STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTON A. ANDERSON, SR.,

Defendant-Appellant.

UNPUBLISHED
April 8, 1997

No. 185178
Oakland Circuit Court
LC No. 94-135532-FC

Before: O'Connell, P.J., and Markman and M. J. Talbot,* JJ.

PER CURIAM.

After a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), one count of first-degree home invasion, MCL 750.110a; MSA 28.305(a), one count of breaking and entering, MCL 750.750.115; MSA 28.310, and one count of malicious destruction of property, MCL 750.380; MSA 28.612. Defendant subsequently pleaded guilty to three counts of being a habitual second offender, MCL 769.10; MSA 28.1082. Defendant was also charged with one count of aggravated stalking, MCL 750.411I; MSA 28.643(9), and two additional counts of breaking and entering, MCL 750.115; MSA 28.310, but was found not guilty of those charges. He was sentenced to two sentences of twenty to forty years in prison for the first-degree criminal sexual conduct convictions, ten to twenty years in prison for the first-degree home invasion conviction, ninety days in prison for the malicious destruction of property conviction, and ninety days in prison for the breaking and entering conviction. These charges arise out of defendant's assault and rape of his former girlfriend in the presence of her young son. All of defendant's sentences were to be served concurrently. He now appeals his convictions as of right. We affirm.

Defendant first argues that the trial court abused its discretion by admitting evidence of defendant's prior conviction for fourth-degree child abuse. We disagree. According to MRE § 404(b)(1):

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* Circuit judge, sitting on the Court of Appeals by assignment.

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to, the conduct at issue in the case.

Such evidence is admissible: 1) if it is relevant to an issue other than character or propensity, 2) if it is relevant to an issue or fact of consequence at trial, and 3) if its probative value is not substantially outweighed by the danger of unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), modified on other grounds, 445 Mich 1205; 520 NW2d 338 (1994).

In the instant case, defendant was charged with aggravated stalking. MCL 750.411i; MSA 28.643(9)(1)(e) defines stalking as a "willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed or molested." MCL 750.411i; MSA 28.643(9)(1)(e) would allow into evidence a broad range of previous conduct by a defendant, not in order to show his bad character, but in order to show the reasonableness of a complainant's sense of apprehension concerning the defendant. The fact that defendant assaulted the complainant on a prior occasion in the presence of her son, and that her son was injured in the assault, helps to show why complainant felt harassed and terrorized by defendant. This is also admissible to show that defendant engaged in a system or pattern of physical or mental abuse against complainant. Given that (a) MRE §401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," and (b) the stalking statute very broadly defines what kind of evidence is of consequence, we do not believe that the court abused its discretion in admitting this evidence. Defendant's argument is less with the trial court in the exercise of its discretion than it is with the legislature in its crafting of a criminal statute in which the victim's state of mind becomes of critical importance.

Defendant argues, however, that the probative value of the evidence is outweighed by the danger of unfair prejudice. MRE §403; *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993). Unfair prejudice exists where there is a tendency that the evidence will be given undue or presumptive weight by the jury, or will inject extraneous considerations into the case, or when it would otherwise be inequitable to allow the use of the evidence. *People v Harvey*, 167 Mich App 734, 746; 423 NW2d 335 (1988). Under the facts of the instant case, we do not agree with defendant. Although evidence of defendant's past child abuse was arguably prejudicial, we do not believe that the court abused its discretion in concluding that any such impact was outweighed by the evidence's relevancy to the factfinder. Further, the trial court clearly instructed the jury as to the permissible uses of the evidence of defendant's prior bad acts.

Defendant also argues that the trial court abused its discretion by admitting testimony with respect to the details of an earlier assault upon complainant by defendant. We disagree. Complainant

testified that on July 31, 1993, defendant entered her house by pushing the air conditioner through the window, that he hit her on the face and head, that her son was injured in the struggle, and that the only way to stop defendant from hitting her was to have sex with him. Complainant's testimony was relevant to show a pattern of defendant abusing complainant. To prove the elements of the aggravated stalking charge, the prosecutor was required to show "repeated and continuing harassment" by defendant which caused complainant to feel "frightened, intimidated, threatened, and harassed." MCL 750.411i(1)(e); MSA 28.643(9)(1)(e). We do not find an abuse of discretion of the trial court's part in concluding that the details of this earlier assault were relevant to showing complainant's state of mind. Although the testimony was hurtful to defendant, we also do not find an abuse of discretion of the trial court in concluding that the probative value of the testimony outweighed the danger of unfair prejudice. MRE §403.

Defendant next argues that the trial court abused its discretion by failing to properly control the trial proceedings. Again we disagree. MRE 611(a) directs the court to exercise reasonable control over the questioning of witnesses and the presentation of evidence so as to: 1) ascertain the truth, 2) avoid needless consumption of time, and 3) protect witnesses from harassment or undue embarrassment. The test to determine whether the trial court's conduct pierced the veil of judicial impartiality is whether the trial court's conduct unduly influenced the jury and thereby deprived the defendant of his right to a fair and impartial trial. *People v Collier,* 168 Mich App 687, 698; 425 NW2d 118 (1988). The record must be reviewed as a whole and portions of the record should not be taken out of context. *Collier, supra,* at 698.

