

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
June 18, 2013

v

EVERETT BAHA MUHAMMAD,
Defendant-Appellant.

No. 309769
Kalamazoo Circuit Court
LC No. 2011-001095-FH

Before: MURPHY, C.J., and FITZGERALD and HOEKSTRA, JJ.

PER CURIAM.

Defendant Everett Baha Muhammad appeals as of right his conviction for first-degree home invasion, MCL 750.110a(2). The trial court sentenced defendant as an habitual offender, second offense, MCL 769.10, to 36 to 360 months' imprisonment. We affirm.

Defendant broke into the home of the victim, his ex-girlfriend, by kicking in the back door of her home in May of 2011. After a brief confrontation, defendant left the home. The next morning, defendant once again broke into the victim's home, this time by kicking in the front door. Once inside, he confronted and allegedly assaulted the victim. Approximately one month before these incidents, the victim told defendant, who previously resided in the home, that he was no longer permitted or welcome there. The victim changed the locks and informed defendant that she had done so.

Defendant first argues that he was denied his right to a fair trial because the trial court failed to dismiss two biased jurors whom he challenged for cause. We find defendant waived this issue because he expressed satisfaction with the jury as chosen, and he failed to exercise peremptory challenges when given the opportunity to do so. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994) ("When the defendant expressed satisfaction with the jury with several peremptory challenges remaining, he waived the issue whether a juror should have been excused for cause."). Nevertheless, we find that the argument lacks merit. "[A] criminal defendant has a constitutional right to be tried by an impartial jury . . ." *People v Miller*, 482 Mich 540, 547; 759 NW2d 850 (2008), citing US Const, Am VI; Const 1963, art 1, § 20. This Court uses a four-part test "to determine whether an error in refusing a challenge for cause merits reversal." *People v Lee*, 212 Mich App 228, 248; 537 NW2d 233 (1995).

There must be a clear and independent showing on the record that (1) the court improperly denied a challenge for cause, (2) the aggrieved party exhausted

all peremptory challenges, (3) the party demonstrated the desire to excuse another subsequently summoned juror, and (4) the juror whom the party wished later to excuse was objectionable. [*Id.* at 248-249, citing *Legrone*, 205 Mich App at 81.]

Defendant challenged two jurors, Juror R and Juror M, for cause. At times during voir dire, both jurors expressed an opinion that a defendant should testify in a criminal case, and Juror R, who was eventually dismissed by defendant with a peremptory challenge, appeared to have difficulty understanding the presumption of innocence. However, both jurors ultimately gave responses to questions which indicated that they understood the burden of proof and the presumption of innocence, and the trial court was satisfied with their responses. “This Court defers to the trial court’s superior ability to assess from a venireman’s demeanor whether the person would be impartial.” *People v Williams*, 241 Mich App 519, 522; 616 NW2d 710 (2000). Accordingly, we hold that the trial court did not improperly deny defendant’s challenge to the jurors.

Next, defendant argues that the trial court plainly erred by admitting evidence of other acts of domestic violence that he committed against the victim. He argues that such evidence was not admissible under MRE 404(b) and that the evidence was inadmissible because its probative value was substantially outweighed by the danger of unfair prejudice under MRE 403. We review this issue for plain error affecting substantial rights because defendant did not object to the admission of the evidence at trial. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The prosecution offered evidence of defendant’s prior acts of domestic violence against the victim pursuant to MCL 768.27b. Generally, MRE 404(b) precludes the admission of a defendant’s other crimes, wrongs, or acts in order to show the defendant’s propensity to commit a crime. *People v Railer*, 288 Mich App 213, 219; 792 NW2d 776 (2010). “Notwithstanding this prohibition, however, in cases of domestic violence, MCL 768.27b permits evidence of prior domestic violence in order to show a defendant’s character or propensity to commit the same act.” *Id.* at 219-220.¹ MCL 768.27b provides in pertinent part:

(1) Except as provided in subsection (4)[inapplicable], in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant’s commission of other acts of domestic violence is admissible for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403.

