

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PASHK SYLA,

Defendant-Appellant.

UNPUBLISHED

October 22, 2020

No. 349348

Oakland Circuit Court

LC No. 2018-267922-FC

Before: METER, P.J., and SHAPIRO and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(c) (penetration during commission of other felony), unlawful imprisonment, MCL 750.349b, assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84, and domestic violence, second offense, MCL 750.81. Defendant was sentenced, as a second-offense habitual offender, MCL 769.10, to 14 to 25 years' imprisonment for the CSC-I conviction, 8 to 22 years' imprisonment for the unlawful imprisonment conviction, 5 to 15 years' imprisonment for the AWIGBH conviction, and 48 days' imprisonment for the domestic violence conviction. On appeal, defendant raises several evidentiary challenges, argues that the trial court erred by denying his motion for a directed verdict, and challenges the trial court's assessment of points for offense variable (OV) 3 and OV 10. We affirm.

I. FACTS

The victim in this case reported to the police that, over the course of a weekend in July 2018, defendant confined her to a bedroom, suffocated her, sexually assaulted her, and slapped her. The victim recanted at trial and claimed that defendant only confined her to a bedroom because they were not done arguing, that he did not suffocate her, but instead only placed a piece of clothing over her mouth for a moment, and that the sexual intercourse they engaged in was consensual. During the course of the victim's testimony, the prosecutor impeached her with statements that she made to the police and at defendant's preliminary examination that contradicted her trial testimony.

The prosecutor also called the responding officer, Officer Matthew Theisen, and a forensic nurse, Brenda Wade, to testify at trial. Officer Theisen and Wade testified extensively about what the victim told them soon after the events occurred. Their testimony contradicted the victim's trial testimony. The jury, apparently crediting the testimony of Officer Theisen and Wade, and discounting the testimony of the victim, convicted defendant of CSC-I, unlawful imprisonment, AWIGBH, and domestic violence. This appeal follows.

II. EVIDENTIARY ISSUES

On appeal, defendant raises a number of evidentiary issues. He argues that the trial court erred when it admitted the victim's oral statements to the police, when it admitted evidence of other acts of domestic violence, and when it admitted the victim's diary entry. With the exception of the issue of the victim's oral statements to the police, defendant preserved these issues at trial.

The preserved evidentiary issues are reviewed for an abuse of discretion. *People v Jackson*, 498 Mich 246, 257; 869 NW2d 253 (2015). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled options." *People v Brown*, 326 Mich App 185, 192; 926 NW2d 879 (2018) (quotation marks and citation omitted).

A trial court abuses its discretion when it makes an error of law in the interpretation of a rule of evidence. We review such questions of law de novo. If the court's evidentiary error is nonconstitutional and preserved, then it is presumed not to be a ground for reversal unless it affirmatively appears that, more probably than not, it was outcome determinative—i.e., that it undermined the reliability of the verdict. [*Jackson*, 498 Mich at 257 (quotation marks and citations omitted).]

The unpreserved issue is reviewed for plain error affecting defendant's substantial rights. *People v Young*, 472 Mich 130, 135; 693 NW2d 801 (2005). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id.* "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Id.* at 763-764.

A. THE VICTIM'S ORAL STATEMENTS

Defendant argues that the prosecution violated MCL 768.27c(3) when it used the victim's statements to Detective O'Neill and Detective Garrick to impeach the victim because the prosecution did not provide 15 days' notice of its intent to use the statements. We disagree.

As a preliminary matter, although defendant appears to argue that the trial court erred by allowing Detective O'Neill and Detective Garrick to testify, we note that neither detective actually testified at trial. Instead, the prosecution used the statements that the victim made to the detectives to impeach her testimony. The prosecution did so by questioning the victim about her prior statements during direct examination.

In order to introduce “[e]vidence of a statement by a declarant,” all of the following must be established:

(a) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.

(b) The action in which the evidence is offered under this section is an offense involving domestic violence.

(c) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of a statement made more than 5 years before the filing of the current action or proceeding is inadmissible under this section.

(d) The statement was made under circumstances that would indicate the statement’s trustworthiness.

(e) The statement was made to a law enforcement officer. [MCL 768.27c(1).]

Furthermore, in order to introduce statements under this statute, the prosecution must “disclose the evidence, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered, to the defendant not less than 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown.” MCL 768.27c(3).

Defendant appears to concede that the requirements of MCL 768.27c(1) were met, but argues that the prosecution failed to comply with the notice requirement contained in MCL 768.27c(3). However, this Court has explained:

MCL 768.27c(3) does not require the prosecution to give written notice of its intent to offer evidence. Rather, and notably in contrast to other hearsay exceptions that require the offering party to inform the adverse party of their intent to offer the evidence (see, e.g., MRE 803(24); MRE 803A), the statute only requires that the prosecuting attorney disclose the evidence itself to the defendant at least 15 days in advance of trial. [*People v Jurewicz*, 329 Mich App 377, 394; 942 NW2d 116 (2019).]

