to call the police and that he went to the garage with the intention of killing himself.

II. SUPPLEMENTAL JURY INSTRUCTION

Defendant first argues that the trial court erred when it provided the jury with a supplemental instruction that formal service was not required for defendant to have actual notice

of the PPO. We conclude that the trial court's additional instruction was not erroneous.[1]

A trial court may give additional jury instructions as long as they accurately state the law and are applicable. See *Mull v Equitable Life Assur Soc. of US*, 196 Mich App 411, 423; 493 NW2d 447 (1992), aff'd 444 Mich 508 (1994). "Even if the instructions are somewhat imperfect, reversal is not required as long as they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

"Aggravated stalking consists of the crime of 'stalking,' MCL 750.411h(1)(d), and the presence of an aggravating circumstance specified in MCL 750.411i(2)." *People v Threatt*, 254 Mich App 504, 505; 657 NW2d 819 (2002). The aggravated circumstance relevant to this case provides that "[a]t least 1 of the actions constituting the offense is in violation of a restraining order and the individual has received actual notice of that restraining order or at least 1 of the actions is in violation of an injunction or preliminary injunction." MCL 750.411i(2)(a).

The trial court instructed the jury on the elements of aggravated stalking, including that the prosecution needed to prove beyond a reasonable doubt that "the stalking was committed in violation of a restraining order, of which, the Defendant had actual notice." During deliberations, the jury sent a note to the trial court asking: "Is an oral notification an actual notice of a PPO?" While speaking with the attorneys outside the presence of the jury, the trial court noted that the model jury instruction for stalking, M Crim JI 25, explained that the alternative element quoted above had been added to the model instruction following *Threatt*, 254 Mich App 504, which held that, if the stalking charge is based on a violation of a restraining order, the defendant must have actual knowledge of restraining order but formal notice is not required. Defense counsel requested the court "just reread the jury instruction instead of giving them something extra at this point." The court disagreed, stating, "I think the case law is pretty clear." When the jury was brought into the courtroom, the court made the following statement in response to the jury's question:

> The Sixth Element says, Sixth, the stalking was committed in violation of a restraining order, of which the Defendant had actual notice. The Michigan Court of Appeals has held that when the stalking is alleged to have violated a temporary restraining order, as opposed to an injunction[, the] Defendant must have actual knowledge of the restraining order, although formal service is not required.

The trial court did not err by providing that supplemental instruction. In *Threatt*, this Court declined to construe "actual notice" as the equivalent of "personal service for purposes of MCL 750.411i(2)(a)." *Threatt*, 254 Mich App at 507. Therefore, the prosecution was not required to prove that defendant was personally served with a copy of the PPO to prove actual notice. Instead, the prosecution had to present evidence that defendant had knowledge of the PPO. *Id*. at 506-507. Although the initial instruction informed the jury of that element, the jury was confused regarding whether oral notice of the PPO constituted actual notice. The trial court could have simply told the jury to reread the initial instruction, but it was not erroneous for the court, in an attempt to

[1] Claims of instructional error that involve questions of law are reviewed de novo. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

clarify a point of confusion regarding actual notice for the jury, to refer to *Threatt*'s holding that formal service was not required.

III. VOLUNTARINESS OF RECORDED STATEMENT

Defendant next argues that his recorded statements were involuntarily given to the police and should not have been admitted. We find no error in the trial court's decision to admit the video recording of defendant's police interview at trial.[2]

"Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waives his Fifth Amendment rights." *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999) (quotation marks and citation omitted). "The prosecutor may not use custodial statements as evidence unless he demonstrates that before questioning, the accused was warned that he had a right to remain silent, that his statements could be used against him, and that he had the right to retained or appointed counsel." *People v Harris*, 261 Mich App 44, 55; 680 NW2d 17 (2004). "Whether a defendant's statement was knowing, intelligent, and voluntary is a question of law, which the court must determine under the totality of the circumstances." *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005). "Intoxication from alcohol or other substances can affect the validity of a waiver of Fifth Amendment rights, but is not dispositive." *Id*.

Defendant was taken to the hospital for a few hours the day of the assault. The next day Dearborn Police Sergeant Leah Bronson and her partner spoke with defendant in the jail interview room. Bronson went over a form that "specifically outlines each and every constitutional right" with defendant before the interview. Bronson could not recall if defendant was on any medication after being in the hospital. She said she usually asked suspects if they were under the influence of any drugs or alcohol, but she could not recall defendant's response. Bronson explained that "once we establish that he doesn't have any questions and he understands everything, then he signs the form." Bronson indicated she could not recall if defendant had any questions, but she did not believe he had any specific questions about his constitutional rights. Thus, defendant was advised of each of his constitutional rights and, by initialing and signing the form, indicated he understood that he was waiving those rights. Although defendant claims there was a possibility that he was under the influence of medication, he has not made a supporting offer of proof. Considering the totality of the circumstances, the trial court did not err by admitting the recorded interview into evidence.