Here, in addition to being charged with first-degree home invasion, defendant was charged with, and ultimately acquitted of, two counts of assault with intent to commit criminal sexual conduct involving sexual penetration relative to an assault allegedly committed against the victim after entering her home. This conduct fit within the meaning of “domestic violence” as defined by MCL 768.27b(5)(a)(iii) because defendant was accused of attempting to engage

¹ Defendant fails to even acknowledge MCL 768.27b, which controls the analysis, not MRE 404(b). *People v Mack*, 493 Mich 1, 2-3; 825 NW2d 541 (2012).

the victim in involuntary sexual activity by force, threat of force, or coercion. Moreover, the victim was a “family or household member” within the meaning of MCL 768.27b because she and defendant had been involved in a dating relationship. See MCL 768.27b(5)(b)(iv). Consequently, the victim’s testimony concerning defendant’s previous acts of domestic violence was admissible “for any purpose for which it [was] relevant, if it [was] not otherwise excluded under [MRE] 403.” MCL 768.27b(1).

Defendant does not argue that the other acts evidence was irrelevant, MRE 401 and 402. With respect to MRE 403, it provides that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” This Court makes “two distinct inquiries [sic] under the balancing test of MRE 403” with regard to previous acts of domestic violence that are being offered under MCL 768.27b. *People v Cameron*, 291 Mich App 599, 611; 806 NW2d 371 (2011). “First, this Court must decide whether introduction of [the defendant’s] prior-bad-acts evidence at trial was unfairly prejudicial. Then, this Court must apply the balancing test and weigh the probativeness or relevance of the evidence against the unfair prejudice.” *Id.* (internal quotation marks omitted).

Regarding the first inquiry under *Cameron*, the admission of the other acts evidence here was not unfairly prejudicial because its presentation was short and the witnesses who testified to the other acts did not provide specific details with regard to how defendant harmed the victim on previous occasions. See *Railer*, 288 Mich App at 220 (holding that other acts evidence was not inflammatory because its presentation was brief and not graphic). Given the relatively brief and non-descript testimony about the abuse, we find that the other acts evidence did not “stir such passion as to divert the jury from rational consideration of [defendant’s] guilt or innocence of the charged offenses.” *Cameron*, 291 Mich App at 611-612. While the other acts evidence presented by the prosecution was prejudicial, as is typically the case, it was not *unfairly* prejudicial. See *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998) (“Rule 403 does not prohibit prejudicial evidence; only evidence that is unfairly so.”); *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995) (noting that relevant evidence is inherently prejudicial and that unfair prejudice does not equate to damaging evidence). Moreover, defendant does not allege any unfair prejudice caused by the admission of the other acts evidence, other than that the evidence was unfairly prejudicial because it was used for propensity purposes. However, the other acts evidence in this case was admissible for propensity purposes. See, e.g., *Railer*, 288 Mich App at 219-220.

Under the second inquiry, the evidence was admissible because its probative value was not substantially outweighed by any unfair prejudice. The other acts evidence was highly probative because the victim testified that defendant first began abusing her after he became upset that she received a message from another man on a social networking website. By comparison, in the case at bar, the victim testified that defendant became upset with her after he learned she was on a date on the first evening he broke into her home. The fact that defendant abused the victim in the past because he was jealous made it more likely that he committed an act of domestic violence against her in the case at bar because he was jealous. Moreover, and for the same reason, the evidence of previous instances of domestic violence was highly probative because it demonstrated the victim’s credibility. See *Cameron*, 291 Mich App at 612 (holding

that other acts evidence can be relevant to establish the victim's credibility). Because defendant admitted to kicking in the door at the victim's home but denied assaulting her, the victim's credibility was a critical issue in this case. Defendant's prior acts of domestic violence were therefore highly probative where they tended to prove one of the most critical issues in the case. See *People v Pattison*, 276 Mich App 613, 616; 741 NW2d 558 (2007). Accordingly, "[a]ny prejudicial effect of admitting the bad-acts evidence did not substantially outweigh the probative value of the evidence . . ." *Cameron*, 291 Mich App at 612. The evidence was admissible.

