

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BREON MCINTOSH,

Defendant-Appellant.

UNPUBLISHED

October 15, 2026

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No. 374137

Wayne Circuit Court

LC No. 23-004294-01-FC

Before: MURRAY, P.J., and BOONSTRA and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of second-degree murder, MCL 750.317, and carrying a firearm during the commission of a felony (felony-firearm), MCL 750.227b(1).¹ Defendant was sentenced to 22½ years to 60 years’ imprisonment for his second-degree murder conviction and two years’ imprisonment for his felony-firearm conviction, to run consecutively. On appeal, defendant argues he was denied his constitutional right to present a complete defense, and that he is entitled to resentencing because the trial court improperly assessed 10 points for offense variable (OV) 10, MCL 777.40. We affirm defendant’s convictions and sentences, but remand for the ministerial task of correcting the score for OV 10 in the sentencing information report and Presentence Investigation Report (PSIR).

I. RIGHT TO PRESENT A DEFENSE

Defendant argues that he was denied his right to present a defense when the trial court excluded testimony that the victim underwent bariatric surgery. We conclude that defendant has waived this issue for appellate review.

“A criminal defendant has a due process right to present a defense under the state and federal Constitutions.” *People v Solloway*, 316 Mich App 174, 198; 891 NW2d 255 (2016). See

¹ Defendant was initially charged with first-degree premeditated murder, MCL 750.316(1)(a), but the jury convicted him of second-degree murder.

US Const, Ams VI and XIV; Const 1963, art 1, §§ 17 and 20. However, a defendant “must still comply with ‘established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.’ ” *Solloway*, 316 Mich App at 198 (quotation marks and citation omitted). “Accordingly, the right to present a defense ‘extends only to relevant and admissible evidence.’ ” *Id.* (citation omitted).

Defendant has waived his right to raise this issue on appeal. Waiver is the “intentional relinquishment or abandonment of a known right.” *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (quotation marks and citation omitted). “One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error.” *Id.* (quotation marks and citation omitted). “When defense counsel clearly expresses satisfaction with a trial court’s decision, counsel’s action will be deemed to constitute a waiver.” *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011).

Defendant attempted to testify that in May 2022, the victim underwent bariatric surgery. When the prosecutor objected on relevancy grounds, defense counsel explained that the victim’s subsequent weight loss changed her relationship with defendant. Defense counsel wanted to demonstrate to the jury that despite these changes, defendant never thought about killing the victim until seeing her with another man. Although the trial court found the changed marriage dynamic was relevant information, it would not allow defense counsel to “demonize” the victim by discussing her medical procedure. Thus the court held that defendant could testify that the marriage began having issues, but he could not discuss the victim’s medical procedures.

Defense counsel expressed satisfaction with the trial court’s ultimate ruling. When the trial court stated it would not allow discussion of the victim’s medical procedures *unless* it was relevant, defense counsel stated that was “fine.” The trial court then explicitly asked defense counsel to confirm that he did not need to introduce that information, to which defense counsel replied that was “correct.” Counsel may waive a defendant’s rights with respect to the admission of evidence and may decide what agreements to conclude regarding the admission of evidence. *Carter*, 462 Mich at 217-219. Because defense counsel expressed satisfaction with the parameters of the trial court’s ruling, this “waiver has extinguished any error.” *Id.* at 215. See also *People v Riley*, 465 Mich 442, 449; 636 NW2d 514 (2001) (“When a court proceeds in a manner acceptable to all parties, it is not resolving a disputed point and thus does not ordinarily render a ruling susceptible to reversal.”).

Nonetheless, a defendant’s right to present a defense is not violated if the defendant is otherwise able to present his theory to the jury with other evidence. See *People v Herndon*, 246 Mich App 371, 411-412; 633 NW2d 376 (2001). Defendant’s theory of defense was that despite the strain caused by the victim’s changing behavior and their July 2023 altercation, he never thought about killing her until seeing her with Johnson. Yet, according to defendant, the jury was unable to hear the specific facts underlying the changed marriage dynamic, including the victim’s surgery, her weight loss, her changed behavior, or the details of the July 2023 domestic-violence incident.

Importantly, the trial court never instructed the jury that it could not consider defendant’s testimony about the change in the relationship he had with the victim after her surgery. And, defendant testified that in about April 2023 his relationship with the victim changed, explaining

that she was not acting like herself because she was more secretive and neglectful. In response to defense counsel's questions, defendant denied he thought about killing the victim beginning in April 2023 or at the time of the July 2023 incident. Further, defendant testified about the July 2023 incident without objection. Indeed, defense counsel explained this theory during closing argument. Accordingly, defendant's right to present a defense was not violated because he was able to present his theory of defense to the jury.

II. SENTENCING

Defendant next argues that the trial court erred by using a circumstance created by the offense to justify assessing 10 points for OV 10, and that the trial court impermissibly relied on acquitted conduct during sentencing.

