STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 16, 2013
v	No. 308784 Allegan Circuit Court
STEVEN TYRELL WHITE, Defendant-Appellant.	LC No. 11-017215-FH

Before: FITZGERALD, P.J., and O'CONNELL and SHAPIRO, JJ.

PER CURIAM.

Following a jury trial, defendant appeals as of right his convictions and sentences of assault with intent to do great bodily harm less than murder, MCL 750.84; domestic assault third offense, MCL 750.81(2), (4); and aggravated domestic assault, second offense, MCL 750.81a(3). For the reasons stated in this opinion, we affirm defendant's convictions and sentences for assault with intent to do great bodily harm less than murder and aggravated domestic assault, we vacate his conviction and sentence for domestic assault, and we remand for the ministerial task of correcting his sentencing information report.

Defendant's convictions arose out of two incidents that occurred on an autumn day in 2010 between defendant and Renea Spooner, who were in a dating relationship. On that day, Spooner and defendant argued while in Spooner's apartment. Defendant began punching Spooner, pulled her onto the floor and slammed her head into the wooden frame of a couch. At some point during this assault, defendant put his hands around Spooner's neck and began to choke her. Defendant ultimately released his hold, and the two remained in the apartment. Later the same day, defendant and Spooner argued again, and defendant punched Spooner in the face, causing her nose to bleed. Defendant then had Spooner drive him to a store, where she dropped him off. While driving back to her apartment, Spooner called her mother, and the police were subsequently notified. One of the responding officers testified that Spooner told him she thought defendant was going to kill her, and that defendant had kicked her torso and had told her, "[y]ou like it when I do this to you." Spooner was taken to Holland Hospital, where the examining physician noted that her face, nose, and chest were bruised. Her nose had a comminuted fracture, and three of her ribs were broken. The physician considered the rib fractures in particular to be significant injuries.

At trial, defendant testified that the first beating Spooner described did not happen, but he admitted striking Spooner in the face. Additionally, while he claimed he blacked out after first striking Spooner, he denied kicking or choking her and denied acting with intent to commit great bodily injury.

On appeal, defendant first argues that the convictions for both domestic assault and aggravated domestic assault violated the constitutional protections against double jeopardy.[1] Defendant did not raise his double jeopardy challenge at trial; therefore, we review his unpreserved claim "for plain error that affected the defendant's substantial rights, that is, the error affected the outcome of the lower court proceedings." *People v McGee*, 280 Mich App 680, 682; 761 NW2d 743 (2008). We review de novo the underlying double jeopardy challenge as a question of law. *People v Smith*, 478 Mich 292, 298; 733 NW2d 351 (2007).

The double jeopardy analysis requires this Court to apply the same-elements test. See *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932); *Smith*, 478 Mich at 316; 733 NW2d 351 (2007); *People v Cain*, ___ Mich App ___; ___ NW2d ___ (Docket No. 301492, issued Dec. 20, 2012), slip op at 6, lv pending. The same-elements test calls for a determination of whether each offense at issue contains an element not contained in the other. *Smith*, 478 Mich at 296. Unless each offense has an element that the other does not, the double jeopardy protections bar punishment for both offenses. *Id*.

In this case, the same-elements test precludes defendant's convictions of both aggravated domestic assault and domestic assault, because all of the elements of domestic assault are also contained in aggravated domestic assault. The elements of domestic assault require that the defendant and the victim must be associated in one of the ways set forth in MCL 750.81(2)—including a dating relationship— and that the defendant must either intend to batter the victim or the defendant's unlawful act must place the victim in reasonable apprehension of being battered. *People v Corbiere*, 220 Mich App 260, 266; 559 NW2d 666 (1996); MCL 750.81(2). Similarly, the elements of aggravated domestic assault require that "an individual . . . assaults . . . an individual with whom he or she has or has had a dating relationship . . . without a weapon and inflicts serious or aggravated injury upon that individual without intending to commit murder or to inflict great bodily harm less than murder . . . ." MCL 750.81a(1), (3).

In this case, the record demonstrates that defendant assaulted Spooner twice in one day: the initial beating in which defendant hit Spooner's head against the couch and the later incident in which defendant punched Spooner in the nose. The first assault supported defendant's conviction for assault with intent to do great bodily harm less than murder. The remaining second assault could not support convictions for both domestic assault and aggravated domestic assault. Accordingly, we vacate the conviction of the lesser offense. See *People v Herron*, 464 Mich 593, 609; 628 NW2d 528 (2001). This in turn requires the ministerial task of changing defendant's prior record variable (PRV) 7 score to 10 points. MCL 777.57(a)-(b). We decline

[1] US Const, Am V ("No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ."); Const 1963, art 1, § 15 ("No person shall be subject for the same offense to be twice put in jeopardy.").

defendant's request for resentencing, however, because the reduction does not change his PRV level or his minimum sentencing range. See *People v Sims*, 489 Mich 970; 798 NW2d 796, mod on reconsideration on other grounds 490 Mich 857 (2011); *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

Next, defendant argues that the trial court should not have assessed points against him on offense variable (OV) 7. MCL 777.37(1)(a) provides that OV 7 is to be scored at 50 points when "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." The OV 7 statute defines "sadism" as "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.37(3). We review the trial court's OV scoring "to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v Glenn*, 295 Mich App 529, 532; 814 NW2d 686, (2012), lv gtd 491 Mich 934 (2012).

In this case, defendant attempts to analogize the conduct underlying his OV 7 score to the conduct this Court examined in *Glenn*, 295 Mich App at 532-536. We reject defendant's proposed analogy. In *Glenn*, the Court found no evidence the defendant had subjected the victims to extreme or prolonged pain or humiliation. *Id*. at 532-533. Here, in contrast, there was evidence of both prolonged pain and humiliation. Defendant beat Spooner with his hands, slammed her head into the wooden couch frame, ignored her plea to stop, and choked her; the beating resulted in bleeding, numerous bruises, and multiple broken bones. Spooner and her mother testified that Spooner took weeks to fully recover from her injuries. Defendant also humiliated Spooner by making demeaning remarks suggesting that she liked his treatment of her. Moreover, Spooner indicated to her mother that she did not want her daughter to see what she looked like after the assaults.

Further, the record in this case was sufficient to support a conclusion that defendant's conduct was excessively brutal and was designed to substantially increase Spooner's fear or anxiety. Defendant terrorized Spooner in her home twice in one day, to the point that Spooner believed defendant would kill her. Further, defendant may have inflicted the assaults as an attempt at punishment or revenge: Spooner testified that the first beating occurred after defendant became aware that Spooner had communicated with another man and that defendant had argued with Spooner about that communication. This evidence readily distinguishes defendant's conduct from the conduct of the defendant in *Glenn.* See *id*. at 533-534. In sum, we find no error requiring reversal in the trial court's decision to score 50 points for OV 7.

Next, defendant argues that OV 13 should not have been scored. We disagree. OV 13 is scored for a "continuing pattern of criminal behavior." MCL 777.43(1). In this case, 25 points were scored for OV 13 pursuant to MCL 777.43(1)(c), which provides that 25 points should be scored when "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." In scoring OV 13, "all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a). Assault with intent to commit great bodily harm, MCL 750.84, is categorized as a crime against a person, as are aggravated domestic assault with prior convictions, MCL 750.81a(3), and domestic assault with two or more prior convictions for domestic assault, MCL 750.81(4). MCL 777.16d. Although defendant's third conviction for

domestic assault must be vacated, additional evidence introduced at trial showed that defendant committed another act of domestic assault against Spooner in the summer of 2010, which occurred after defendant had twice been convicted for domestic assault involving a different victim. For purposes of scoring OV 13, crimes against the person "shall be counted *regardless* of whether the offense resulted in a conviction." MCL 777.43(2)(a) (emphasis added). Accordingly, there was evidence in support of the trial court's decision to score 25 points for OV 13.

Finally, defendant argues in his Standard 4 brief that alleged hearsay testimony was erroneously admitted in a preliminary examination. However, this preliminary examination was in a *different* case involving charges of witness intimidation that defendant acknowledges were ultimately dismissed. Further, this preliminary examination testimony was not introduced at trial in the case on appeal, and the victim, whose statements were recounted by a detective in the preliminary examination for the other case, actually testified at trial in the instant case. Defendant's argument is therefore meritless.

Defendant's convictions for assault with intent to do great bodily harm less than murder and aggravated domestic assault, second offense, are affirmed. His conviction and sentence for domestic assault third offense, is vacated, and the case is remanded for the ministerial task of correcting his sentencing information report. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell
/s/ Douglas B. Shapiro