Additionally, defendant appears to argue that the other acts evidence should have been excluded because the prosecution did not give him notice of its intent to use the evidence before trial. MCL 768.27b(2) requires the prosecution to give a defendant at least 15 days' notice of its intent to use such evidence. On December 21, 2011, the prosecution filed notice of its intent to use other acts of domestic violence at trial pursuant to MCL 768.27b. Trial began on February 8, 2012; the prosecution's notice filed on December 21, 2011, was given more than the requisite 15 days before trial.

Next, defendant, without citing any particular testimony or explaining his argument, contends that in addition to being impermissible propensity evidence, the evidence of domestic violence presented at trial was inadmissible hearsay. Because he gives only cursory treatment to this assertion, and it is not in his statement of questions presented, we need not consider his argument. *People v Fonville*, 291 Mich App 363, 383; 804 NW2d 878 (2011); *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Moreover, we have reviewed his argument and find it to be meritless.

Defendant also argues that his trial counsel was ineffective for failing to object to the admission of the other acts evidence. Because any objection to the evidence would have been futile, we decline to find defendant's trial counsel ineffective. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Next, defendant argues that the trial court abused its discretion by failing to grant a mistrial after the victim, in two unresponsive answers, testified that defendant had previously been incarcerated. We review this issue for an abuse of discretion. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003). "A mistrial is warranted only when an error or irregularity in the proceedings prejudices the defendant 'and impairs his ability to get a fair trial.'" *People v Waclawski*, 286 Mich App 634, 708; 780 NW2d 321 (2009), quoting *People v Bauder*, 269 Mich App 174, 195; 712 NW2d 506 (2005). Here, each time the victim mentioned that defendant was imprisoned for a previous offense, her response was volunteered and not elicited by the prosecutor. Moreover, the victim's first reference to defendant's incarceration was stricken from the record. Generally, "an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995); see also *People v Mahone*, 294 Mich App 208, 213; 816 NW2d 436 (2011) ("In any event, unresponsive answers may work a certain amount of mischief with the jury, but they are generally not considered prejudicial errors unless egregious or not amenable to a curative instruction.") (internal quotation marks omitted). Although no curative instruction was given, defendant, after initially requesting such an instruction, expressed satisfaction with the jury instructions as given. He cannot claim that he is entitled to relief when he agreed that an instruction was unnecessary. See *Haywood*, 209 Mich App at 229. Additionally, defendant was

not denied a fair trial because he later testified and was impeached with his previous felony conviction. Thus, evidence of defendant's previous conviction was properly before the jury, which could easily have inferred that he was previously incarcerated.

Next, defendant argues that the evidence produced at trial was insufficient for a rational jury to convict him of first-degree home invasion. "We review de novo a challenge on appeal to the sufficiency of the evidence." *Ericksen*, 288 Mich App at 195. However, while the articulated standard of review is de novo, appellate review of a sufficiency claim is deferential to the jury and its verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). For instance, this Court "examine[s] the evidence in a light most favorable to the prosecution, resolving all evidentiary conflicts in its favor, and determine[s] whether a rational trier of fact could have found that the essential elements of the crime were proved beyond reasonable doubt." *Ericksen*, 288 Mich App at 196. As provided in MCL 750.110a(2), the three elements of first-degree home invasion are set up as alternatives. *People v Wilder*, 485 Mich 35, 43; 780 NW2d 265 (2010). The first element is satisfied by either: (i) breaking and entering a dwelling; or (ii) entering a dwelling without permission. *Id.* MCL 750.110a(1)(c) defines "without permission" as "without having obtained permission to enter from the owner or lessee of the dwelling or from any other person lawfully in possession or control of the dwelling." One who has the right to enter does not commit a breaking. *People v Brownfield (After Remand)*, 216 Mich App 429, 432; 548 NW2d 248 (1996). The second element of the offense is satisfied by either: (i) entering with the intent to commit a felony, larceny, or assault in the dwelling; or (ii) actually committing a felony, larceny, or assault while present in, or while entering or exiting the dwelling. *Wilder*, 485 Mich at 43. Finally, the third element is satisfied if, while a defendant is entering, present in, or exiting the dwelling: (i) the defendant is armed with a dangerous weapon; or (ii) another person is lawfully present in the dwelling. *Id.*

The only element defendant contests is whether he had permission to enter the victim's home. We find that the evidence was sufficient for a rational jury to find, beyond a reasonable doubt, that defendant did not have permission to enter the victim's home. The victim told defendant he did not have permission to enter, she changed the locks on her home, and she informed defendant that she changed the locks. Although defendant testified to the contrary, the credibility dispute between the victim's account and defendant's account must be resolved in a way that supports the jury's verdict. *Nowak*, 462 Mich at 400. Thus, the prosecution presented sufficient evidence for a rational jury to find that defendant did not have permission to enter the victim's home.

Defendant disagrees and argues, without providing any support, that he was a lessee of the victim and that he had a right to enter the home until he was evicted. There is no support in the record for such a claim, as the victim testified that she never had a lease agreement with defendant, but rather, that he simply lived with her as her guest because he was her boyfriend. Therefore, defendant was merely a guest in the victim's home, and he was not entitled to notice and other protections accorded lessees under landlord-tenant law before the victim asked him to leave when she ended their relationship. See *Ann Arbor Tenants Union v Ann Arbor YMCA*, 229 Mich App 431, 438; 581 NW2d 794 (1998) ("The distinction between a guest and a tenant is significant whereby a guest is not entitled to notice of termination and can be the subject of self-help eviction, including a lockout, by the proprietor, while a tenant has protection against such measures."). Defendant relies on *People v Rider*, 411 Mich 496; 307 NW2d 690 (1981), wherein

our Supreme Court held that there can be no unlawful breaking if a person has a right to enter a dwelling and that when an individual has a key to a dwelling with no qualifications or restrictions on its use, there can be no breaking if the key is used to enter the dwelling. Here, defendant had a key, but there was evidence that the locks had been changed by the victim, that the victim had informed defendant about the new locks, that the victim told defendant he was no longer welcome or permitted to enter her home, and that defendant entered the home by kicking in doors and not through the use of a key. Accordingly, defendant's reliance on *Rider* is entirely unavailing.

Next, defendant argues that the trial court erred by scoring one point under offense variable (OV) 16. MCL 777.46(1) sets forth the scoring of OV 16, which pertains to "property obtained, damaged, lost, or destroyed." In pertinent part, the statute directs the trial court to score one point where "[t]he property had a value of \$200.00 or more but not more than \$1,000." MCL 777.46(1)(d). It is unnecessary for us to resolve this argument, given that, assuming error in the scoring of one point for OV 16, it would not change defendant's recommended minimum sentence range under the legislative guidelines. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).² Additionally, because this argument is meritless, we reject defendant's claim that his trial counsel was ineffective for failing to raise the issue. *Ericksen*, 288 Mich App at 201.

Defendant next raises a host of unpreserved sentencing issues. We find that he is not entitled to relief on any of these issues because he fails to demonstrate plain error requiring reversal. *Carines*, 460 Mich at 763-764. First, defendant argues that the trial court erred by failing to consider mitigating evidence, including his acceptance of responsibility, when it sentenced defendant. However, we have held that the trial court is not required to consider such evidence in sentencing a defendant. *People v Osby*, 291 Mich App 412, 416; 804 NW2d 903 (2011). Next, defendant argues that the trial court failed to satisfy the articulation requirement when it sentenced him. Here, the trial court satisfied the articulation requirement because it "expressly relie[d] on the sentencing guidelines in imposing the sentence . . ." *People v Conley*, 270 Mich App 301, 313; 715 NW2d 377 (2006). Defendant further argues that he was entitled to a downward departure from the guidelines range because of his mental illness. A downward departure requires "substantial and compelling" reasons for departing from the guidelines range, *People v Babcock*, 469 Mich 247, 251; 666 NW2d 231 (2003), and none exist in the case at bar. Moreover, the record belies defendant's claim that he suffered from a mental illness.