A. STANDARD OF REVIEW

"Under the sentencing guidelines, the [trial] court's factual determinations 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), superseded in part by statute on other grounds as stated by *People v Rodriguez*, 327 Mich App 573, 579 n 3; 935 NW2d 51 (2019). "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made." *People v Blevins*, 314 Mich App 339, 348-349; 886 NW2d 456 (2016). "'Preponderance of the evidence' means such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth." *People v Cross*, 281 Mich App 737, 740; 760 NW2d 314 (2008) (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." *Hardy*, 494 Mich at 438.

B. OV 10

OV 10 considers the "exploitation of a vulnerable victim." MCL 777.40(1). Under that statute, the trial court must assess 15 points if "[p]redatory conduct was involved," MCL 777.40(1)(a), 10 points if "[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), five points if "[t]he offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious," MCL 777.40(1)(c), or zero points if "[t]he offender did not exploit a victim's vulnerability," MCL 777.40(1)(d).

The trial court assessed 10 points for OV 10, finding the victim was vulnerable when she was on the ground after initially being shot by defendant. Specifically, the trial court found that the victim "was unconscious it seems, or she was certainly in some capacity disabled. The liken [sic] victim's intoxication or drug use on victim being asleep [sic]." This finding is consistent with a finding that an offender "exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious," which must be assessed five points. MCL 777.40(1)(c). Accordingly, the trial court erred in assessing 10 points for characteristics warranting a five-point score.

Nevertheless, defendant challenges the two foundations for applying OV 10, vulnerability and exploitation. With respect to the trial court's factual findings, defendant argues the trial court

erred by using the victim's incapacitation created by the shooting to justify finding the victim was vulnerable for purposes of OV 10. The trial court should assess points for OV 10 "only when it is readily apparent that a victim was 'vulnerable,' i.e., was susceptible to injury, physical restraint, persuasion, or temptation." *People v Cannon*, 481 Mich 152, 158; 749 NW2d 257 (2008).

Factors to be considered in deciding whether a victim was vulnerable include (1) the victim's physical disability, (2) the victim's mental disability, (3) the victim's youth or agedness, (4) the existence of a domestic relationship, (5) whether the offender abused his or her authority status, (6) whether the offender exploited a victim by his or her difference in size or strength or both, (7) whether the victim was intoxicated or under the influence of drugs, or (8) whether the victim was asleep or unconscious. [*Id.* at 158-159.]

"The mere existence of one of these factors does not automatically render the victim vulnerable." *Id.* at 159. Defendant is correct that the victim was not incapacitated until after she was shot, and indeed, arguably anyone who is incapacitated by injury during an assault is *susceptible* to further injury. However, contrary to defendant's assertion, the statute does not require the victim to have been vulnerable when the shooting began, only that the victim was "susceptible to injury, physical restraint, persuasion, or temptation." *Id.* at 158. Accordingly, because the victim was susceptible to further injury when defendant left her unconscious after the first shooting, the trial court did not clearly err when it determined the victim was vulnerable.

To assess certain points under OV 10, exploitation of the victim is required. *Cannon*, 481 Mich at 158-159. "The subsections of the statute directing the assessment of 5 and 10 points explicitly require the sentencing judge to determine if the offender 'exploited a victim.'" *Id.* at 159. "Within the meaning of the statute, exploitation requires manipulation of the victim 'for selfish or unethical purposes.'" *People v Ziegler*, 343 Mich App 406, 412; 997 NW2d 493 (2022). See MCL 777.40(3)(b). "[T]he definition of 'exploitation' intrinsically establishes an element of intent: any manipulation must have been done with a *goal* of accomplishing something selfish or unethical." *Ziegler*, 343 Mich App at 413. "The significance is clear: for purposes of OV 10, 'exploitation' means the defendant intended to gain something from the manipulation of the victim at some kind of cost to the victim." *Id.*

The record indicates the trial court believed defendant exploited the victim's unconsciousness when he stood over her and shot her again. The evidence presented at trial showed that defendant walked away after shooting the victim on the ground, before returning moments later to shoot her again. Because a preponderance of the evidence supports a finding that defendant took advantage of the victim's incapacitation to return and shoot her, we are not "left with a definite and firm conviction that a mistake was made." *Blevins*, 314 Mich App at 348-349. Accordingly, the trial court's findings that defendant exploited a vulnerable victim were not clearly erroneous.

In line with the trial court's findings, defendant should only have been assessed five points for OV 10. Adjusting defendant's OV score places him in the same OV level for sentencing, resulting in the same minimum sentencing guidelines range. See MCL 777.61. Resentencing is therefore not required. See *People v Davis*, 468 Mich 77, 83; 658 NW2d 800 (2003).

