STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEYANEE RANIECE TURNER,

Defendant-Appellant.

UNPUBLISHED
August 20, 2020

No. 348859
Wayne Circuit Court
LC No. 18-008855-01-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT ALLEN LESURE, also known as ROBERT ALLEN LESUER,

Defendant-Appellant.

No. 348873
Wayne Circuit Court
LC No. 18-008691-01-FC

Before: RONAYNE KRAUSE, P.J., and SAWYER and BOONSTRA, JJ.

PER CURIAM.

These consolidated appeals arise from the convictions of defendants, Keyanee Turner and Robert Lesure, following a joint jury trial. Both defendants were convicted of first-degree child abuse, MCL 750.136b(2), and Turner was also convicted of torture, MCL 750.85. The trial court sentenced Turner to 18 years and 9 months to 35 years' imprisonment for each conviction, to be served concurrently. The court sentenced Lesure to 15 to 35 years' imprisonment for his conviction. Turner appeals as of right in Docket No. 348859, and Lesure appeals as of right in Docket No. 348873. We affirm defendants' convictions and sentences, but we remand for the ministerial task of correcting Turner's sentencing guidelines score.

I. GENERAL BACKGROUND

Defendants' convictions arise from charges related to the treatment of Turner's four-year-old daughter, AR. The jury convicted both defendants of first-degree child abuse and also convicted Turner of torture, but acquitted Lesure of torture related to AR. Turner was also charged with abusing her older daughters, 11-year-old HT and 13-year-old MT. The jury acquitted Turner of second-degree child abuse, MCL 750.136b(3), and third-degree child abuse, MCL 750.136b(5), related to the older children. Similarly, Lesure was charged with but acquitted of second-degree child abuse based on his treatment of MT.

In the summer of 2018, Turner lived in a two-story home with her three daughters, AR, HT, and MT. Lesure either lived in the home or was a very frequent visitor. During that summer, HT, then 10 years old, spent part of July and August with a maternal aunt who lived in New York. During that visit, HT "told [her] aunt and said that [Lesure] was putting his hands on [AR]." The aunt testified that she and her husband became concerned, so they gave HT a phone for the purpose of emergencies and obtaining evidence. HT testified that after she returned to Michigan, she generally either hid it or gave it to MT, "[b]ecause there were cameras in our room." HT and MT used the phone to call or text the aunt, and also to record "what was going on." Among other events, HT and MT testified that through the heat vents, they could hear AR "screaming," crying, and begging for help from the basement for several days while defendants were also in the basement. HT and MT also heard both of defendants' voices and what they described as loud slapping or punching noises. AR was four years old at the time.

On August 27, 2018, AR returned to Turner's home from her regular weekend visit with her biological father. Her father testified that AR did not wish to return to Turner's house, because she did not want to return to "the monsters." Over the next three days, events transpired in the home that prompted either MT or HT to contact their aunt. Several extended family members then concluded that family intervention was required. Consequently, on August 30, 2018, two cousins went to Turner's home to check on the children's well-being. During this visit, the cousins took Turner to the grocery store. While Turner was briefly absent from the home, MT, HT, and AR climbed out a kitchen window and began running to their grandmother's nearby home. Both HT and MT testified that when they brought AR out of the basement, she was unable to stand or walk. As a consequence, when the three siblings fled the house, HT and MT took turns carrying AR. As they fled, the children were intercepted by the cousins who had moments earlier dropped Turner back at the family home. The cousins took the children to the police station. From there, AR was transported to the hospital, where she was admitted to the pediatric intensive care unit. She remained hospitalized for four days.

On September 1, 2018, Turner was interviewed; a recording of the interview was played for the jury. Turner admitted that she tied AR to a folding chair in the basement and "spanked" AR with a leather belt. Turner denied that she punched AR's legs, but explained that the "loop" marks on AR were from the "whupping." The other children testified that Turner frequently punched them as a form of "discipline." Turner also admitted that AR tried to get away, but could not because she was tied up. She also acknowledged that the older children probably heard what was going on, but denied that they would have seen AR tied up. During the "spanking," AR urinated on herself. Turner initially denied that Lesure was present, but eventually admitted that he was present while AR was tied up. Turner initially claimed that bruising on AR's lip came

from AR chewing on the inside of her mouth, but admitted that she "popped" AR in the mouth on one occasion, meaning she smacked AR with an open hand.