² Defendant's "prior record variable" (PRV) score totaled 25 points, placing him at level D on the PRV-OV grid for purposes of a class B felony, which is the crime class for first-degree home invasion. MCL 777.63; MCL 777.16f. Defendant's total OV score was one point, placing him at OV level I on the PRV-OV grid for a class B felony. MCL 777.63. Assuming the total OV score should be zero points, defendant would still be at OV level I on the grid. *Id.* Taking into consideration defendant's status as a second-habitual offender, MCL 777.21(3)(a), the minimum sentence range with either one or zero total OV points is 36 to 75 months, MCL 777.63.

Defendant also argues that the trial court failed to assess his rehabilitative potential and, as a result, sentenced defendant based on incomplete information. Although MCR 6.425(A)(1)(e) requires a defendant's PSIR to include, depending on the circumstances, information concerning the defendant's health, substance abuse history, and current mental health evaluations, it does not require the trial court to order an assessment of the defendant's rehabilitative potential in light of these factors. Moreover, contrary to defendant's claims, the PSIR does not indicate that he has any mental health or substance abuse problems.

Next, defendant asserts without any accompanying argument that "the sentences [sic] imposed are excessive under both federal constitutional and state law principles." He cites US Const, Am VIII, and Const 1963, art 1, § 16, so we assume that he is arguing that his sentence was cruel and/or unusual. However, defendant's sentence was within the guidelines range. A sentence that is within the guidelines range is presumptively proportionate, and a proportionate sentence is neither cruel nor unusual. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). Defendant's minimum sentence of 36 months was at the extreme low end of the guidelines range, and the maximum sentence of 360 months was consistent with MCL 750.110a(5) (20-year maximum for first-degree home invasion) and MCL 769.10 (second-habitual offender can be subject to 1½ times the statutory maximum for a crime). We find that the sentence was proportionate to the offense and the offender, and therefore, not cruel or unusual.

Because we rejected each of defendant's claims of error related to his sentence, we also reject his claim that his trial counsel was ineffective for failing to raise these meritless objections. *Ericksen*, 288 Mich App at 201.

Lastly, defendant argues that the trial court erred when it instructed the jury on the elements of first-degree home invasion, given that it failed to instruct the jury on the statutory definition of "without permission" and failed to instruct the jury that defendant was a lessee who had a right to enter the victim's home. We find that defendant waived this issue because he expressed satisfaction with the jury instructions as they were given. *People v Chapo*, 283 Mich App 360, 372-373; 770 NW2d 68 (2009) ("Counsel's affirmative expression of satisfaction with the trial court's jury instruction waived any error."). Moreover, we find the issue to be meritless. First, defendant's claim that the trial court should have instructed the jury on the statutory definition of "without permission" as found in MCL 750.110a(1)(c) is meritless because the statutory definition simply focuses on who can give permission to enter a dwelling. Here, there was no dispute that if defendant had permission to enter the home, it was and had to have been from the victim, as she was the sole owner of the home and had given defendant such permission in the past. Thus, the only issue for the jury to resolve was whether defendant had permission to enter the home from the victim, not whether defendant had permission to enter the home from another individual who could have given such permission under MCL 750.110a(1)(c). Additionally, the trial court specifically instructed the jury that the prosecution was required to prove beyond a reasonable doubt that defendant "entered a dwelling without permission." As such, the trial court's given instructions presented the issue to the jury in a fair manner that was sufficient to protect defendant's rights, and defendant is not entitled to relief. See *People v Kowalski*, 489 Mich 488, 501-502; 803 NW2d 200 (2011). Second, we reject defendant's claim that the trial court should have instructed the jury that defendant was a lessee who had an interest in the home. There was no support in the record for such an instruction. *People v McGhee*, 268

Mich App 600, 606; 709 NW2d 595 (2005) (the trial court is only required to instruct on a party's theory or defense if that theory or defense is supported by the evidence).

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra