

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JASON EDWARD ARWOOD,

Defendant-Appellee.

UNPUBLISHED

October 22, 2009

No. 285213

Antrim Circuit Court

LC No. 08-004138-FH

Before: Hoekstra, P.J., and Bandstra and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his convictions following a jury trial of domestic violence, second offense, MCL 750.81(3), and aggravated domestic violence, second offense, MCL 750.81a(3). The trial court departed upward from the sentencing guidelines on the aggravated domestic violence conviction, and sentenced defendant to 16 to 24 months in prison, to be served concurrently with 93 days on the domestic violence conviction. We affirm defendant's convictions, but vacate his sentence and remand for resentencing under *People v Smith*, 482 Mich 292; 754 NW2d 284 (2008).

Defendant first argues that the trial court erred by allowing the prosecutor to cross-examine him concerning prior alleged assaults against his girlfriend. We review this preserved evidentiary issue for an abuse of discretion. *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007). An abuse of discretion occurs when the trial court's ruling is outside the range of reasonable and principled outcomes. *Id.*

We find the cross-examination was permissible under MRE 608(b)(1). A defendant who elects to testify may be impeached like any other witness. *People v Fields*, 450 Mich 94, 110; 538 NW2d 356 (1995). Here, defendant testified that he treated his girlfriend "like a princess" and indicated that he believed "it's not right for anybody to put their hands on each other" except in self-defense. These statements directly placed his past treatment of his girlfriend, and his asserted character trait of nonviolence, at issue. Thus, once defendant made these gratuitous statements, the prosecutor was entitled to attempt to impeach his testimony by reference to allegations of prior assaults. MRE 404(a)(1); MRE 405(a).

Defendant next argues that the trial court erred by allowing the prosecutor to present rebuttal testimony from defendant's girlfriend. "The admission of rebuttal testimony rests within the sound discretion of the trial court, and we will not disturb the trial court's ruling absent a clear abuse of discretion." *People v Nantelle*, 215 Mich App 77, 85; 544 NW2d 667 (1996).

Rebuttal evidence is admissible only to refute, contradict, explain or disprove evidence presented by an opposing party. *Id.*; *People v Leo*, 188 Mich App 417, 422; 470 NW2d 423 (1991). “The test for error regarding rebuttal evidence is whether it is justified by the evidence it is offered to rebut.” *Id.*

The rebuttal testimony at issue directly responded to defendant’s assertions of his excellent treatment of his girlfriend and of his non-violent character. We recognize that under *Leo*, *supra*, and *People v Losey*, 413 Mich 346; 320 NW2d 49 (1982), rebuttal testimony is not permissible if offered to counter testimony improperly elicited on cross-examination. Here, however, the cross-examination was proper. Defendant placed his character at issue, thereby opening the door for rebuttal testimony. Moreover, defendant’s assertions on cross-examination were self-serving and gratuitous. Although the specific instances of defendant’s conduct described in the rebuttal testimony might not have been admissible to impeach defendant’s credibility under MRE 608(b), the evidence was admissible to rebut the character evidence offered by defendant under MRE 404(a)(1).

Defendant also challenges the sufficiency of the evidence on the injury element of his aggravated domestic violence conviction. Having conducted a de novo review of the record in keeping with *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005), we find the evidence sufficient to allow a reasonable juror to conclude that defendant’s girlfriend sustained serious or aggravated injuries during the assault. Defendant’s convictions arose out of two altercations he had with his girlfriend on a single day. During the course of these altercations, defendant pushed his girlfriend down the stairs, struck her repeatedly, stepped on her head, and grabbed her by the throat. Defendant refused to take her to the hospital, so she attempted to drive herself. While driving, her head was throbbing and her vision was blurry, so she stopped and called 911. An ambulance transported her to the hospital, where she underwent medical testing. Although the diagnostic tests performed in the emergency room were negative with regard to brain trauma and kidney injury, the victim required medical intervention for pain. Further, she sustained bruising, redness, and swelling. A reasonable jury could thus find that she sustained injuries “that require[d] immediate medical treatment or that cause[d] disfigurement, impairment of health, or impairment of a part of the body.” CJI2d 17.6; see also *People v Brown*, 97 Mich App 606, 611; 296 NW2d 121 (1980).

Lastly, defendant challenges his sentence as an improper upward departure from the sentencing guidelines. The trial court stated at sentencing:

I’m departing from the guideline range because of the history of repeated incidents of violence with this particular victim. Those violence incidents are not considered in the guidelines. And, the fact it’s with the same victim, which makes it far worse. So, that’s a substantial and compelling reason to depart from the guideline range in this case.

Defendant does not contest the factual basis for the departure. Rather, defendant contends that departure is disproportionate. We review a challenge to the amount of a trial court’s departure from the guidelines for abuse of discretion. *Smith*, *supra* at 300.

Defendant’s score under the sentencing guidelines placed defendant in an intermediate sanction cell. MCL 777.68, MCL 769.31(b). A prison sentence is not an intermediate sanction. *People v Muttscheler*, 481 Mich 372, 375; 750 NW2d 159 (2008). To impose a prison sentence,

the trial court was required to state “on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections.” MCL 769.34(4). Further, the trial court was required to explain “why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been.” *Smith, supra* at 304. With regard to proportionality, as our Supreme Court explained in *Smith*,

Appellate review is also aided when a court explains the similarity between the facts justifying the departure and the facts describing a crime meriting the same sentence under the guidelines. Also, a comparison of a defendant’s characteristics and those of a hypothetical defendant whose recommended sentence is comparable to the departure sentence is a valuable exercise. This, too, will aid an appellate court in reviewing the proportionality of the departure.

The trial court should note which variables it is considering in such a comparison. It should explain why its reasons for departure are as significant as the characteristics that would produce an equally lengthy recommended minimum sentence under the guidelines. [*Id.* at 310.]

Here, defendant’s characteristics are not comparable to the characteristics that could have warranted a prison sentence under the guidelines. To warrant a prison sentence, a defendant would have a prior record variable (PRV) score of more than twice defendant’s PRV score. MCL 777.68. Even if defendant had received PRV points for his prior assaults against his girlfriend, his scores would still place him in an intermediate sanction cell. Similarly, the fact that defendant had previously assaulted this particular victim does not necessarily support the upward departure from the guidelines. The applicable guideline grid requires intermediate sanctions even for a defendant in the highest offense (OV) level unless the defendant’s PRV level is in one of top two tiers. Accordingly, if the prior assaults had been assessed against defendant as part of his OV score, defendant would still be in an intermediate sanction cell.

We conclude that under *Smith, supra* at 318, the trial court’s articulation of the basis for departing from the guidelines did not sufficiently explain how an upward departure was proportionate to defendant’s conviction, to his prior record, or to the offense characteristics. With this conclusion, we do not intend to denigrate the effects of defendant’s malevolent conduct, nor do we express any opinion as to the appropriate sentence on remand. The trial court did not have the benefit of the *Smith* parameters at the time of sentencing. On remand, the trial court may opt to sentence defendant within the guidelines, or explain on the record why a departure sentence is more proportionate than a guidelines sentence in this case, as well as justify the level of departure imposed. *Id.*

Defendant’s convictions are affirmed, his sentence is vacated, and the case is remanded for resentencing. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Richard A. Bandstra
/s/ Deborah A. Servitto