The medical testimony established that AR suffered serious internal and external injuries. When AR was taken to the emergency room and admitted to the pediatric intensive care unit, she presented with a distended abdomen, among other things. A blood workup indicated that her hemoglobin was low, which was indicative of a low blood count. Her AST and ALP levels were elevated, suggesting injury to the liver. AR's amylase and lipase were irregular, suggesting an injury to the pancreas. Her BUN and creatinine levels were also elevated, consistent with dehydration and kidney injury. AR also had an elevated creatine phosphokinase, which is elevated when the body has experienced a breakdown of muscles. Related to this condition was a finding that AR was suffering from rhabdomyolysis, or "rhabdo," a condition in which muscle tissue breaks down, releasing substances into the blood that can cause kidney damage.

A CT scan of AR's abdomen revealed a prominent pancreas, which correlated with the lab work that suggested injury to that organ. Dr. Speck, a pediatric surgeon, explained that the pancreas is located in the abdomen right in front of the spine. In front of the pancreas is the transverse colon. Because of the location of the organ, it would take a significant degree of blunt-force trauma to the abdomen to injure the pancreas. The CT scan also revealed that AR's liver was very swollen. Dr. Speck explained that this finding suggested trauma to the liver. The CT scan also revealed free fluid, i.e., blood, in the space around the intestines and liver. This internal bleeding explained the distension of AR's belly. Dr. Speck explained that the intestines could be the potential source of the blood. Dr. Speck opined that AR's injuries would have been potentially life-threatening if AR had not received medical treatment.

Finally, Dr. Speck, along with several other witness, testified regarding the severe bruises, marks, and cuts all over AR's body. Her external injuries included what appeared to be fingernail marks; scratches; and large bruises on her arms, legs, neck, and buttocks. Photographs also substantiated the presence of severe physical injuries consistent with being beaten with a belt. AR was not able to talk well, and her throat was swollen. She eventually retained scars all over her body, including her back, legs, and face; she also required physical therapy for her hands.

After their arrest, Turner was charged with torture, and one count each of first, second, and third-degree child abuse. Lesure was charged with torture, and one count each of first and second-degree child abuse. All three daughters were identified as victims of defendants' abuse. The prosecution proceeded on the theory that both defendants were active perpetrators and aiders or abettors. Defendants were acquitted of charges related to the alleged abuse of MT and HT, and Lesure was acquitted of torture related to AR, but the jury convicted both defendants of first-degree child abuse related to AR and also convicted Turner of torture for her treatment of AR.

II. SUFFICIENCY OF THE EVIDENCE (DEFENDANT TURNER)

Turner challenges the sufficiency of the evidence to support her convictions of first-degree child abuse, MCL 750.136b(2), and torture, MCL 750.85(1), based on her treatment of her daughter, AR. This Court reviews de novo challenges to the sufficiency of the evidence. *People v Lockett*, 295 Mich App 165, 180; 814 NW2d 295 (2012). The evidence must be viewed in the light most favorable to the prosecution to determine if any rational trier of fact could have found

that the essential elements of the crime were proven beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012).

A. TORTURE

Torture is proscribed by MCL 750.85, which provides, in relevant part:

> (1) A person who, with the intent to cause cruel or extreme physical or mental pain and suffering, inflicts great bodily injury or severe mental pain or suffering upon another person within his or her custody or physical control commits torture and is guilty of a felony punishable by imprisonment for life or any term of years.
>
> (2) As used in this section:
>
> (a) "Cruel" means brutal, inhuman, sadistic, or that which torments.
>
> (b) "Custody or physical control" means the forcible restriction of a person's movements or forcible confinement of the person so as to interfere with that person's liberty, without that person's consent or without lawful authority.
>
> (c) "Great bodily injury" means either of the following:
>
> (i) Serious impairment of a body function as that term is defined in section 58c of the Michigan vehicle code, 1949 PA 300, MCL 257.58c.
>
> (ii) One or more of the following conditions: internal injury, poisoning, serious burns or scalding, severe cuts, or multiple puncture wounds.
>
> (d) "Severe mental pain or suffering" means a mental injury that results in a substantial alteration of mental functioning that is manifested in a visibly demonstrable manner caused by or resulting from any of the following:
>
> (i) The intentional infliction or threatened infliction of great bodily injury.
>
> (ii) The administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt the senses or the personality.
>
> (iii) The threat of imminent death.
>
> (iv) The threat that another person will imminently be subjected to death, great bodily injury, or the administration or application of mind-altering substances or other procedures calculated to disrupt the senses or personality.
>
> (3) Proof that a victim suffered pain is not an element of the crime under this section.