IV. SUFFICIENCY OF THE EVIDENCE

Defendant also argues there was insufficient evidence to convict him of CSC-I, first-degree home invasion, and aggravated stalking. At the outset, we note that this case was largely a credibility contest between complaint and defendant. "Questions regarding the weight of the evidence and credibility of witnesses are for the jury, and this Court must not interfere with that

[2] We review de novo the voluntariness of a statement. Any factual findings made by the trial court are reviewed for clear error. *People v Ryan*, 295 Mich App 388, 396; 819 NW2d 55 (2012).

role . . . ." *People v Carll*, 322 Mich App 690, 696; 915 NW2d 387 (2018). Deferring to the jury's credibility determination, there was sufficient evidence to support defendant's convictions.[3]

A. CSC-I

A person is guilty of CSC-I "if he . . . engages in sexual penetration with another person and if" "[s]exual penetration occurs under circumstances involving the commission of any other felony," or "[t]he actor is armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon." MCL 750.520b(1)(c), (e). "Sexual penetration" means "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." MCL 750.520a(r). A complainant's testimony is sufficient evidence to support a CSC conviction. See *People v DeLeon*, 317 Mich App 714, 719; 895 NW2d 577 (2016).

Complainant testified that defendant penetrated her anally and vaginally against her will. The sexual assault occurred under circumstances that involved first-degree home invasion and aggravated stalking, and complainant testified that defendant was armed with a knife. Defendant asserts that the prosecution's evidence was insufficient because the registered nurse who performed the sexual-assault examination of complainant testified that, while complainant had bruises and abrasions on her forehead, neck, chest and legs, she had no injuries to her genital area. However, the nurse also explained that it was normal for a sexual-assault victim to have no such injuries. Viewed in the light most favorable to the prosecution, the evidence was sufficient to allow a reasonable jury to conclude that defendant was guilty of each count of CSC-I.

B. FIRST-DEGREE HOME INVASION

MCL 750.110a(2) defines first-degree home invasion as follows:

> A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:
>
> (a) The person is armed with a dangerous weapon.

[3] Challenges to the sufficiency of the evidence are reviewed de novo. *People v Miller*, 326 Mich App 719, 735; 929 NW2d 821 (2019). "In evaluating defendant's claim regarding the sufficiency of the evidence, this Court reviews the evidence in a light most favorable to the prosecutor to determine whether any trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt." *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006).

(b) Another person is lawfully present in the dwelling.

First-degree home invasion "can be committed in several different ways, each of which involves alternative elements necessary to complete the crime." *People v Wilder*, 485 Mich 35, 43; 780 NW2d 265 (2010).

Here, there was sufficient evidence to convict defendant of first-degree home invasion under either a breaking-and-entering or entering-without-permission theory. See *id*. Complainant testified that she returned to her home to find the side door of her house unlocked, and it appeared to her that the lock was "pulled out" and "broken." Defendant relies on his testimony that he entered through the front door with a key, but complainant indicated that there was a latch on the front door that would have prevented entry even if the door was unlocked. Further, per the PPO, defendant did not have permission to enter the residence. There was sufficient evidence presented for the jury to conclude that defendant committed CSC-I and aggravated stalking while in the home, and complainant, who was lawfully present in her home, testified that defendant was threatening her with a knife, i.e., a dangerous weapon.

C. AGGRAVATED STALKING

"Stalking" is defined as "a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 750.411i(1)(e). A "[c]ourse of conduct" is "a pattern of conduct composed of a series of 2 or more separate noncontinuous acts evidencing a continuity of purpose." MCL 750.411i(1)(a). Conduct is considered harassment if it is "directed toward a victim" and "includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress." MCL 750.411i(1)(d). As noted, an aggravating circumstance exists when "[a]t least 1 of the actions constituting the offense is in violation of a restraining order and the individual has received actual notice of that restraining order . . . ." MCL 750.411i(2)(c).