C. ACQUITTED CONDUCT

Defendant also argues that the trial court violated his right to due process when it used acquitted conduct to assess points for OV 10. As defendant notes, “when a jury has specifically determined that the prosecution has not proven beyond a reasonable doubt that a defendant engaged in certain conduct, the defendant continues to be presumed innocent.” *People v Beck*, 504 Mich 605, 626; 939 NW2d 213 (2019). As such, a trial court may not rely on acquitted conduct in sentencing decisions. *Id.* at 629. “ ‘Acquitted conduct’ means any ‘conduct . . . underlying charges of which [the defendant] had been acquitted.’ ” *People v Beesley*, 337 Mich App 50, 62; 972 NW2d 294 (2021) (citation omitted; alterations in original). “Consequently, a sentencing court must consider a defendant as having undertaken no act or omission that a jury could have relied upon in finding the essential elements of any acquitted offense were proved beyond a reasonable doubt.” *Id.* (quotation marks and citation omitted).

The jury acquitted defendant of first-degree premeditated murder, instead convicting him of the lesser included offense of second-degree murder. The elements of second-degree murder are: “(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse.” *People v Wafer*, 509 Mich 31, 40; 983 NW2d 315 (2022) (quotation marks and citation omitted). In the context of second-degree murder, malice is “defined as the intent to kill” *People v Spears*, 346 Mich App 494, 514 n 10; 13 NW3d 20 (2023) (quotation marks and citation omitted). Comparatively, first-degree premeditated murder requires: “(1) the intentional killing of a human (2) with premeditation and deliberation.” *People v Oros*, 502 Mich 229, 240; 917 NW2d 559 (2018) (quotation marks and citation omitted). The prosecution “must establish beyond a reasonable doubt a ‘murder perpetrated by means of poison, lying in wait, or any other willful, deliberate, and premeditated killing.’ ” *Id.* at 239-240, quoting MCL 750.316(1)(a) (alteration omitted). “To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem.” *Oros*, 502 Mich at 240 (quotation marks and citation omitted). “Premeditation may be established through evidence of (1) the prior relationship of the parties, (2) the defendant’s actions before the killing, (3) the circumstances of the killing itself, and (4) the defendant’s conduct after the homicide.” *People v Unger*, 278 Mich App 210, 229; 749 NW2d 272 (2008).

The jury’s acquittal of defendant of first-degree premeditated murder reflects that the jury was not convinced beyond a reasonable doubt that defendant acted with premeditation and deliberation. See *People v Yeager*, 511 Mich 478, 501; 999 NW2d 490 (2023) (explaining “a conviction of first-degree murder requires a finding of all the elements of second-degree murder, plus an additional element”). See also *People v Jackson*, ___ Mich App ___, ___; ___ NW3d ___ (2024) (Docket No. 366078); slip op at 4 (finding that the jury acquitting defendant of felonious assault and felony-firearm “reflects that the jury was not convinced beyond a reasonable doubt that defendant possessed, nor used, a firearm”). Accordingly, the trial court generally could not consider evidence of premeditation and deliberation when assessing defendant points for OV 10.

At sentencing, the trial court found the victim was unable to get up at the time defendant stood over her and shot her again. Defendant argues the trial court was barred from considering this evidence because it relied on the prosecution’s “execution-style narrative,” despite the jury’s finding that premeditation and deliberation was not proven beyond a reasonable doubt.

To identify what evidence is prohibited from consideration at sentencing, this Court has articulated an approach centered on “what the parties actually disputed at trial.” *People v Brown*, 339 Mich App 411, 423; 984 NW2d 486 (2021). This approach involves “examining the record to determine the ground or grounds upon which a rational jury could have acquitted the defendant.” *Id.* “Under *Brown*’s rational-jury standard, we look at the conduct actually disputed at trial to determine the basis of the jury’s acquittal and whether the evidence the trial court considered at sentencing was consistent with that acquittal.” *People v Boukhatmi*, 351 Mich App 181, 192; 34 NW3d 914 (2024). “Moreover, if a specific fact or circumstance was relevant to both the acquitted charge and the convicted charge—i.e., if there was an overlap of relevant conduct—then the trial court could consider that fact or circumstance when sentencing on the convicted charge.” *Brown*, 339 Mich App at 425.

Defendant’s argument fails because it was undisputed at trial that he intentionally killed the victim. While “the circumstances of the killing itself” may establish premeditation, see *Unger*, 278 Mich App at 229, evidence of defendant purposefully standing over the victim to shoot her again is also relevant to showing malice, which the jury was required to find beyond a reasonable doubt to convict defendant of second-degree murder. See *Yeager*, 511 Mich at 502 (“The *mens rea* of second-degree murder—malice—is also present in first-degree murder . . .”). Because defendant intentionally shooting the victim “was relevant to both the acquitted charge and the convicted charge,” the trial court was allowed to consider it at sentencing. *Brown*, 339 Mich App at 425.

III. CONCLUSION

We affirm defendant’s convictions and sentences, but remand to the trial court for the ministerial task of correcting the score for OV 10 in defendant’s sentencing information report and PSIR. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Mark T. Boonstra
/s/ Michael J. Riordan