

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIERNAN QUINN GOLEMBIEWSKI,

Defendant-Appellant.

UNPUBLISHED

October 08, 2026

9:00 AM

No. 374845

St. Clair Circuit Court

LC No. 24-001632-FC

Before: MARIANI, P.J., and O'BRIEN and WALLACE, JJ.

PER CURIAM.

Defendant appeals as of right from his jury-trial convictions of assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84; domestic violence, MCL 750.81(2); and unlawful imprisonment, MCL 750.349b.¹ The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to serve 15 to 30 years' imprisonment each for his AWIGBH and unlawful-imprisonment convictions, and 93 days in jail for his domestic-violence conviction. On appeal, defendant argues: (1) the trial court's exclusion of defendant's statement asserting the victim, AS, was arrested for domestic violence in the past violated defendant's due-process right to present a defense; (2) the evidence was insufficient to sustain defendant's conviction of unlawful imprisonment; (3) the trial court's refusal to instruct the jury on self-defense violated defendant's due-process right to present a defense; and (4) defendant is entitled to resentencing because the trial court improperly assessed 50 points for offense variable (OV) 7. We affirm.

¹ Defendant was also charged with one count of first-degree criminal sexual conduct, MCL 750.520b, and one count of second-degree criminal sexual conduct, MCL 750.520c. However, the jury could not reach a unanimous verdict and an order of *nolle prosequi* entered as to these two counts following sentencing.

I. FACTS

AS and defendant met on an online dating website in May 2024, when AS was 19 years old and defendant was 25 years old. They moved into an apartment together about one month later. On July 4, 2024, AS and defendant attended an Independence Day gathering at the home of AS's family friend. Defendant was talking with AS's "aunt" more than he was talking with AS, which made her upset. AS confronted defendant, and they began an argument that lasted the entire evening. Upon returning to the apartment, the argument turned physical, but AS and defendant recounted substantially different versions of events.

According to AS, after she entered the apartment, defendant immediately pushed her to the floor and repeatedly strangled her until she nearly lost consciousness. Defendant took AS's cell phone, preventing her from contacting anyone for help, and found a recent conversation between AS and her ex-boyfriend, which angered him. AS was able to run to the bathroom and lock herself inside. After attempting to use a pen to unlock the door, defendant banged on the door until AS eventually opened it, but not before grabbing a curling iron to use for her defense. He continued to physically attack her, so she hit him with the curling iron "[a]s many times as [she] could." Defendant only stopped because he had an asthma attack (and AS retrieved an inhaler for him). Defendant then requested oral sex from AS and subsequently dragged her into the bedroom to have sex with him. She felt she had to submit because defendant would hurt her if she resisted. AS attempted to leave the apartment several times but defendant prevented her from escaping.

AS's mother picked her up the next morning and AS showed her the bruises around her neck. They contacted the police, who referred AS to a Sexual Assault Nurse Examiner (SANE nurse). The SANE nurse noted multiple areas of abrasions and bruising. The bruising on AS's neck and other symptoms she was experiencing were consistent with strangulation.

On the other hand, defendant testified that he approached AS in the bedroom to try to "fix" things when she accused him of being unfaithful because he received a text message from another woman earlier in the evening. He went to the bathroom to take "a break from the arguing." AS followed several minutes later, demanding to see the messages, which he had already deleted. "[F]urious," AS grabbed the curling iron and began hitting defendant on the head with it. Defendant explained he impulsively reached out in "self-defense" and grabbed AS's neck, accidentally squeezing "just a little bit."

The day after the argument, police officers arrested defendant, who admitted to arguing with AS but denied that it turned physical. The interviewing officer recalled defendant's explanation for the strangulation marks on AS's neck was her preference for rough sex. Defendant did not mention acting in self-defense or accidentally grabbing AS in the interview.

At trial, defendant testified that he and AS agreed to look through each other's cell phones, and when he found text messages from AS's ex-boyfriend on her cell phone, he asked her "if this was the man that she got arrested for with [sic] domestic violence before." The court sustained the prosecutor's objection to the statement. Defense counsel requested a self-defense jury instruction, which the trial court declined to give, explaining: "[I]n order to argue self-defense as to the underlying charge of assault by suffocation, he has to intend to engage in that conduct for purposes of self-defense, and that's not what his testimony was." Defendant was convicted as

indicated. At sentencing, defense counsel did not object to the assessment of 50 points for OV 7. The court opined, “this was a torturous event that went on for many, many hours.” Regarding defendant’s unlawful imprisonment conviction, the court commented: “[T]here was no way she was going anywhere. You weren’t going to let her.” Defendant was sentenced at the ceiling of the sentencing guidelines.

II. DISCUSSION

A. MRE 404

Defendant argues evidence of the alleged domestic violence incident between AS and her ex-boyfriend “should have been admitted under the ‘reverse Rule 404(b)’ doctrine” as evidence defendant was not the initial aggressor, and the exclusion violated his constitutional right to present a defense. We disagree.

A party must raise an issue before the trial court to preserve it for appeal, and “[a] challenge on one ground before the trial court is not sufficient to preserve a challenge on another ground on appeal.” *People v Swenor*, 336 Mich App 550, 562; 971 NW2d 33 (2021). While defendant raised and sought to introduce evidence about AS’s alleged domestic violence arrest at trial, he did not raise his constitutional claim below, so that claim is unpreserved. This Court reviews a trial court’s decision to admit or exclude evidence for abuse of discretion. *People v Thorpe*, 504 Mich 230, 251; 934 NW2d 693 (2019). Unless the trial court’s decision regarding admitting evidence falls “outside the range of principled outcomes,” it will not be disturbed. *Id.* at 251-252 (quotation marks citation omitted). An abuse of discretion occurs when a trial court “admits evidence that is inadmissible as a matter of law,” and “this Court reviews de novo whether a rule or statute precludes admission of evidence as a matter of law.” *People v Roper*, 286 Mich App 77, 91; 777 NW2d 483 (2009). We review defendant’s unpreserved claim of constitutional error “for plain error affecting defendant’s substantial rights.” *People v Thigpen*, 349 Mich App 437, 449; 27 NW3d 647 (2023). “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).

“[T]he right to present a defense extends only to relevant and admissible evidence.” *People v Solloway*, 316 Mich App 174, 198; 891 NW2d 255 (2016) (quotation marks and citation omitted). In general, relevant evidence is admissible. *Roper*, 286 Mich App at 91, citing MRE 402. Admissibility of relevant character evidence, however, is “strictly limited because of its highly prejudicial nature.” *Id.* For this reason, MRE 404(a) prohibits the introduction of character evidence “to prove that on a particular occasion the person acted in accordance with the character or trait.” MRE 404(a)(1); see also *Roper*, 286 Mich App at 91. MRE 404(b)(1) also prohibits the introduction of evidence regarding “any other crime, wrong, or act” offered “to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.” MRE 404(b)(1); see also *Roper*, 286 Mich App at 91. However, if it is material, other acts evidence may be admissible for another purpose, including “motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, absence of mistake, or lack of accident.” MRE 404(b)(2); see also *Roper*, 286 Mich App at 92. In other words, “[e]vidence of other crimes or bad acts is admissible when it is offered for a proper purpose, MRE 404(b)(1); it is relevant under MRE 402; and its probative value is not substantially outweighed

by unfair prejudice, MRE 403.” *People v Bergman*, 312 Mich App 471, 493; 879 NW2d 278 (2015).

Defendant cites a federal case, *United States v Seals*, 419 F3d 600 (CA 7, 2005), to explain the admissibility of “reverse 404(b) evidence.”² *Id.* at 606. “[A] defendant can seek to admit evidence of other crimes under this rule if it tends to negate the defendant’s guilt of the crime charged against him.” *Id.* In determining the admissibility of reverse 404(b) evidence, a lower court “must balance ‘the evidence’s probative value under Rule 401 against considerations such as prejudice, undue waste of time, and confusion of the issues under Rule 403.’ ” *Id.* at 606, quoting *United States v Reed*, 259 F3d 631, 634 (CA 7, 2001). The standard for admissibility of reverse 404(b) evidence is lower than for standard 404(b) evidence “ ‘because prejudice to the defendant is not a factor.’ ” *Seals*, 419 F3d at 606, quoting *United States v Stevens*, 935 F2d 1380, 1404 (CA 3, 1991).

As noted, assuming defendant’s statement about AS’s alleged previous arrest for domestic violence is characterized as “other acts” evidence under MRE 404(b), it was admissible only if it was relevant, offered for a proper purpose, and its probative value was not outweighed by unfair prejudice. *Bergman*, 312 Mich App at 493. Defendant argues evidence of AS’s alleged arrest for domestic violence was offered for the proper purpose of negating his guilt by explaining “why he felt the need to defend himself” and suggests AS was the initial aggressor. Inherent in this assertion is the assumption that AS was acting in conformity with her supposed “character of being a violent person.” MRE 404(a)(2)(B) permits admission of evidence of “an alleged victim’s trait for aggression” *in a homicide case*, when self-defense is an issue; this is not a homicide case, however, and defendant correspondingly makes no argument for admission of this evidence under MRE 404(a) or under any other court rule aside from MCR 404(b).

In essence, defendant’s claim that the reverse 404(b) evidence was offered to support his self-defense claim flows from *character* evidence that AS acted in conformity with her trait for violence or aggression. This type of character evidence is not admissible in this case. Because character evidence is inadmissible to prove a person acted in conformity with that trait on a particular occasion, MRE 404(a)(1), the trial court did not abuse its discretion by excluding it. Accordingly, defendant’s constitutional right to present a defense was not violated. *Solloway*, 316 Mich App at 198.

As to MRE 404(b), defendant maintains that evidence regarding AS’s alleged prior arrest was admissible because it was not offered simply as proof of AS’s character, but for the proper, nonpropensity purpose of supporting his claim of self-defense. Both below and on appeal, however, defendant has not meaningfully developed this assertion. He has made no offer of proof, for instance, regarding what evidence he would have offered about the alleged arrest beyond the passing mention of it he made at trial. Nor has he otherwise attempted to substantiate or explain any of the details of the alleged arrest or the conduct and circumstances underlying it, or which of those details he might have known at the time of the events at issue in this case—and thus how exactly the alleged arrest might have demonstrated his honest and reasonable belief that his use of

² *Seals*, 419 F3d at 606, refers to Rule 404(b) of the Federal Rules of Evidence, which is substantially similar to MRE 404(b).

force against AS was necessary to defend himself in this case. See, e.g., MCL 780.972. He has also made no effort to explain why whatever “probative value” this evidence may have possessed in that regard would not have been “substantially outweighed by” one or more of the dangers set forth in MRE 403. Given the record and arguments before us on this point, we cannot conclude that the trial court abused its discretion by excluding this evidence or that defendant’s constitutional right to present a defense was violated as a result. *Solloway*, 316 Mich App at 198.

B. SUFFICIENCY OF EVIDENCE

Defendant contends that restraint is an element of the unlawful imprisonment statute, MCL 750.349b, and that there is insufficient evidence that he restrained AS under the relevant circumstances delineated in that section. We disagree.

Challenges to the sufficiency of the evidence are reviewed de novo. *Solloway*, 316 Mich App at 180. Evidence is reviewed “in the light most favorable to the prosecution” to determine “whether there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt.” *People v Oros*, 502 Mich 229, 239; 917 NW2d 559 (2018) (quotation marks and citation omitted). Under this deferential standard of review, this Court must “ ‘draw all reasonable inferences and make credibility choices in support of the jury verdict.’ ” *Id.*, quoting *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Further, all evidentiary conflicts must be resolved in the prosecution’s favor. *Solloway*, 316 Mich App at 180-181.

The unlawful imprisonment statute, MCL 750.349b, states, in relevant part:

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

* * *

(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. [*People v Railer*, 288 Mich App 213, 217; 792 NW2d 776 (2010), quoting MCL 750.349b.]

As used in MCL 750.349b, “ ‘restrain’ 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 need not occur “for any particular length of time and may be related or incidental to the commission of other criminal acts.” MCL 750.349b(3)(a). “To ‘secretly confine’ means either ‘[t]o keep the confinement of the restrained person a secret’ or ‘[t]o keep the location of the restrained person a secret.’ ” *Railer*, 288 Mich App at 217, quoting MCL 750.349b(3)(b)(i) and (ii).

In *Railer*, the defendant and the victim were in a dysfunctional romantic relationship and, one night, the defendant took the victim’s phone and keys and “told her that she was going to spend time with him.” *Id.* at 214-215. The victim attempted to escape, but the defendant dragged her by her hair across the parking lot and into her car, then drove to another parking lot where he punched and strangled her until she lost consciousness. *Id.* at 215. When she regained

consciousness, the victim's sister called, and the defendant threatened to hang up if the victim revealed their location. *Id.* at 215-216. The victim convinced the defendant to go into a store alone and she was able to contact the police while he was inside. *Id.* at 216. This Court affirmed the defendant's unlawful-imprisonment conviction because it was "clear" the victim was "forcibly confined against her will" when she was dragged by her hair and forced into the car. *Id.* at 218. The victim "dared not leave while in [the] defendant's presence" because he had punched and strangled her when she expressed "displeasure with the situation." *Id.* This Court also found the defendant's interference with the victim's communication with her sister revealed his intention to keep the victim's confinement secret, satisfying MCL 750.349b(1)(b) ("[t]he restrained person was secretly confined"). *Railer*, 288 Mich App at 217-218.

In this case, AS asserted that defendant immediately pushed her to the ground and began repeatedly strangling her after she entered the apartment, and she believed she was going to die. AS tried to yell for help, but defendant covered her mouth with one hand and strangled her with the other. Defendant took AS's cell phone and text messaged AS's mother, pretending to be AS, asserting she and defendant were "good." His control over her cell phone prevented AS from reaching out for help. AS attempted to leave several times. She "got out one time. [She] made it halfway into the hallway, and he ran up to the door and told [her] to get [her] a*s back inside." She complied because she was afraid "he was just going to tackle [her] and bring [her] back in." At other times, he physically grabbed her and prevented her from leaving. Defendant continued to physically assault and strangle AS in the apartment.

Defendant challenges the sufficiency of evidence to prove he knowingly restrained AS *to facilitate the commission of another felony*. MCL 750.349b. However, when viewed in the light most favorable to the prosecution, *Oros*, 502 Mich at 239, AS's testimony supports defendant's conviction. Defendant began assaulting AS when she entered the apartment and prevented her from leaving or calling for help. Like the defendant in *Railer*, 288 Mich App at 215-216, defendant used physical violence and the threat of physical violence to exert control over AS, amounting to a forcible restriction in her freedom of movement. MCL 750.349b(3)(a). In this case, the evidence demonstrates defendant restrained AS to continue his physical assault. MCL 750.349b(1)(c). Additionally, defendant's interference with AS's cellular phone prevented her from seeking help, reflecting his intention to keep AS's confinement a secret. This conduct satisfies MCL 750.349b(1)(b) ("[t]he restrained person was secretly confined"). *Railer*, 288 Mich App at 217-218.

We find that the evidence in this matter is more than sufficient to sustain defendant's conviction because he restricted AS's movements by threat of violence, AS's testimony suggests he did so to commit AWIGBH, and because he took actions to attempt to keep AS's confinement a secret. A rational juror would be justified in finding that defendant was guilty of unlawful imprisonment beyond a reasonable doubt. *Oros*, 502 Mich at 239.

C. JURY INSTRUCTIONS ON SELF-DEFENSE

Defendant asserts the trial court's erroneous refusal to instruct the jury on defendant's claim of self-defense deprived defendant of his rights to present a defense and to a properly instructed jury. Again, we disagree.

This Court reviews de novo “questions of law arising from the provision of jury instructions,” *People v Guajardo*, 300 Mich App 26, 34; 832 NW2d 409 (2013), and reviews “a trial court’s determination whether a jury instruction is applicable to the facts of a case” for an abuse of discretion, *People v Thigpen*, 349 Mich App at 449. “ ‘An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes.’ ” *Guajardo*, 300 Mich App at 34, quoting *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). In determining whether an error occurred, the instructions are considered in their entirety. *Thigpen*, 349 Mich App at 449. Reversal is unwarranted “if the ‘instructions fairly presented the issues to be tried and sufficiently protected the defendant’s rights.’ ” *Id.*, quoting *People v Eisen*, 296 Mich App 326, 330; 820 NW2d 229 (2012). “The instructions must include all elements of the crime charged and must not exclude consideration of material issues, defenses, and theories for which there is supporting evidence.” *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

[I]f an applicable instruction was not given, the defendant bears the burden of establishing that the trial court’s failure to give the requested instruction resulted in a miscarriage of justice. Reversal for failure to provide a jury instruction is unwarranted unless it appears that it is more probable than not that the error was outcome determinative. [*People v McKinney*, 258 Mich App 157, 163, 670 NW2d 254 (2003) (quotation marks and citations omitted).]

Whether a defendant was denied their constitutional right to present a defense is reviewed de novo. *Kurr*, 253 Mich App at 327. While defendant argued below that he was entitled to a self-defense jury instruction, he did not raise his constitutional claim. As such, the constitutional claim is unpreserved. *Thorpe*, 504 Mich at 252. Unpreserved claims of constitutional error are reviewed for plain error affecting the defendant’s substantial rights. *Thigpen*, 349 Mich App at 449. “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. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings.” *Carines*, 460 Mich at 763 (citation omitted).

A criminal defendant is entitled to a properly instructed jury, *Guajardo*, 300 Mich App at 34, and “[i]nstructional errors that directly affect a defendant’s theory of defense can infringe a defendant’s due process right to present a defense.” *Kurr*, 253 Mich App at 326-327. Before a trial court is required to instruct a jury on affirmative defenses asserted by a defendant, the defendant “must produce some evidence on all elements of the defense.” *Guajardo*, 300 Mich App at 34 (quotation marks and citation omitted).

In this case, defendant claimed that he acted in self-defense. The Self-Defense Act (SDA), MCL 780.971 *et seq.*, states, in relevant part:

(1) An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if either of the following applies:

(a) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual.

* * *

(2) An individual who has not or is not engaged in the commission of a crime at the time he or she uses force other than deadly force may use force other than deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if he or she honestly and reasonably believes that the use of that force is necessary to defend himself or herself or another individual from the imminent unlawful use of force by another individual. [MCL 780.972.]

As recognized by our Supreme Court: “A finding that a defendant acted in justifiable self-defense necessarily requires a finding that the defendant acted intentionally, but that the circumstances justified his actions.” *People v Dupree*, 486 Mich 693, 707; 788 NW2d 399 (2010) (quotation marks and citation omitted).³ See also *People v Nelson*, ___ Mich ___, ___; ___ NW3d ___ (2025) (Docket No. 166297); slip op at 11. As such, if defendant “honestly and reasonably” believed his use of force was necessary to defend himself from imminent death, great bodily harm, or the unlawful use of force, and he intentionally used force to defend himself, his self-defense claim was possibly applicable to the facts.

The trial court declined to instruct the jury on self-defense because it found that defendant’s testimony established he did not act intentionally in response to AS hitting him with the curling iron. He explained: “I reach[ed] out to, out of self-defense and just impulse, I reached my hand out. And I go to push her away, but, uh, I ended up grabbing her or whatever.” Defendant grabbed AS’s neck “out of impulse.” He did so because “it actually hurt being hit on the head with a pretty dense metal curling iron. Um, I didn’t mean to harm her. I was just, you know, just caught off guard and just trying to defend myself in the process.” He squeezed AS’s neck, “just a little bit” and “it wasn’t on purpose.” Defendant acknowledged he could have walked out of the bathroom. He decided to push AS away, and instead of pushing her, he “accidentally” grabbed her neck and “accidentally” squeezed “out of impulse.” The trial court opined defendant’s testimony did not support a self-defense instruction: “[I]n order to argue self-defense as to the underlying charge of assault by suffocation, he has to intend to engage in that conduct for purposes of self-defense, and that’s not what his testimony was.”

