STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 28, 2011
V	No. 295982 St. Clair Circuit Court
COLLEEN MARIE STURDEVANT, Defendant-Appellant.	LC No. 09-001993-FC

Before: TALBOT, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to murder (AWIM), MCL 750.83, unarmed robbery, MCL 750.530, and unlawful imprisonment, MCL 750.349b. The trial court sentenced defendant to concurrent prison terms of 225 months to 30 years for the AWIM conviction and 7 to 15 years for the unarmed robbery and unlawful imprisonment convictions. We affirm defendant's convictions and sentences.

I. BASIC FACTS

This case involves the unarmed robbery, imprisonment, and assault of Andrew Maurice on May 31, 2009, in Port Huron. Maurice, unknown to defendant or her boyfriend Thomas Johnson, was walking to a Speedy Q gas station, when he was approached by Johnson. Johnson offered to buy some marijuana for the two men to smoke. Maurice accepted the offer, and the two men got into a car driven by defendant.

After a stop at defendant's house, defendant drove Maurice and Johnson to a house on Beach Road. There, Johnson and another man, Martell Levens, beat and robbed Maurice and stripped him naked. They then forced Maurice back into the car. Maurice believed that defendant hit him at the Beach Road house because she remarked in the car that her hand hurt.

As defendant was driving away from the Beach Road house, Johnson began to punch Maurice. Defendant stopped the car on the side of West Water Street, and Johnson pulled Maurice from the car. Johnson continued to beat Maurice. Defendant hit Maurice twice in the back side.

Johnson put Maurice back in the car. Defendant eventually drove them to a more rural area. On the way, Johnson continued to punch Maurice, causing Maurice to black out. Johnson

pulled Maurice from the car, and the beating continued. Johnson kicked Maurice, stepped on his neck, and choked him. When defendant went to investigate the beating, Johnson asked her to grab a glass bottle from the car. Defendant retrieved the bottle, and after breaking it on the road, she used it to cut Maurice's neck. She and Johnson then drove away.

II. EVIDENCE OF DURESS

Plaintiff first argues on appeal that the trial court denied her the constitutional right to present a defense when it prevented her from providing the factual context for her claim of duress. We disagree.

Defendant never argued below that trial court denied her the right to present a defense. Accordingly, defendant's claim of error is unpreserved. *People v Morey*, 230 Mich App 152, 162; 583 NW2d 907 (1998), aff'd 461 Mich 325 (1999). We review an unpreserved claim of constitutional error for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A defendant has a federal and state constitutional right to present a defense. *People v Unger (On Remand)*, 278 Mich App 210, 250; 749 NW2d 272 (2008). Duress, a common-law affirmative defense, applies to situations where the crime committed avoids a greater harm. *People v Lemons*, 454 Mich 234, 245-246; 562 NW2d 447 (1997). "[F]or reasons of social policy, it is better that the defendant, faced with a choice of evils, choose to do the lesser evil (violate the criminal law) in order to avoid the greater evil threatened by the other person." *Id.* at 246, quoting 1 LaFave & Scott, Substantive Criminal Law, § 5.3, pp 614-615. To establish a duress defense, a defendant must introduce evidence from which the jury could conclude the following:

> A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;
>
> B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;
>
> C) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and
>
> D) The defendant committed the act to avoid the threatened harm. [*People v Dupree*, 284 Mich App 89, 100; 771 NW2d 470 (2009), aff'd 486 Mich 693 (2010) (internal quotation and citation omitted).]

According to defendant, the trial court "limited" testimony concerning Johnson's abuse of her to the time period immediately preceding the May 31, 2009 assault. Defendant points to the trial court's ruling on the prosecutor's objection after her mother testified to the change in defendant's demeanor after defendant began dating Johnson. The trial court ruled, "I don't want to prevent you from pursing a defense and I'm going to give you a lot of latitude on this, but we do have to have relevant topics. Proceed." Defendant then elicited testimony from her mother that defendant had "fingerprint bruises" on her arms on May 29, 2009. Defendant also points to the trial court's ruling on the prosecutor's objection after defendant began to testify how dating

defendant changed her. The trial court ruled, "I am going to allow you some latitude to establish enough of a record to demonstrate what her state of mind would have been on the day of the incident, but . . . the date of the incident, that's going to be controlling." Defendant then testified that defendant was aggressive toward her. He constantly put his hands on her, leaving marks on her arms. One time, he wrapped the cord of a cellular telephone charger around her neck. He verbally threatened her, saying that if she told anyone he would do worse. These threats caused defendant to stop doing her homework and even going to school. Defendant stated that she wanted to leave defendant but that she was too scared to try to leave. She, however, did attempt to leave several times, but defendant would always take her car keys or cellular telephone.

As seen in its rulings, the trial court gave defendant "some" or "a lot of" "latitude" to establish her duress defense. While defendant claims that the trial court limited the evidence that she could present, defendant did not make an offer of proof of the testimony that the trial court supposedly excluded. See MRE 103(a)(2); *People v McPherson*, 263 Mich App 124, 137; 687 NW2d 370 (2004). Defendant presented evidence concerning the elements of the duress defense, and we find no plain error in the trial court's responses to the prosecutor's objections.

III. DURESS INSTRUCTION

Plaintiff argues that because AWIM is not a homicide offense, the trial court erred in refusing to instruct the jury that duress is a defense to AWIM. We disagree.

We review de novo claims of instructional error. *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007).

Duress is not a defense to homicide. *People v Gimotty*, 216 Mich App 254, 257; 549 NW2d 39 (1996). This is because "one cannot submit to coercion to take the life of a third person, but should risk or sacrifice his own life instead." *People v Dittis*, 157 Mich App 38, 41; 403 NW2d 94 (1987); see also Wharton's Criminal Law (15th ed), § 52, pp 344-345 ("As Blackstone put it, 'he ought rather to die himself than escape by the murder of an innocent.'").

The trial court held that the fact that defendant was charged with AWIM rather than murder was "a distinction without a difference" with regard to the defense of duress. It explained that the distinction between the two crimes "has nothing to do with the actions of [the] defendant, but rather with the survival of the victim." We agree with the trial court. A defendant convicted of AWIM intended to kill the victim, but it is only because the victim survived that the defendant was not charged with murder. See *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010) (stating that the elements of AWIM are "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder"). Thus, a defendant charged with AWIM, but who claims duress, submitted to coercion by engaging in acts that the defendant intended would kill the victim. It is this course of conduct—choosing to kill someone rather than sacrificing one's own life—that the defense of duress does not protect. Accordingly, we hold that duress is not a defense to AWIM. Therefore, the trial court did not err when it refused to instruct the jury that duress was a defense to the AWIM charge.

III. OFFENSE VARIABLES

Defendant argues that the trial court erred in scoring offense variables (OVs) 4, 6, 7, and 13. We agree that the trial court abused its discretion in scoring OV 7, but disagree that the trial court committed error in its scoring of OVs 4, 6, and 13.

"A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). We will uphold a scoring decision for which there is any evidence in support. *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

Defendant argues that the trial court erred in scoring ten points for OV 4, MCL 777.34, because there was no evidence that Maurice suffered serious psychological harm. Ten points may be scored for OV 4 if a victim "[s]uffered serious psychological injury requiring professional treatment." MCL 777.34(1)(a). There is no evidence that Maurice received professional treatment, but that fact is not conclusive. MCL 777.34(2); *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004). At trial, Maurice testified that he looks over his shoulder when he walks and that he no longer trusts people. This was evidence that he suffered serious psychological injury. Accordingly, the trial court did not abuse its discretion in scoring ten points for OV 4.

Defendant claims that the trial court erred in scoring 50 points for OV 6, MCL 777.36, rather than 25 points, because she did not have a premeditated intent to kill. Fifty points may be scored for OV 6 if the defendant had the "premeditated intent to kill," whereas 25 points are to be scored if the defendant had an "unpremeditated intent to kill." MCL 777.36(1)(a), (b). "To premeditate is to think about beforehand[.]" *People v Furman*, 158 Mich App 302, 308; 404 NW2d 246 (1987). It characterizes a thought process undisturbed by hot blood. *Id.* "While the minimum length of time needed to exercise this process is incapable of exact determination, a sufficient interval between the initial thought and the ultimate action should be long enough to afford a reasonable man an opportunity to take a 'second look' at his contemplated actions." *Id.*

The trial court provided the following explanation for its finding that defendant had the premeditated intent to kill:

> [Defendant's] statement at trial was that she picked up the beer bottle at the direction of Mr. Johnson, then she herself broke the bottle, and instead of handing the bottle to Mr. Johnson, walked over, slit the throat of Andrew Maurice. That demonstrates to me sufficient time to contemplate her actions and the result of those actions. I believe she was sufficiently able to contemplate what she was doing, and she chose that conduct and that constitutes premeditation under OV6 [sic].

The trial court accurately recalled defendant's testimony. Based on defendant's testimony, one could find that she had the opportunity to take a second look at her actions. Accordingly, the trial court did not abuse its discretion in scoring 50 points for OV 6.