Contrary to defendant's argument, a rational trier of fact could conclude that complainant felt threatened by or was fearful of defendant's presence at the home. Complainant testified that she was scared when she first saw defendant in her home and that she attempted to jump out of the bedroom window to get away from him. After the assault, complainant told defendant she needed some water in an attempt to get away from him. But defendant followed the victim to the kitchen and prevented her from leaving the house by standing in front of her. One of the responding officers testified that complainant appeared "very scared" and "nervous." Defendant claims that complainant could not have been scared because she offered defendant to examine her genital area. But complainant testified that she said this in response to defendant's repeated accusation that she was cheating on him, and her actions must be viewed in context of defendant's threatening and abusive behavior toward her. Viewed in that light, complainant's statement could be taken as an effort to de-escalate the situation out of fear.

Defendant also argues that because he was not formally served with the PPO, he did not have actual notice of the PPO and, thus, the prosecution could not establish a necessary element

of his aggravated-stalking charge. As discussed, the prosecution is not required to prove that a defendant was formally served with a copy of the PPO to establish actual notice. *Threatt*, 254 Mich App at 506-507. Complainant gave the PPO to defendant's brother-in-law and requested that he deliver it to defendant. Voicemails recorded thereafter indicated that defendant was aware of the PPO. Indeed, when defendant testified at trial, he admitted that he "knew of [a PPO] existing after [he] got out of the hospital" at the end of November 2018. Moreover, one of the officers who responded to the possible home invasion call on November 29, 2019, testified that he and other police officers verbally notified defendant of the PPO and told him he could not return to the complainant's residence or he would be arrested. The officer indicated that defendant stated that he understood. This was sufficient evidence for the jury to conclude that defendant had actual notice of the PPO against him at the time of the events of December 2, 2018.

V. SCORING OF OFFENSE VARIABLES (OVs)

Defendant also argues the trial court erred when it scored OV 10 and OV 11. We affirm the scoring of OV 10 but reverse the assessment of 50 points for OV 11.[4]

OV 10 addresses exploitation of a vulnerable victim. MCL 777.40(1). The trial court assessed 10 points, which is appropriate if "[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status[.]" MCL 777.40(1)(b). "Exploit" means "to manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(b).

Points may be assessed under OV 10 only for conduct involving the exploitation of a vulnerable victim. *People v Cannon*, 481 Mich 152, 157-158; 749 NW2d 257 (2008). "Vulnerability" for this purpose "means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." MCL 777.40(3)(c). Vulnerability can arise from "the existence of a domestic relationship." *Cannon*, 481 Mich at 158. A domestic relationship for this purpose "must be a familial or cohabitating relationship." *People v Jamison*, 292 Mich App 440, 447; 807 NW2d 427 (2011).

The trial court did not clearly err by assessing 10 points for OV 10. Because of the marital relationship, defendant knew where complainant lived, how to get into her home, and that their children would not be there at the time of the assault. Defendant's conduct during the assault clearly constitutes exploitation of the victim for selfish or unethical purposes. Complaint testified that defendant was verbally abusive, calling her a "whore," accusing her of cheating on him, and threatening to kill her and himself. Complainant eventually told defendant that he could look to see if she had sex the night before. He then used this as an opportunity to rape her. All of this was accomplished through exploitation of the domestic relationship.

[4] "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." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "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." *Id*.

We agree with defendant, however, that the trial court erred by assessing 50 points for OV 11, which concerns criminal sexual penetration and is scored at 50 points if "[t]wo or more criminal sexual penetrations occurred." MCL 777.41(1)(a). However, in assessing OV 11, the trial court must "not score points for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense." MCL 777.41(2)(c).

The trial court improperly assessed 50 points for OV 11. The evidence supported the conclusion that there were two penetrations arising from the December 2, 2018 assault. The first occurred when defendant penetrated complainant's anus, and the second occurred when defendant penetrated her vagina. Because the court could not count points for the penetration forming the basis of sentencing offense, there was only one sexual penetration for purposes of scoring OV 11. Therefore, the trial court should have assessed 25 points for OV 11. MCL 777.41(1)(b). Reducing OV 11 from 50 to 25 points reduces defendant's total OV score from 80 to 55. A total OV score of 55, combined with a total PRV score of 24, changes defendant's sentencing guidelines range from 126 to 210 months to 81 to 135 months. MCL 777.62 (minimum sentence ranges for Class A felonies). Because the scoring error affects defendant's appropriate guidelines range, he is entitled to resentencing. *People v Francisco*, 474 Mich 82, 92; 711 NW2d 44 (2006).

VI. CONCLUSION

Defendant's convictions are affirmed, but the case is remanded to the trial court for resentencing. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Kirsten Frank Kelly
/s/ Douglas B. Shapiro