Although the trial court correctly found that defendant’s testimony indicated that he did not intend to repeatedly strangle AS, the court incorrectly ignored the fact that his testimony nonetheless established that he intended to use some type of physical force against AS, which he alleged to have undertaken in order to stop her from continuing to strike him with a curling iron. As a result, we find that defendant did, in fact, introduce sufficient evidence to demonstrate that he acted intentionally. *Dupree*, 486 Mich at 707. While there were other potential bases upon

³ In *Dupree*, the Supreme Court analyzed the availability of self-defense for the crime of felon-in-possession under the common law because the crime predated the SDA’s effective date. *Dupree*, 486 Mich at 703-709.

which the court could have arguably refused to provide the self-defense instruction in this matter, including significant evidence demonstrating that defendant was the aggressor, we need not decide whether the trial court nonetheless properly excluded the instruction, i.e., whether the court made the right decision for the wrong reason, because defendant cannot demonstrate that it was more probable than not that the failure to provide the instruction was outcome determinative.

A staggering amount of evidence was introduced in support of the prosecution's theory that defendant committed AWIGBH in the instant case, which included far more than just the testimony of AS. While defendant testified that he impulsively grabbed AS's neck with his hand, in self-defense, and squeezed it "just a little bit," that testimony was contradicted by photographic evidence showing a significant amount of bruising to the neck, i.e., the photographs corroborated AS's testimony that he actually strangled her. Witnesses at trial authenticated photographs demonstrating that AS suffered bruising to a significant number of areas in addition to her neck, including her shoulder, thigh, cheek, the back of her arm, below her kneecap, and underneath her chin, as well as an abrasion to her ankle. Additionally, AS's mother testified to observing her daughter after the incident and seeing what appeared to be a handprint from being slapped or held on her side, a big bruise on AS's thigh, and what appeared to be a bite mark on the back of her neck. She further testified that she saw her daughter the night prior to the incident with defendant and did not witness her having any such injuries at that time. Further, a SANE nurse who treated AS following the incident testified that the bruising was consistent with strangulation.⁴ The nurse also testified about various other bruises suffered by AS, as depicted in photographs entered as evidence at trial, including a bruise to the rib cage area that bore a pattern consistent with AS's statement that defendant elbowed her there, and a five-centimeter bruise to the right knee that was consistent with AS's testimony that defendant pushed her down. The nurse further testified that, during the examination, AS reported significant pain to the neck and throat area, "as well as pretty much her entire body," and that AS said she was coughing up blood and was nauseous. In total, the prosecution admitted over 50 exhibits in this matter, most of which consisted of the photographs supported by the above-referenced witness testimony. Finally, we note that defendant conceded during his trial testimony that he never suggested to the officers who interviewed him after the incident that he acted in self-defense, meaning the only evidence defendant offered to rebut the extensive evidence of his physical assault on AS was his trial testimony.

Considering the voluminous evidence supporting the charge of AWIGBH, and defendant's lack of any rebuttal evidence other than his own testimony, no reasonable juror would have nonetheless determined that defendant acted in self-defense in this matter. The evidence shows that defendant battered and strangled AS, conduct that had the potential to cause grievous bodily injury in this case. As a result, even if the trial court should have instructed the jury regarding self-

⁴ We note that the SANE nurse testified that her qualifications included 30 years' nursing experience, a bachelor's degree in nursing, and a master's degree in forensic nursing, which she described as caring for patients that have been victims of sexual assault, strangulation, trafficking, and abuse. She further testified that she had been working for a grant-funded program that provides comprehensive care to victims of violent crimes like strangulation for the past seven years, and that she was also teaching forensic nursing at a local university, including teaching a lab every winter that covers strangulation.

defense, defendant cannot demonstrate that it was more probable than not that the error was outcome determinative. *McKinney*, 258 Mich App at 163.

As it pertains to defendant's unpreserved claim that the trial court violated his constitutional right to present a self-defense claim in this case, we first note that defendant testified that he acted in self-defense and his counsel argued that he acted in self-defense during closing argument. But, to the extent that defendant argues the trial court's refusal to provide the self-defense jury instruction deprived him of his constitutional right to present a self-defense claim in his case, that unpreserved argument likewise fails in this matter because he cannot meet the requisite third prong of the plain error standard, i.e., he cannot show that his substantial rights were affected because he cannot prove that he was prejudiced by the court's decision on the self-defense issue. *Carines*, 460 Mich at 763. As previously indicated, defendant cannot demonstrate that the outcome of the trial would have been different if the court had allowed the self-defense instruction, thereby allowing defendant to further present his self-defense claim, because no reasonable juror would find that defendant acted in self-defense considering the overwhelming evidence showing that defendant strangled AS with both hands and caused the extensive injuries already delineated.⁵

D. OV 7

Defendant's final argument is that the trial court erroneously assessed 50 points for OV 7 because there is no evidence defendant treated AS with "sadism, torture, excessive brutality, or similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). We disagree.

A trial court's factual determinations relating to the sentencing guidelines " 'are reviewed for clear error and must be supported by a preponderance of the evidence.' " *People v Lydic*, 335 Mich App 486, 490; 967 NW2d 847 (2021), quoting *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013), superseded by statute on other grounds as stated in *People v Rodriguez*, 327 Mich App 573; 935 NW2d 51 (2019). A clear error has occurred if "an appellate court is left with a definite and firm conviction that a mistake was made." *Lydic*, 335 Mich at 490 (quotation marks and citation omitted). This Court reviews de novo whether the facts satisfy the statutory scoring conditions, which is a question of statutory interpretation. *Id.*

Under MCL 777.37(1)(a), if a defendant treats a victim with "sadism, torture, excessive brutality, or similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense," the trial court may properly assign 50 points for OV 7. *Lydic*, 335 Mich App at 498. When "a statute does not contain internal definitions of terms used in it, we give terms their ordinary meaning." *People v Peals*, 476 Mich 636, 641; 720 NW2d 196 (2006). MCL 777.37 does not define "torture" or "excessive brutality." But when analyzing OV 7, this Court has previously defined "torture" as "the act of inflicting excruciating pain, as punishment or revenge, as a means of getting a confession or information, or for sheer cruelty." *Rodriguez*, 327 Mich App at 578 n 2 (quotation marks and citation omitted). This Court has defined "excessive

⁵ Because we have determined that any such error by the trial court, if it occurred, would not have been outcome determinative in this case, we will not further address the prosecution's argument that defendant introduced insufficient evidence to present a self-defense claim.

brutality” as “savagery or cruelty beyond even the ‘usual’ brutality of a crime.” *Id.* (quotation marks and citation omitted).

As the SANE nurse explained, strangulation is the application of external force to the neck that can cause injury to the blood vessels in the neck. That external pressure can stop blood flow, and consequently, oxygen delivery to the brain, causing brain cell death, memory lapses, and in some cases, unconsciousness. AS testified that defendant strangled her “over and over again.” He would release her neck, let her breathe, and strangle her again. AS thought defendant was going to kill her. Her physical injuries and symptoms were consistent with multiple acts of strangulation. AS indicated she was “too mentally unstable” to seek employment after the assault. At sentencing, the prosecutor argued defendant tortured AS because he strangled her multiple times, severely enough to leave visible marks, “right to the point that she can’t breathe and she thinks she’s going to pass out,” then released, only to “strangle her again, over and over and over.”

The trial court’s factual determination that this was a “torturous event” in which AS suffered anguish of body and mind, or agony or pain, is supported by a preponderance of the evidence and is not clearly erroneous. *Lydic*, 335 Mich App at 490. The conclusion defendant inflicted intense pain by applying an external “crushing” force to AS’s neck as punishment for “embarrassing” him or conversing with her ex-boyfriend is also supported by a preponderance of the evidence. *Id.*

A defendant’s conduct only needs to fall within one of the four categories of conduct set forth in MCL 777.37(1)(a) to support the assessment of 50 points for OV 7, *Hardy*, 494 Mich at 439-440. Accordingly, because we find defendant’s conduct constituted “torture,” we need not evaluate whether it likewise meets other categories of conduct, such as “excessive brutality.”

The trial court did not err in assessing 50 points for OV 7.

Affirmed.

/s/ Philip P. Mariani
/s/ Colleen A. O’Brien
/s/ Randy J. Wallace