At trial, during a discussion about whether the prosecution would call Detective O’Neill as a witness, the prosecution explained that “[t]he statements were in the police report which [defense counsel] had from the probable cause conference months and months and months ago.” Defense counsel replied, “Yeah, I—I have police reports from that. I’m not deny[ing] that . . .” Therefore, the prosecution did, in fact, disclose the evidence months prior to trial clearly meeting the 15-day requirement contained in MCL 768.27c(3), and no error occurred when the trial court permitted the prosecution to impeach the victim with the statements contained in the police reports.

B. OTHER-ACTS EVIDENCE

Defendant argues that the trial court erred when it admitted other acts of domestic violence pursuant to MCL 768.27b because the only relevance of the evidence was to demonstrate defendant's propensity to commit domestic violence. We disagree.

The admission of evidence of other acts of domestic violence or sexual assault is governed by MCL 768.27b(1), which provides:

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

Domestic violence includes "[c]ausing or attempting to cause physical or mental harm to a family or household member." MCL 768.27b(6)(a)(i). Accordingly, "MCL 768.27b provides that in domestic violence cases, evidence of other acts of domestic violence is admissible, even to show propensity, so long as admission of the evidence does not violate MRE 403 and the acts took place no more than 10 years before the charged offense." *People v Rosa*, 322 Mich App 726, 732; 913 NW2d 392 (2018).

This Court must first consider whether the other-acts evidence was admissible under MCL 768.27b, and then whether the evidence violated MRE 403. "The language of MCL 768.27b clearly indicates that trial courts have discretion to admit relevant evidence of other domestic assaults to prove any issue, even the character of the accused, if the evidence meets the standard of MRE 403." *People v Cameron*, 291 Mich App 599, 609; 806 NW2d 371 (2011) (quotation marks and citations omitted). MRE 403 provides: "Although 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."

The witness testimony concerning the violence perpetrated by defendant against his former father-in-law and ex-wife meets the threshold requirement of admissibility under MCL 768.27b because the evidence involved domestic violence perpetrated against family members. As the evidence meets the threshold requirement of admissibility, its probative value must be weighed under MRE 403. *Cameron*, 291 Mich App at 609. Our Supreme Court has identified the following considerations to take into account when deciding whether to admit or exclude other-acts evidence:

(1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony. [*People v Watkins*, 491 Mich 450, 487-488; 818 NW2d 296 (2012).]

The prosecution introduced evidence concerning two separate acts of domestic violence. The first act of domestic violence occurred in 2009. Defendant arrived uninvited to his then in-

laws' house. When he arrived, his then father-in-law asked him to leave. Defendant refused and grabbed his then father-in-law by the neck and punched him multiple times. Defendant's then brother-in-law broke up the altercation. After the altercation, defendant threatened to kill his then in-laws. The 2009 incident is similar to the charged crime in that it shows defendant's propensity to resort to violence when he is displeased. The act occurred within 10 years of the charged offenses. Three separate witnesses testified to the 2009 incident making the evidence more reliable. Finally, there was need for evidence beyond the victim's testimony in this case because the complainant denied much of the alleged violence committed against her when testifying at trial.

The second incident occurred in 2016, and involved defendant and his then wife. Defendant's ex-wife testified that defendant punched her shoulder and hit her in the legs with a charging cable. The 2016 incident is similar to the charged crime because both involved violence committed by defendant and directed at his romantic partner—first his then wife and later his then girlfriend. Defendant's actions in 2016 demonstrate his propensity to commit domestic violence when he is angry at his romantic partner. The 2016 incident occurred only two years before the charged crimes occurred. Once again, there was need for evidence beyond the complainant's testimony in this case because the complainant denied much of the alleged violence committed against her when testifying at trial.

Furthermore, the trial court provided the jury with the following instruction: "You must not convict the defendant here based solely because you believe he's guilty of other bad conduct. The evidence must . . . convince you beyond a reasonable doubt that the defendant committed the alleged crime or you must find him not guilty." "Jurors are presumed to follow the court's instructions . . ." *People v Mullins*, 322 Mich App 151, 173; 911 NW2d 201 (2017). Accordingly, the jury was instructed that it could not convict defendant on the basis of other-acts evidence alone and the jury is presumed to have followed that instruction.

Finally, to the extent that defendant argues he was denied due process because the evidence introduced under MCL 768.27b involves propensity evidence, this argument also fails. Defendant does not point to any federal or Michigan authority that holds a defendant's right to due process was violated because a state permitted the introduction of other bad acts evidence. The United States Supreme Court has never held "that a state violates due process by permitting propensity evidence in the form of other bad acts evidence." *Bugh v Mitchell*, 329 F3d 496, 512 (CA 6, 2003). Therefore, defendant has failed to establish that his right to due process was violated by the introduction of other-acts testimony.