Defendant next argues that the trial court erred in scoring 50 points for OV 7, MCL 777.37, because she did not treat Maurice with excessive brutality. Defendant acknowledges that she cut the throat of Maurice but claims that her conduct was not excessively brutal because her

conduct was necessary to commit the offense of AWIM. A trial court may score 50 points for OV 7 if "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). In scoring OV 7, a court may only consider the defendant's conduct. *People v Hunt*, ___ Mich ___; ___ NW2d ___ (2010). Thus, only if defendant herself "commit[ed], [took] part in, or encourage[d] others to commit acts" of excessive brutality is 50 points a proper score for OV 7. *Id.* In addition, because the statutory language of OV 7 does not direct otherwise, OV 7 must be scored only by reference to the sentencing offense, which in this case is AWIM. See *People v McGraw*, 484 Mich 120, 135; 771 NW2d 655 (2009).

The phrase "excessive brutality" is not defined by statute; therefore, we may consult a dictionary. *People v Denio*, 454 Mich 691, 699; 564 NW2d 13 (1997). "Brutality" is defined as "the quality of being brutal; cruelty; savagery." *Random House Webster's College Dictionary* (1992). The adjective "excessive" means "going beyond the usual, necessary, or proper limit or degree; characterized by excess." *Id.* While brutality by a defendant is often present in the commission of crimes, the term "excessive brutality" refers to brutality that is "beyond the usual" in committing a crime. This conclusion is supported by the inclusion of the phrase "conduct designed to substantially increase the fear and anxiety a victim suffered during the offense" in OV 7. See *People v Hill*, 486 Mich 658, 668; 786 NW2d 601 (2010) (stating that a term is given meaning by its context or setting). This phrase recognizes that while a victim suffers a baseline level of fear and anxiety during the commission of a crime, OV 7 may only be scored when the defendant's conduct "substantially increases" the fear and anxiety a victim suffers. Thus, it too contemplates conduct that exceeds that which is usual in committing a crime.

Here, defendant's conduct in committing AWIM consisted of cutting Maurice's throat with a broken glass bottle. Defendant's conduct was brutal; it was savage and cruel. However, AWIM generally requires a brutal act—it requires an assault done with the intent to kill. *Ericksen*, 288 Mich App at 195-196. We conclude that defendant's act of cutting defendant's throat was not "excessively brutal," i.e., it was not beyond what was usual or necessary to commit AWIM. Compare *People v James*, 267 Mich App 675, 680; 705 NW2d 724 (2005) (concluding that the defendant, convicted of assault with intent to do great bodily harm, treated the victim with excessive brutality when he repeatedly stomped on the face of the victim, who was unconscious); *People v Wilson*, 265 Mich App 386, 396-398; 695 NW2d 351 (2005) (holding that the defendant, also convicted of assault with intent to commit great bodily harm, engaged in excessive brutality when over the course of several hours he attacked the victim with numerous weapons and choked, kicked, punched, and slapped her). Accordingly, we conclude that the trial court abused its discretion in scoring 50 points for OV 7. OV 7 should have been scored at zero points.

Finally, defendant argues that the trial court erred in scoring 25 points for OV 13, MCL 777.43. Defendant claims that because all three of her felony convictions arose from a single incident, they do not show a pattern of felonious criminal behavior. Twenty-five points may be scored for OV 13 if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c). "For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a).

In *People v Harmon*, 248 Mich App 522, 523-524; 640 NW2d 314 (2001), the defendant was convicted of four counts of making child sexually abusive material, which arose from four photographs of two girls, two pictures of each girl, taken on a single date. This Court held that the defendant's "four concurrent convictions" supported a 25-point score for OV 13. *Id.* at 532.

Defendant relies on *People v Smith*, unpublished opinion per curiam of the Court of Appeals, issued February 25, 2003 (Docket No. 229137), where the defendant was convicted of operating a vehicle while his license was revoked causing death, operating a motor vehicle while under the influence of intoxicating liquor causing death, manslaughter, and failure to stop at the scene of a serious personal injury accident. The defendant's convictions arose from one motor vehicle accident. This Court held that the defendant's four convictions did not support a 25-point score under OV 13 because, unlike the defendant's four convictions in *Harmon*, they stemmed from one incident, not four individual acts. *Id.*, slip op p 9.

In addition to *Smith* not being binding authority, MCR 7.215(C)(1); *People v Cross*, 281 Mich App 737, 738; 760 NW2d 314 (2008), *Smith* is easily distinguishable from the present case, as it was from *Harmon*. Defendant's three convictions did not stem from one incident, but from individual acts. Defendant committed three separate and distinct crimes; each conviction was based on conduct that did not form the basis for the other two convictions. During the late evening hours of May 31, 2009, defendant had ample time to cease her criminal activity, but she chose to engage in numerous criminal activities until she thought Maurice was dead. Defendant's actions on that day constituted a pattern of criminal activity. The trial court did not abuse its discretion in scoring 25 points for OV 13.

Despite the trial court's error in scoring 50 points for OV 7, defendant is not entitled to be resentenced. The scoring error does not alter the appropriate guidelines range. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

Affirmed.

/s/ Michael J. Talbot
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher