STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 13, 2014
v	No. 312232 Calhoun Circuit Court
KENDALL JEREMIAH BLAIR, Defendant-Appellant.	LC No. 2010-003750-FC

Before: DONOFRIO, P.J., and SAAD and METER, JJ.

PER CURIAM.

Following a jury trial, defendant appeals by right his convictions for assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84, and domestic assault, third offense, MCL 750.81(4). The trial court sentenced defendant to 57 to 120 months' imprisonment for the AWIGBH conviction and to 14 to 24 months' imprisonment for his domestic assault conviction. We affirm.

I. SUFFICIENCY OF THE EVIDENCE

On appeal, defendant first challenges the sufficiency of the evidence supporting his convictions. We review claims regarding the sufficiency of the evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). When considering a claim of insufficient evidence, we "must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

Defendant maintains that there was insufficient evidence to support his convictions because the victim testified at trial that she was never assaulted and that she sustained her injuries by falling down the stairs. However, defendant concedes in his brief on appeal that the victim's preliminary examination testimony, which was admitted into evidence at trial, "indicated an assault" occurred. He asserts that the "contradictory testimony from the preliminary examination cannot be seen as providing proof beyond a reasonable doubt when her trial testimony was clear that Defendant did not assault her." We disagree. Although the victim's trial testimony differed from her preliminary examination testimony, her credibility at trial constituted a question for the jury that this Court will not disturb on appeal. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Additionally, in

reviewing this issue, we resolve any conflicts in the evidence, such as the case here, in favor of the prosecution. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). Thus, with these two differing versions of what transpired, we resolve the conflict in favor of the prosecution and conclude that the victim's admitted preliminary examination testimony was sufficient evidence to support defendant's convictions.[1] In other words, the fact that the jury was confronted with two conflicting versions of events does not mean that it was precluded from believing beyond a reasonable doubt the version where defendant committed the assault.

II. EVIDENTIARY RULINGS

Next, defendant challenges two of the trial court's evidentiary rulings. These claims are preserved and reviewed for an abuse of discretion. *People v Orr*, 275 Mich App 587, 588; 739 NW2d 385 (2007). An abuse of discretion occurs when the trial court departs from the range of "reasonable and principled outcomes." *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008). When an evidentiary question involves a preliminary question of law, such as whether a rule of evidence or statute precludes admission of the evidence, those questions of law are reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

In his first evidentiary claim, defendant maintains the trial court abused its discretion in admitting the victim's preliminary examination testimony under MRE 801(d)(1)(A). As a general rule, hearsay, i.e., an out-of-court statement offered for the truth of the matter asserted, may not be admitted into evidence. MRE 801; MRE 802. However, a prior statement of a witness is not hearsay provided that "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition." MRE 801(d)(1)(A). Statements admitted under MRE 801(d)(1) may be used as substantive evidence. See *People v Malone*, 445 Mich 369, 381-382; 518 NW2d 418 (1994). In this case, consistent with the requirements of MCR 801(d)(1)(A), the victim testified at trial, she was subject to cross-examination, her preliminary examination testimony was inconsistent with her trial testimony, and her prior statement was given under oath subject to the penalty of perjury at the preliminary examination. Defendant does not dispute these facts, but instead argues that MRE 801(d)(1)(A) is inapplicable because the transcript was a writing that the victim did not personally prepare and thus, in defendant's view, not a "statement." Defendant cites no authority for this argument, and it clearly lacks merit. By definition, the term "statement" includes an "an oral or written assertion." MRE 801(a)(1). The victim's testimony at the preliminary examination was an oral assertion and thus a "statement" within the meaning of MRE 801. Defendant's argument confuses the difference between a statement and the record of a statement. The victim's prior statement was her oral testimony, and the transcript admitted at trial was a certified record of that statement. Consequently, the trial court did not abuse its discretion in admitting this evidence. Moreover, defendant's illogical position is further illustrated by considering that if he were correct—that the

[1] Importantly, as discussed, *infra*, the victim's testimony at the preliminary examination was properly admitted.

transcript of the prior testimony was not a "statement"—then the testimony would have been admissible in any event because the general hearsay rule only bars the admission of hearsay "statements." MRE 801(a), (c).

Defendant's second evidentiary claim relates to the prosecution's questioning of the victim regarding numerous instances between 2007 through 2010 when defendant perpetrated acts of domestic violence against the victim. Defendant argues on appeal that allowing such propensity evidence is prohibited under MRE 404(b), which generally precludes the admission of evidence of "other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith." In making this argument, however, defendant entirely ignores MCL 768.27b, the statutory provision on which the trial court relied in deciding that the prosecutor could ask the victim about past acts of violence. In particular, this provision provides, in pertinent part:

> [I]n 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. [MCL 768.27b(1).]

Thus, "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." *People v Railer*, 288 Mich App 213, 219-220; 792 NW2d 776 (2010), citing *People v Schultz*, 278 Mich App 776, 778; 754 NW2d 925 (2008). Accordingly, defendant's reliance on MRE 404's ban on propensity evidence is misplaced since MCL 768.27b expressly allows for such evidence.

Further, to the extent defendant's challenge to the other acts evidence appears constitutional in nature, in that he argues that the introduction of propensity evidence denied him due process by running afoul of the presumption of innocence, his argument is without merit. We have previously explained that MCL 768.27b(1) affects the admissibility of a specific type of evidence; it "did not change the burden of proof necessary to establish the crime, ease the presumption of innocence, or downgrade the type of evidence necessary to support a conviction." *Schultz*, 278 Mich App at 778. Thus, defendant's constitutional argument is without merit, and overall we conclude that the trial court did not abuse its discretion in allowing the prosecution to question the victim about defendant's past acts of domestic violence under MCL 768.27b.

III. OFFENSE VARIABLES

Lastly, defendant raises numerous challenges to the trial court's scoring of several offense (OV) variables. When reviewing scoring decisions under the sentencing guidelines, the trial court's factual findings 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). "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." *Id.*

Defendant first contends the trial court erred in scoring OV 3 at 25 points, the score appropriate where "[l]ife threatening or permanent incapacitating injury occurred to a victim." MCL 777.33(1)(c). We disagree. Here, the victim described defendant's physical attack, as a result of which she suffered injuries to her face to the extent that her face appeared black and blue, her eyes were swollen shut where she could not open them on her own, and there was considerable blood in her left eye. Numerous bones around her eye were fractured and an artificial lens that had been previously implanted came out of her left eye. As a result, the victim ultimately underwent surgery to have her left eye removed. On these facts, we conclude that it was not clear error for the trial court to determine the victim suffered life threatening or permanently incapacitating injury. Cf. *People v McCuller*, 479 Mich 672, 697; 739 NW2d 563 (2007). It is evident that having one's eye removed is a "permanent incapacitating injury." In an undeveloped argument on appeal, defendant implies that the injury could not be considered incapacitating since the victim had a preexisting eye condition. However, the fact that the victim's eye may have been more susceptible to injury does not mean her injuries were not life-threatening or permanently incapacitating within the meaning of OV 3. It is well established that a defendant takes his victim as he finds her. See *People v Brown*, 197 Mich App 448, 451; 495 NW2d 812 (1992). Nowhere does the statute suggest that defendant must be the sole cause of that injury or that the victim may not have had some underlying susceptibility to injury. See *People v Laidler*, 491 Mich 339, 346; 817 NW2d 517 (2012). Defendant's actions contributed to the loss of the victim's eye, erasing any hope she made have had for improved vision in that eye, and as such, the trial court properly assessed 25 points for OV 3.

Next, defendant challenges the trial court's assessment of 50 points for OV 7, the score appropriate where 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." MCL 777.37(1). With the statute's use of "or," there are four categories of conduct that require the scoring of 50 points for this OV. *Hardy*, 494 Mich at 440-441. Regarding the fourth category, "it is proper to assess points under OV 7 for conduct that was intended to make a victim's fear or anxiety greater by a considerable amount." *Id.* at 441. The trial court found that there was conduct designed to substantially increase the fear and anxiety of the victim. However, it is not clear if the trial court relied on the prosecution's contention that the subsequent sexual penetration supported this finding. We agree with defendant, albeit for different reasons, that the sexual penetration cannot constitute a proper basis for the scoring of OV 7. The scoring offense in this case was AWIGBH and, because the language of MCL 777.37 does not indicate otherwise, OV 7 may only be scored in relation to the conduct that formed the sentencing offense. *People v McGraw*, 484 Mich 120, 133; 771 NW2d 655 (2009). While the sexual penetration and the AWIGBH formed part of the same criminal episode, from the victim's description of events, it appears that the AWIGBH completely ended before the sexual penetration began. Without minimizing the fear and anxiety produced by a sexual assault, under *McGraw*'s rationale and contrary to the prosecution's argument, a sexual assault which follows after the conduct constituting AWIGBH has ended is not conduct designed to substantially increase the fear and anxiety that the victim suffered *during* the AWIGBH. MCL 777.37(1); *McGraw*, 484 Mich at 133-134.

Nevertheless, we are persuaded that, on the facts of this case, OV 7 was properly scored at 50 points because the facts demonstrate that defendant's conduct during the AWIGBH was "designed to substantially increase the fear and anxiety" of the victim. Defendant began his

attack while the victim slept, meaning she awoke to find herself being assaulted. While being choked would always be a frightening experience, there is something additionally terrifying and anxiety producing in being awakened in a darkened room to find oneself being straddled and choked. Further, the PSIR included descriptions of the victim's statements to police, in which she described defendant choking her so hard that she would almost black out, at which point he would let go of her neck. Once she became coherent again, he would resume choking her; he repeated this process four or five times. This method of attack was not necessary to accomplish an AWIGBH, and it is more probable than not that the furtive nature of the attack was intended to substantially increased the victim's fear and anxiety. Thus the scoring of 50 points for OV 3 was warranted. See *Hardy*, 494 Mich at 443-444.

Defendant next challenges the scoring of OV 10, which the trial court scored at five points, the score appropriate where, among other possibilities, the offender "exploited a victim who was *intoxicated*, under the influence of drugs, *asleep*, or unconscious." MCL 777.40(1)(c) (emphasis added). Consistent with this score, the victim described falling asleep while intoxicated and awaking to find herself in bed, being straddled and attacked by defendant. On this testimony, it was not clear error for the trial court to conclude that the victim had a readily apparent vulnerability—her sleeping and intoxicated state—which defendant exploited for selfish or unethical purposes when he initiated his assault. See *People v Cannon*, 481 Mich 152, 158-159; 749 NW2d 257 (2008). Accordingly, OV 10 was properly scored.

Regarding OV 11, defendant contends the trial court erred in assessing 25 points for one criminal sexual penetration. MCL 777.41(1)(b); MCL 777.41(2)(a). We disagree. Although the jury found defendant not guilty of first-degree CSC, the victim described having sex with defendant after the AWIGBH, explaining that she did so against her wishes because she did not want to anger him further. Based on this testimony and the context in which the sexual penetration occurred, even if the jury was not convinced beyond a reasonable doubt, the trial court did not clearly err in finding by a preponderance of the evidence that a criminal sexual penetration occurred. See *People v Ratkov (After Remand)*, 201 Mich App 123, 126; 505 NW2d 886 (1993). Contrary to defendant's arguments, we are also persuaded that the sexual penetration "arose from" the AWIGBH as required by MCL 777.41(2)(a). Both offenses occurred at the same place, under the same set of circumstances, and during the same general course of conduct. See *People v Mutchie*, 251 Mich App 273, 277; 650 NW2d 733 (2002). Indeed, it was the AWIGBH which motivated the victim to submit to defendant's subsequent sexual advances. Given this causal connection between the offenses, the sexual penetration arose from the AWIGBH and the trial court did not err in scoring OV 11 at 25 points. See *People v Johnson*, 474 Mich 96, 100-101; 712 NW2d 703 (2006).

Defendant next challenges the scoring of OV 12, and we agree that defendant should not have been assessed any points under this variable.[2] Under OV 12 the trial court must score

[2] At sentencing, the prosecution conceded that OV 12 should have been scored at zero points, and the trial court appeared to accept that position. However, in an apparent oversight, the sentencing information report signed by the trial court sheet still reflected that OV 12 was scored at five points.

points for a "contemporaneous felonious criminal act," meaning a criminal act occurring within 24 hours of the sentencing offense that has not and will not result in a separate conviction. MCL 777.42(2)(a). Under these terms, defendant's domestic assault conviction could not be scored because it resulted in a separate conviction. MCL 777.42(2)(a). Further, because the sexual penetration in this case was scored under OV 11, it cannot be used to score OV 12. MCL 777.42(c). In the absence of a contemporaneous felonious criminal act, OV 12 should have been scored at zero points. MCL 777.42(1)(g).

Lastly, defendant challenges the trial court's assessment of 25 points for OV 13, the score appropriate where "the offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c). In scoring this variable, "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). Under MCL 777.43(2)(a), the sentencing offense must be counted when scoring OV 13. However, offenses scored under OV 11, as in the case of the sexual penetration here, may not be scored under OV 13. MCL 777.43(2)(c).

Defendant does not dispute that his two convictions in the present case—AWIGBH and domestic assault, third offense—constitute felonies and crimes against a person, which count toward the scoring of OV 13. He maintains, though, that the trial court erroneously used the sexual penetration as a basis for the necessary third felonious activity. This contention is without merit. The record is clear that the trial court did not rely on the sexual penetration to score OV 13 but, instead, based its determination on defendant's resisting and obstructing conviction from 2008.[3] In any event, even if the trial court did err in scoring 25 points for OV 13, any error would have been harmless. Assuming zero points was proper for OV 13, it would have reduced defendant's overall OV score to 105 points.[4] This new score still falls in the highest OV category (VI) since it is above 75 points. MCL 777.65. Therefore, any error in scoring OV 13 at 25 points would not have affected defendant's sentencing guidelines range, and he is not entitled to resentencing. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006). Consequently, we need not consider whether it was appropriate to count defendant's 2008 resisting/obstructing incident as felonious behavior. See *People v Richmond*, 486 Mich 29, 34; 782 NW2d 187 (2010) (stating that courts need not reach moot questions or declare principles of law that have no practical effect in the case before it).

Therefore, with the exception of OV 12, the trial court did not clearly err in the scoring of the OVs and, even adjusting defendant's total OV score to account for the error in OV 12, defendant is not entitled to resentencing. Specifically, when reducing defendant's OV score from 135 to 130 to correct for OV 12, defendant's total OV is still well within the highest OV category for a class D felony. MCL 777.65. Because adjustment to defendant's score will not

[3] In 2008, defendant was charged with two felony counts of resisting/obstructing a police officer, MCL 750.81d(1). In a plea deal, defendant pleaded guilty to one misdemeanor count of attempted resisting/obstructing a police officer, MCL 750.92.

[4] We are taking into consideration scoring OV 12 at zero points as well.

change the recommended minimum sentencing range under the legislative guidelines, defendant is not entitled to resentencing. *Francisco*, 474 Mich at 89 n 8.

Affirmed.

/s/ Pat M. Donofrio
/s/ Henry William Saad
/s/ Patrick M. Meter