C. THE VICTIM'S WRITTEN STATEMENT

Defendant argues that the trial court erred when it admitted the victim's diary entry under MRE 803(1) because the entry was not written immediately after the victim perceived the events described. We disagree.

On appeal, defendant argues that the diary entry could not be admitted under MRE 803(1), which is the hearsay exception for present sense impressions. However, the trial court did not admit the diary entry under MRE 803(1). Instead, it admitted the diary entry under MRE 803(5), which is the hearsay exception for recorded recollections. Specifically, the trial court stated:

... I don't think it's present sense, I think it's recorded recollection which is according to 803(5) a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness's memory, and to reflect that knowledge correctly. That's what we have here.

Defendant's argument on appeal thus fails to address the hearsay exception under which the diary entry was actually admitted. Therefore, defendant's argument that the trial court erred when it admitted the diary entry under MRE 803(1) fails because the court actually admitted the diary entry under MRE 803(5).

III. DIRECTED VERDICT

Defendant argues that the trial court erred when it denied defendant's motion for a directed verdict on the charges of CSC-I, unlawful imprisonment, and AWIGBH. We disagree.

When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt. [*People v Aldrich*, v; 631 NW2d 67 (2001).]

Defendant's specific argument appears to be that there was no substantive evidence offered in this case to support defendant's convictions for CSC-I, unlawful imprisonment, and AWIGBH. Defendant contends that the only evidence offered to support the charged offenses was impeachment evidence, including the victim's prior statements to the police and testimony at the preliminary examination. Defendant's argument completely ignores the testimony of Wade, the nurse who examined the victim, and Officer Theisen, the responding officer. The testimony of both Wade and Officer Theisen was substantive evidence that could persuade a rational jury that the essential elements of the crimes charged were proved beyond a reasonable doubt.

A. CSC-I

To sustain a CSC-I conviction under MCL750.520b(1)(c), the prosecution must establish beyond a reasonable doubt "that (1) sexual penetration occurred and (2) it occurred 'under circumstances involving the commission of any other felony.'" *People v Lockett*, 295 Mich App 165, 174-175; 814 NW2d 295 (2012), quoting MCL 750.520b(1)(c). Wade testified that the victim disclosed to her that defendant penetrated her vagina with his penis. Similarly, Officer Theisen testified that the victim told him that defendant had sex with her over her objections. The penetration in this case occurred during the commission of unlawful imprisonment and AWIGBH, which are felonies under Michigan law. See MCL 750.349b; MCL 750.84(1)(b). Viewed in the light most favorable to the prosecution, there was sufficient evidence to prove the elements of CSC-I beyond a reasonable doubt, and thus, the trial court properly denied defendant's motion for a directed verdict. See *Aldrich*, 246 Mich App at 122-123.

B. UNLAWFUL IMPRISONMENT

The elements of unlawful imprisonment are delineated in MCL 750.349b as follows:

(1) A person commits the crime of unlawful imprisonment if he or she knowingly restrains another person under any of the following circumstances:

(a) The person is restrained by means of a weapon or dangerous instrument.

(b) The restrained person was secretly confined.

(c) The person was restrained to facilitate the commission of another felony or to facilitate flight after commission of another felony. [See *People v Chelmicki*, 305 Mich App 58, 64-65; 850 NW2d 612 (2014).]

“ ‘Restraining’ means to forcibly restrict a person’s movements or to forcibly confine the person so as to interfere with that person’s liberty without that person’s consent or without lawful authority. The restraint does not have to exist for any particular length of time and may be related or incidental to the commission of other criminal acts.” MCL 750.349b(3)(a).

The victim told Officer Theisen that defendant forced her into a bedroom and took her keys and cellphone. When the victim attempted to leave the bedroom, defendant pushed her back into the bedroom and blocked the doorway so she could not escape. The victim even testified at trial that, when she attempted to exit the bedroom, defendant would not allow her to do so because he was not done arguing with her. She further testified that defendant had taken her cellphone and keys and placed them in his pocket. While defendant and the victim were in the bedroom, defendant committed CSC-I as described above, and AWIGBH as described below. Thus, defendant restrained the victim in order to commit another felony, specifically CSC-I and AWIGBH. Viewed in the light most favorable to the prosecution, there was sufficient evidence to prove the elements of unlawful imprisonment beyond a reasonable doubt, and thus, the trial court properly denied defendant’s motion for a directed verdict. See *Aldrich*, 246 Mich App at 122-123.