Thus, in essence, torture is a specific-intent crime committed against a person under restraint or confinement by the defendant.

We initially observe that the evidence permits no possible doubt that AR suffered "great bodily injury," given the extent and nature of her internal and external injuries as described above. In addition, the evidence showed that AR suffered serious impairment of a body function. The torture statute adopts the definition of "serious impairment of a body function" from the Michigan vehicle code. MCL 750.85(2)(c)(*i*). The loss of use of a limb is included in the nonexclusive lists of serious impairments in MCL 257.58c(a). The loss need not "be long-lasting or permanent." *People v Thomas*, 263 Mich App 70, 77; 687 NW2d 598 (2004). As noted, AR was unable to walk when she was rescued by the older children. There was no evidence that AR's inability to walk was permanent, but the evidence was sufficient to enable the jury to find beyond a reasonable doubt that AR's temporary loss of the use of her legs constituted serious impairment of a body function.

Finally, the evidence established that Turner tied AR, a four-year-old child, to a chair so tightly that she sustained bruises all over her arms and legs. Thus, AR was unambiguously within Turner's "custody or physical control." AR's screams and pleas for release demonstrate that her restraint was not consensual. Although a parent has *some* lawful authority to discipline the parent's children, the intentional infliction of serious injury is far outside the scope of that authority. See, e.g., *People v Hicks*, 149 Mich App 737, 743-744; 386 NW2d 657 (1986); see also *People v Green*, 155 Mich 524, 533; 119 NW 1087 (1909) ("[I]t is the unquestionable right of parents and those in loco parentis to administer such reasonable and timely punishment as may be necessary to correct growing faults in young children; but his right can never be used as a cloak for the exercise of malevolence or the exhibition of unbridled passion on the part of a parent."). All of the elements of torture other than specific intent were clearly established beyond any reasonable doubt.

Turner thus argues that the evidence was insufficient to establish that she acted with the intent to cause cruel or extreme physical or mental pain and suffering. We disagree. Turner's conduct could hardly be accidental or inadvertent, but as noted, torture is a specific-intent crime. "[B]ecause it can be difficult to prove a defendant's state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice to establish the defendant's state of mind, which can be inferred from all the evidence presented." *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008). A defendant's intent may be inferred "from his words or from the act, means, or the manner employed to commit the offense." *People v Hawkins*, 245 Mich App 439, 458; 628 NW2d 105 (2001) (footnotes omitted).

The evidence shows that Turner tied a four-year-old child to a chair and beat her to the point of sustaining severe internal injuries and leaving permanent scars, while the child screamed and begged to be released. AR would have been utterly helpless, unable to protect herself, incapable of escaping, and powerless to even slightly deflect any of the impending blows. Turner could not possibly have been unaware that she was inflicting serious pain on AR. Likewise, even if physical discipline might ever be appropriate, the severity of the beatings inflicted by Turner was grossly disproportionate to AR's age. This evidence allowed the jury to find that Turner intended that AR would feel the full physical and emotional impact of being beaten with a leather belt by a parent—a person to whom a child, especially a four-year-old child, would naturally look for security, protection, and guidance. As noted, AR also sustained severe and potentially life-

threatening injuries, as well as permanent scarring. In general, the severity of an injury can be evidence of a specific intent to cause an equivalent quantum of harm, even if the actual injury received was not the particular injury intended. See *People v Miller*, 91 Mich 639, 642-645; 52 NW 65 (1892). The jury could conclude beyond a reasonable doubt that Turner intended to cause AR cruel or extreme physical or mental pain and suffering.

B. FIRST-DEGREE CHILD ABUSE

The elements of first-degree child abuse are (1) the person, (2) knowingly or intentionally (3) causes serious physical or mental harm to a child. MCL 750.136b(2). "Serious physical harm" is defined by the statute as "any physical injury to a child that seriously impairs the child's health or physical well-being, including but not limited to, brain damage, a skull or bone fracture, subdural hemorrhage or hematoma, dislocation, sprain, internal injury, poisoning, burn or scald, or severe cut." MCL 750.136b(1)(f). A conviction for torture does not preclude a conviction for first-degree child abuse, despite the overlapping evidence. MCL 750.85(4). The disturbing evidence discussed above, which we need not repeat, clearly establishes that the jury could find beyond a reasonable doubt that Turner intended to cause serious physical injury to AR.

Turner argues that she merely disciplined AR to the point where the child, unfortunately but simply, required rehydration and physical therapy. As noted, Turner's conduct exceeded the scope of anything recognized in a civilized society as mere "discipline." In any event, it is clear that the jury rejected this theory and found the medical evidence compelling and the testimony of Turner's older daughters credible, particularly in light of Turner's own admissions, as is its right. *People v Howard*, 50 Mich 239, 242-243; 15 NW 101 (1883). "The prosecution need not negate every reasonable theory consistent with the defendant's innocence, but merely introduce evidence sufficient to convince a reasonable jury in the face of whatever contradictory evidence the defendant may provide." *People v Konrad*, 449 Mich 263, 273 n 6; 536 NW2d 517 (1995). "This Court should not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses." *People v Muhammad*, 326 Mich App 40, 60; 931 NW2d 20 (2018) (quotation and alteration omitted). Accordingly, there is no merit to Turner's argument that there was insufficient evidence to support her convictions.

III. MOTION FOR MISTRIAL AND REMOVAL OF JUROR 8

Turner and Lesure both argue that the trial court abused its discretion when it denied their motions for a mistrial, and instead, removed Juror 8, who allegedly was exposed to extraneous influences. We disagree, and we commend the trial court for its careful handling of the matter.

A. PRINCIPLES OF LAW

"A motion for a mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs the defendant's ability to get a fair trial." *People v Lugo*, 214 Mich App 699, 704; 542 NW2d 921 (1995). "For a due process violation to result in reversal of a criminal conviction, a defendant must prove prejudice to his or her defense." *People v Odom*, 276 Mich App 407, 421-422; 740 NW2d 557 (2007). Further, the moving party must establish that the "error complained of is so egregious that the prejudicial effect can be removed in no other way." *People v Gonzales*, 193 Mich App 263, 266; 483 NW2d 458 (1992). A mistrial is therefore

warranted only if the jury was exposed to extraneous influences that "created a real and substantial possibility that they could have affected the jury's verdict." *People v Budzyn*, 456 Mich 77, 88-89; 566 NW2d 229 (1997).

This Court reviews for an abuse of discretion a trial court's denial of a motion for a mistrial. *People v Dickinson*, 321 Mich App 1, 18; 909 NW2d 24 (2017). A trial court's decision to remove a juror is also reviewed for an abuse of discretion. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001). An abuse of discretion occurs when the trial court chooses an outcome that is outside the range of principled outcomes. *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010). This Court also reviews for clear error a trial court's factual findings, including its determination "whether the prosecutor intended to goad the defendant into moving for a mistrial." *People v Dawson*, 431 Mich 234, 258; 427 NW2d 886 (1988). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing Court is left with a definite and firm conviction that a mistake has been made." *People v Mullen*, 282 Mich App 14, 22; 762 NW2d 170 (2008) (quotation omitted).

B. COMPLAINED-OF EVENTS

During a lunch break after HT's testimony, an assistant prosecutor only identified as "Ms. McGee," who had apparently been attending the trial as an observer, made a comment to a victim's advocate who was also observing the trial. While entering an elevator, McGee said to the advocate, "That's a lot for an 11-year-old girl." McGee explained that the comment was made as the elevator door opened and she stepped in with the victim's advocate behind her. Unfortunately, Juror 8 was in the elevator. McGee asserted that when the elevator door opened, she had not seen Juror 8 standing in the corner of the elevator near the buttons. After this comment was made, apparently another victim's advocate who was present remarked, "We can't talk about this." After the matter was brought to the trial court's attention, it was established that Juror 8 had "tuned them out" and only heard "something like" "that questioning." No other jurors were present, Juror 8 did not discuss the matter with any of the other jurors, and Juror 8 denied that the comment affected her impartiality.

Defendants requested a mistrial. The trial court disagreed on the grounds that none of the other jurors were made aware of the conversation, or even the reason why Juror 8 was being singled out, and there was no indication that Juror 8 was actually prejudiced in any way. The trial court offered to dismiss Juror 8 instead. Defendants declined, insisting that only a mistrial would suffice, and asserting that it would be unjust to deprive them of the opportunity to have the case tried by the jury they selected. The trial court expressed doubt that even Juror 8 had been tainted, let alone any other jurors, but "to err on the side of caution," the trial court dismissed Juror 8.

C. MISTRIAL

As an initial matter, the record is devoid of any indication that McGee's comment amounted to intentional misconduct. Turner argues that the elevators in the courthouse "are small and used routinely by the many jurors who frequent that building on any given day." Certainly, discussing a case in a public area was unwise. However, to accept Turner's argument that McGee intended to provoke a mistrial—beyond our inability to imagine what possible gain there would

be in such an outcome[1]—would require McGee to have predicted that a juror from one specific trial would just happen to be on one specific elevator and to have timed her comment precisely. The absurdity of such a proposition aside, there is no evidence suggesting that McGee had either intent or motive to do so. Negligence is generally not grounds for a mistrial. *People v Dawson*, 431 Mich 234, 257; 427 NW2d 886 (1988). Furthermore, the trial court indicated that it found McGee credible. We find nothing in the record or in defendants' arguments to suggest that we should disregard the deference afforded to such a determination. *McGonegal v McGonegal*, 46 Mich 66, 67; 8 NW 724 (1881); *In re Loyd*, 424 Mich 514, 535; 384 NW2d 9 (1986).

The record is equally devoid of any evidence that any juror other than Juror 8 was aware of McGee's comment, or even of the reason why Juror 8 was being separately questioned. McGee and Juror 8 both indicated that no other jurors had been present, and Juror 8 stated that she had not discussed the comment or the reason for her questioning with the other jurors—who did not even inquire. In any event, Juror 8 clearly had only an extremely vague understanding of McGee's comment. After dismissing Juror 8, when the jury was brought back in, the trial court explained only that the trial would proceed with 13 jurors, further stating, "So please everyone stay healthy because we only have one alternate now." The jury would have only received the impression that Juror 8 may have become ill. Therefore, there is no evidence that the jury was exposed to any extraneous influence, much less intentionally exposed to any influence that might have affected its verdict. In other words, the remaining jurors remained oblivious to any perceived controversy. Defendants have failed to show any prejudice that inured to them as a result of the comments. The trial court did not abuse its discretion by denying defendants' motions for a mistrial.

D. DISMISSAL OF JUROR 8

Defendants also argue that the trial court abused its discretion by dismissing Juror 8. Defendants argue that there was no reason to disqualify Juror 8, and they were entitled to have the jury as originally empaneled hear and decide the case. Under the circumstances, we disagree.

Pursuant to MCR 6.411 and MCL 768.18(1), the trial court and the parties selected fourteen jurors. Thus, *all* of the jurors were deemed acceptable by the parties. A trial court may dismiss jurors during the case if the trial court deems it necessary to do so. MCL 768.18. The clear purpose of the statute and court rule is precisely to accommodate situations like the one at bar, where an unforeseen circumstance causes a need to excuse a juror from further service.

> In any event, this Court has determined that, while a defendant has a fundamental interest in retaining the composition of the jury as originally chosen, he has an equally fundamental right to have a fair and impartial jury made up of persons able

[1] Cf., *Dawson*, 431 Mich at, 258-259, in which "[t]he prosecutor's case was going badly," the prosecutor was clearly hoping for a recess in order "to marshal his forces over the weekend," and when no recess appeared forthcoming, the prosecutor asked a question "which he clearly knew was improper." The prosecutor then declined to argue against the ensuing motion for a mistrial. In contrast, nothing in this record suggests that the prosecution had any reason to suspect its case against either defendant would benefit from starting anew. Indeed, McGee's comment implies that she would not have believed putting HT on the stand again would be desirable.

> and willing to cooperate, a right that is protected by removing a juror unable or unwilling to cooperate . . . Removal of a juror under Michigan law is therefore at the discretion of the trial court, weighing a defendant's fundamental right to a fair and impartial jury with his right to retain the jury originally chosen to decide his fate. [*Tate*, 244 Mich App at 562.]

Nothing in the record suggests that any of the seated fourteen jurors were pre-selected to be dismissed as alternates before deliberation. Rather, the trial court stated during its opening instructions that "we will draw lots to decide which of the two of you will be dismissed in order to form a jury of 12."

We find it incongruous for defendants to argue that on the one hand, McGee's comment was so egregious and damaging that it warranted a mistrial, and on the other hand Juror 8—the only juror who was at all aware of McGee's comment—should have remained on the jury. As discussed, there was no evidence that any juror other than Juror 8 was tainted in any way. Although defendants rejected the trial court's offer to dismiss Juror 8, insisting on only a mistrial, the trial court was obligated to refrain from granting a mistrial if, in its discretion, a less-drastic alternative would suffice to protect defendants' interests. *People v Dry Land Marina, Inc*, 175 Mich App 322, 327; 437 NW2d 391 (1989). As discussed, a mistrial was unwarranted. However, it was not unreasonable to "err on the side of caution" by dismissing Juror 8. The other jurors might have become curious as to why Juror 8 had been singled out. The trial was in the early stages and it is unclear how the matter might evolve during the remainder of the proceedings. The court effectively forestalled any such inquiry about Juror 8's absence because based on what the court revealed to the remaining jurors, they could have reasonably concluded that Juror 8 had left for medical reasons.