C. AWIGBH

“The elements of AWIGBH are (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder.” *People v Stevens*, 306 Mich App 620, 628; 858 NW2d 98 (2014) (quotation marks and citation omitted). A defendant commits AWIGBH by suffocation when he “[a]ssaults another person by strangulation or suffocation.” MCL 750.84(1)(b). “Strangulation or suffocation” includes “intentionally impeding normal breathing or circulation of the blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person.” MCL 750.84(2). An “assault” is “an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery.” *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005). A “battery” is “an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person.” *People v Reeves*, 458 Mich 236, 240 n 4; 580 NW2d 433 (1998).

The victim told both Wade and Officer Theisen that defendant placed items such as blankets and children's clothing over her mouth and nose causing her to have difficulty breathing. Wade testified that the victim reported she "tingled from her head to her toes, that she couldn't breath[e][.] and she thought she'd die." Both Wade and Officer Theisen testified that the victim told them that she urinated the bed because of the suffocation. Viewed in the light most favorable to the prosecution, there was sufficient evidence to prove the elements of AWIGBH beyond a reasonable doubt, and thus, the trial court properly denied defendant's motion for a directed verdict. See *Aldrich*, 246 Mich App at 122-123.

Defendant also argues that there should have been a jury instruction that stated the jury was not to consider impeachment evidence as substantive evidence. After the jury was charged, defense counsel expressed satisfaction with the jury instructions. As a result, defendant has waived any claim of instructional error, and we decline to address the issue. *People v Kowalski*, 489 Mich 488, 504; 803 NW2d 200 (2011).

IV. OFFENSE VARIABLES

Defendant argues that the trial court erred when it assessed points for OV 3 and OV 10 because the victim testified that she did not suffer any injuries and defendant did not exploit the victim. We disagree.

This Court reviews "the proper interpretation and application of the legislative sentencing guidelines" de novo. *People v Sours*, 315 Mich App 346, 348; 890 NW2d 401 (2016) (quotation marks and citation omitted). The trial court's "factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *Id.* (quotation marks and citation omitted). There is clear error if this Court "is left with a definite and firm conviction that a mistake has been made." *People v Waclawski*, 286 Mich App 634, 645; 780 NW2d 321 (2009) (quotation marks and citation omitted). "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." *Sours*, 315 Mich App at 348 (quotation marks and citation omitted).

A. OV 3

OV 3 is properly assessed five points when "[b]odily injury not requiring medical treatment occurred to a victim." MCL 777.33(1)(e). The court believed it was appropriate to assess five points because of the testimony of Wade and Officer Theisen who indicated that the victim was injured. Wade, the nurse who examined the victim, testified that she observed bruising on the victim's right knee, inner part of her right leg, left arm, and right forearm. Wade also observed a scratch on the victim's cheek and an abrasion to her left upper lip. Similarly, Officer Theisen, the responding officer, testified that the victim had some bruising on her arms, her upper left chest, and the inner part of her thigh. He further testified that she had a small cut inside her lip and a scratch on her cheek. The testimony of Wade and Officer Theisen demonstrates that the victim suffered bodily injuries as a result of the ordeal with defendant. Therefore, the trial court properly assessed five points for OV 3.

B. OV 10

OV 10 is properly assessed 10 points when “[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). The term “ ‘vulnerability’ means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation.” MCL 777.40(3)(c). The term “ ‘[e]xploit’ means to manipulate a victim for selfish or unethical purposes.” MCL 777.40(3)(b). A “domestic relationship” means “a familial or cohabitating relationship.” *People v Jamison*, 292 Mich App 440, 447; 807 NW2d 427 (2011). “Accordingly, to merit a score of 10 points for OV 10, a defendant must have manipulated a [] victim for a selfish or unethical purpose and the victim’s vulnerability must have been readily apparent.” *People v Needham*, 299 Mich App 251, 255; 829 NW2d 329 (2013). The trial court determined that this was “a classic case of exploitation by the defendant against the victim.” The case involved a 24-hour incident involving suffocation, mental harassment, and physical violation.

Defendant appears to concede that he and the victim were in a domestic relationship. His argument is that he did not exploit the victim. However, the facts demonstrate that defendant did exploit the victim. Defendant manipulated his domestic relationship with the victim for “selfish” and “unethical” purposes when he raped her for his own sexual gratification. See *id.* at 257 (“Defendant acted on his ‘selfish’ and ‘unethical’ desire to possess child sexually abusive material for his own sexual gratification.”). Defendant also took the victim’s keys and cellphone, would not let her out of the bedroom, and told her he would make her suffer. Defendant then suffocated the victim and raped her while telling her that he wanted to get her pregnant. Defendant further manipulated the victim when he sent her photographs of himself crying after the rape occurred in order to garner her sympathy. Therefore, the trial court properly assessed 10 points for OV 10.

Affirmed.

/s/ Patrick M. Meter
/s/ Douglas B. Shapiro
/s/ Michael J. Riordan