It is not clear to us that it would have been an abuse of discretion to leave Juror 8 on the jury. However, removing Juror 8 was a reasonable method by which the court could ensure and protect defendants' fundamental right to have a fair and impartial jury consider the evidence. The court had principled reasons for dismissing the juror, particularly considering defendants' concerns that the situation with Juror 8 compromised their ability to receive a fair and impartial trial, including that the juror might reveal the assistant prosecutor's comments to the other jurors. The trial court's decision to err on the side of caution was not outside the range of principled outcomes, so it was not an abuse of discretion.

IV. SENTENCING

Both defendants argue that the trial court incorrectly scored several offense variables of the sentencing guidelines. Although the trial court mis-scored OV 12, the error does not affect defendants' sentence guidelines ranges and therefore does not require resentencing. Lesure also argues that he is entitled to be resentenced because his 15-year minimum sentence is unreasonable and disproportionate. We disagree.

A. SCORING OF OFFENSE VARIABLES

When reviewing a trial court's scoring decision, the 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). We review de novo the trial court's determination whether the facts as found satisfy the scoring conditions articulated in the statute. *Id*.

1. OV 1

Lesure first challenges the trial court's scoring of OV 1, which "assesses points for the aggravated use of a weapon." *People v Morson*, 471 Mich 248, 256; 685 NW2d 203 (2004). Ten points are properly assessed for OV 1 if "[t]he victim was touched by any other type of weapon." MCL 777.31(1)(d). Further, MCL 777.31(2)(b) provides that "[i]n multiple offender cases, if 1 offender is assessed points for the presence or use of a weapon, all offenders shall be assessed the same number of points." Lesure contends that because he was not present during the beating with the leather belt, the trial court erred when it assessed 10 points for OV 1. We disagree.

The evidence supported a finding that defendants, over the course of three days, aided and actively participated in the abuse of AR. Both defendants were heard in the basement with AR. The evidence established that Lesure was present in the bedroom when Turner bound AR to a chair and beat her with a leather belt. MT recalled hearing defendants and AR in the upstairs bedroom. AR was screaming and saying "it hurts" and "stop." MT specifically recalled hearing Turner and Lesure telling AR to "shut up." Turner eventually admitted during her police interview that Lesure was in the home on the night she bound AR to the chair. Lesure also acknowledged at trial that he told the police that he was present when the events occurred in the bedroom. Indeed, he specifically recalled telling the police that he was upstairs, but then went downstairs to get something to eat, and then he went back upstairs. He did not recall telling the police that he saw AR in a chair or Turner hitting AR with a belt. However, during his trial testimony, Lesure admitted that he was upstairs "one time" when AR was receiving a spanking with a belt. From the evidence presented, the trial court could have found by a preponderance of the evidence that Lesure was present and aided or actively participated in the beating of AR with a leather belt. Thus, the trial court did not err when it assessed 10 points for OV 1.

2. OV 3

Both defendants argue that the trial court incorrectly assessed 25 points for OV 3 because there was no evidence that AR suffered a life-threatening or permanent incapacitating injury. We disagree.

OV 3 addresses physical injury to the victim. The focus of OV 3 is on the victim's injuries, not the defendant's actions. *People v Chaney*, 327 Mich App 586, 590; 935 NW2d 66 (2019). MCL 777.33(1)(c) instructs the trial court to assess 25 points if, during the commission of the offense, a "life threatening or permanent incapacitating injury occurred to a victim." By contrast, 10 points should be assessed when there is "bodily injury requiring medical treatment." MCL 777.33(1)(d). The term "life-threatening" as used in MCL 777.33 is not defined by the statute. Accordingly, in *Chaney*, this Court consulted a dictionary to determine the ordinary meaning of the term as being " 'capable of causing death: potentially fatal.' " *Chaney*, 327 Mich App at 589, quoting *The Merriam-Webster Online Dictionary*. Importantly, OV 3 does not require injuries that are *guaranteed* to cause death if left untreated to warrant a score of 25 points; rather, it requires

injuries that are potentially fatal in the "normal course" without medical intervention. See *id*. at 590-591.

Pediatric Surgeon Dr. Speck characterized AR's injuries as "serious" and ones that required medical treatment. She further explained that if any of the conditions worsened, they would be life-threatening. When asked to elaborate, Dr. Speck explained the consequences if AR had not obtained medical treatment: "[W]ell, the most obvious thing would be the dehydration, in conjunction with the rhabdomyolysis, could have caused acute and then chronic renal failure, which is the kidney, which would have led to the need for dialysis." She further noted that renal failure can be life-threatening. In *Chaney*, the victim's injuries were serious, required lengthy hospitalization, and multiple ongoing procedures, but there was no evidence that her burn wounds were potentially fatal. *Chaney*, 327 Mich App at 590-591. Here, Dr. Speck explained that aggressive rehydration was the first line of treatment for all of AR's injuries, and she was at risk for life-threatening further injury without treatment. Although she opined that AR *might* have been adequately rehydrated by drinking water, she believed it was "very fortunate" that AR was in the hospital. In other words, AR's life clearly was in serious danger without medical intervention, even if that intervention proved to be a fairly simple treatment. The trial court properly scored OV 3 at 25 points.

3. OV 7

Turner and Lesure both take issue with the trial court's assessment of 50 points for OV 7, albeit on different grounds. With respect to both defendants, we conclude that the trial court did not err in scoring OV 7. MCL 777.37(1)(a) provides that OV 7 should be scored at 50 points when "[a] victim was treated with sadism, torture, excessive brutality, or similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." Thus, there are four categories of conduct under which OV 7 should be scored at 50 points. *Hardy*, 494 Mich at 439-441. "Excessive brutality" means savagery or cruelty beyond even the 'usual' brutality of a crime." *People v Rosa*, 322 Mich App 726, 743; 913 NW2d 392 (2018). Regarding the "similarly egregious conduct" clause, this Court explained "that this conduct must be similarly egregious to sadism, torture, or excessive brutality." *People v Rodriquez*, 327 Mich App 573; 579; 935 NW2d 51 (2019). A score of 50 points under OV 7 is properly based on conduct "that was intended to make a victim's fear or anxiety greater by a considerable amount." *Hardy*, 494 Mich at 440-441. When considering whether a defendant's conduct qualifies as similarly egregious conduct, trial courts should inquire "(1) whether the defendant engaged in conduct beyond the minimum required to commit the offense; and, if so, (2) whether the conduct was intended to make a victim's fear or anxiety greater by a considerable amount." *Id* at 443-444.

The record supports a finding that Turner treated AR with both excessive brutality and "similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." In addition to the appalling evidence already discussed above, further evidence indicated that over a three-day period, defendants kept AR in the basement, locked her in a small room, forced her to march, and forced her to hold her body in extreme positions. The other children testified that they could hear AR and defendants in the basement, even at night. They described AR screaming, crying, and begging for help or escape, along with sounds like "smacks and punches." HT was unable to sleep because she was awakened by AR's screams. During these events, MT heard both Lesure and Turner telling AR to "shut up."

Turner even admitted to tying AR's arms and legs to a chair and then striking her repeatedly with a leather belt. When asked how AR could have received the severe injuries to her internal organs, Turner admitted that it was probably caused by the manner in which she was tied up. Turner asserted that although AR was bound for 30 minutes, she did not beat her the entire time. Thus, there were moments when AR likely waited, with fear and anxiety, for Turner to strike the next blow. Further, during the beating, AR was clearly traumatized because she urinated on herself. Turner's conduct directed toward a four-year-old child qualifies as extreme brutality and egregious conduct designed to substantially increase the victim's fear and anxiety during the offense. Accordingly, the trial court properly assessed Turner 50 points for OV 7.

Lesure argues that the trial court could not assess 50 points for OV 7 because the jury acquitted him of torture.[2] However, MCL 777.37 identifies four circumstances under which OV 7 is properly assessed 50 points. As discussed, one circumstance is if "a victim was treated with sadism, torture, excessive brutality, or similar egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense."

The testimony established that Lesure confined AR, a four-year-old child, in the basement, on and off, over the course of three days; including locking AR in a closet, from which she banged on the door and begged to be let out. MT recalled hearing Lesure tell AR to "get into the position" and "get into the closet" from the basement. Audio recordings made by MT corroborated her testimony. In one recording, AR can be heard saying, "I can't hold it anymore." MT also testified that she heard Lesure in the basement "acting like a monster." Lesure admitted that he told the police that he would threaten AR with going down to the basement. He would tell AR that there was a monster in the basement closet. Lesure treated AR in a manner that was designed to create greater fear and anxiety in a four-year-old child.

At other times, including in the middle of the night, Lesure made AR march around the basement. On an audio recording, Lesure can be heard telling AR to "walk, walk, walk, walk, walk, walk." The evidence supports a finding that the forced physical exertion was taken to the extreme. Dr. Speck explained that when AR was admitted to the hospital, blood work revealed an elevated CPK level, which occurs when the body has experienced a breakdown of muscle. Related to this condition was a finding that AR was suffering from rhabdomyolysis, a condition in which muscle tissue breaks down, releasing substances into the blood that can cause kidney damage. Dr. Speck explained that rhabdomyolysis can be caused by traumatic injury, overexertion, and prolonged physical activity.

Considering this evidence, the trial court did not err when it assessed Lesure 50 points for OV 7. A preponderance of the evidence established that Lesure engaged in "similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37.

[2] See *People v Beck*, 504 Mich 605, 609; 939 NW2d 213 (2019).

4. OV 8

Both defendants also challenge the trial court's assessment of 15 points for OV 8. Fifteen points should be assessed for OV 8 when "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." MCL 777.38(1)(a). Such asportation may be accomplished if "a victim is carried away or removed to another place of greater danger or a situation of greater danger," and the movement need not be "greater than necessary to commit the sentencing offense." *People v Barrera*, 500 Mich 14, 21; 892 NW2d 789 (2017) (quotation omitted). In *Barrera*, merely moving the victim from the living room into the defendant's bedroom was sufficient, because the bedroom was "a location where the sexual assault was less likely to be discovered, which rendered the location a 'place of greater danger' or 'a situation of greater danger.' " *Id.* at 21-22. Here, defendants' movement of AR into their bedroom or down into a locked room in the basement placed AR into a location of "greater danger" where the abuse could be less readily observed and from which any rescue was less possible. Accordingly, the trial court did not err when it assessed both defendants 15 points to OV 8.

5. OV 12

Finally, Turner challenges the trial court's assessment of 10 points for OV 12. The prosecutor concedes, and we agree, that the trial court relied on conduct of which Turner was acquitted in scoring OV 12, contrary to *People v Beck*, 504 Mich 605, 609; 939 NW2d 213 (2019). Thus, OV 12 must be rescored to 0 points.

6. SUMMARY

Lesure's guidelines were correctly scored, so he is not entitled to resentencing. Turner's total OV score must be reduced by 10 points. However, Turner's minimum sentence range is unaffected by that deduction. Her original total OV score of 130 points, and her corrected total OV score of 120 points, both place her in to Level VI for a class A offense. MCL 777.62. Combined with Turner's 10-point prior record variable score, Turner remains in cell C-VI, with a minimum sentence range of 135-225 months. Because the scoring errors do not affect Turner's appropriate guidelines range, she is also not entitled to resentencing. *People v Rhodes (On Remand)*, 305 Mich App 85, 91; 849 NW2d 417 (2014).

B. UNREASONABLE AND DISPROPORTIONATE SENTENCE

In addition to challenging the scoring of the guidelines, Lesure also argues that he is entitled to be resentenced because his 15-year minimum sentence is unreasonable and disproportionate. Lesure's argument is premised on his guidelines having been erroneously scored. As discussed, we disagree. There is no dispute that Lesure's minimum sentence falls within the guidelines minimum range as scored. Because the trial court did not impose a departure sentence, its sentence is presumed to be proportionate and we generally need not consider whether it was reasonable. *People v Odom*, 327 Mich App 297, 315; 933 NW2d 719 (2019); *People v Anderson*, 322 Mich App 622, 636; 912 NW2d 607 (2018). "In order to overcome the presumption that the sentence is proportionate, a defendant must present unusual circumstances that would render the presumptively proportionate sentence disproportionate." *People v Lee*, 243 Mich App 163, 187;

622 NW2d 71 (2000). Lesure has not identified any unusual circumstances in this case to overcome the presumption of proportionality. Accordingly, we reject Lesure's claim that he is entitled to resentencing.

V. CONCLUSION

In Docket No. 348873, we affirm Lesure's conviction and sentence. In Docket No. 348859, we affirm Turner's convictions and sentences, but we remand for the ministerial task of correcting Turner's sentencing guidelines score. We do not retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ David H. Sawyer
/s/ Mark T. Boonstra