Defendant first argues that the trial court failed to properly control the proceedings by allowing improper evidence to be admitted. However, as already noted, we find no abuse of discretion in the admission of evidence in the instances noted by defendant.

Defendant next argues that the trial court's questioning, and the trial court's allowance of the jury's questioning, of the witnesses was improper. We disagree. Generally, a judge may question witnesses to clarify testimony or to elicit additional relevant information. MRE 614(b); *People v Davis*, 216 Mich App 47, 49-51; 549 NW2d 1 (1996). However, the questioning must not be intimidating, argumentative, prejudicial, unfair, or partial. *People v Conyers*, 194 Mich App 395, 404; 487 NW2d 787 (1992). When questioning a witness, a judge must avoid any invasion of the prosecutor's role. *People v Ross*, 181 Mich App 89, 91; 449 NW2d 107 (1989). The test to determine whether the court's questioning of a witness was appropriate is "whether the judge's questions and comments may well have unjustifiably aroused suspicion in the mind of the jury as to a witness' credibility, and whether partiality quite possibly could have influenced the jury to the detriment of the defendant's case. *Conyers, supra*, at 405.

In the instant case, it is unclear whether certain questions were those of the trial judge or the jury. However, the questioning was not improper. The questioning of Jennifer Cerini, defendant's alibi witness, by the court and the jury was not improper. Cerini's credibility and defendant's whereabouts on October 6-7, 1994, were important issues in the case. The questioning was relevant, and revealed no bias or partiality. Similarly, the questions asked to complainant by the court and the jury were not

improper. Complainant had already testified that defendant used drugs and was abusive toward her on previous occasions, as well as of the details of the July 31, 1993, assault and her attempts to defend herself against defendant. The trial court's questioning of the witnesses did not deny defendant a fair trial.

Defendant next argues that the trial court abused its discretion by granting the prosecution's motion for late endorsement of expert witness Hedy Nuriel. We disagree. MCL 767.40a(3); MSA 28.980(1)(3) requires a prosecutor to send a list of witnesses it intends to produce at trial to the defendant not less than thirty days before trial. However, a prosecutor's late endorsement of a witness is permitted at any time upon leave of the court and for good cause shown. MCL 767.40a(4); MSA 28.980(1)(4); *People v Burwick*, 450 Mich 281, 288; 537 NW2d 813 (1995). Allowing late endorsement of an expert witness is not an abuse of discretion where the court adopts procedures to guarantee the defendant adequate time to prepare, and the defendant fails to articulate any prejudice due to the late endorsement of the witness. *People v Heard*, 178 Mich App 692, 696; 44 NW2d 542 (1989).

In the instant case, the trial court's ruling allowing the expert to testify required that defense counsel be given the opportunity to interview the witness before she took the stand. Prior to the expert's testimony, defense counsel indicated to the court that he had spoken to the expert on the telephone and did not indicate that he had inadequate time to interview the witness

. Further, we do not find, as argued by defendant, that the form of the questions asked of the expert too closely paralleled the facts of the instant case. Generally, hypothetical questions asked to an expert should be based on facts in the record. *People v Holleman*, 138 Mich App 108, 116; 358 NW2d 897 (1984). Moreover, the trial court properly instructed the jury that the expert was not permitted to give an opinion as to whether defendant assaulted complainant but that her testimony could only be considered to determined whether complainant's behavior was consistent with that of victims of domestic abuse.

Defendant next argues that he was improperly charged and convicted of first-degree home invasion, MCL 750.110a; MSA 28.305(a). Specifically, defendant argues that he was improperly convicted because he owned the home and there was insufficient evidence that complainant was "legally in possession or control" of the home for the purposes of MCL 750.110a; MSA 28.305(a). We disagree. MCL 750.110a(2); MSA 28.305(a)(2) provides:

> A person who breaks and enters a dwelling with the intent to commit a felony or a larceny in the dwelling or the person who enters a dwelling without permission with intent to commit a felony or a larceny in the dwelling is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exist:
>
> (a) The person is armed with a dangerous weapon.
>
> (b) Another person is lawfully present in the dwelling.

The statute defines the term "without permission" as "without having obtained permission to enter from the owner or lessee of the dwelling or from any other person lawfully in possession or control of the dwelling." MCL 750.110a(1)(c); MSA 28.305(a)(1)(c).

In the instant case, complainant lived in the house for six years and defendant never objected to her presence in the house. Furthermore, there is no right to enter one's own home in violation of a restraining order. *People v Szpara*, 196 Mich App 270, 273-274; 492 NW2d 804 (1992); *People v Pohl*, 202 Mich App 203, 205; 507 NW2d 809 (1993). In the instant case, although defendant was not under a court order prohibiting him from entering the house, the conditions of his probation prohibited him from having contact with complainant who was lawfully living in the house. Accordingly, we find that defendant was properly convicted of first-degree home invasion.

Finally, defendant argues that he is entitled to resentencing because offense variables two, six, and seven were improperly scored. We disagree. Appellate review of guidelines calculations is very limited. *People v Johnson*, 202 Mich App 281, 288; 426 NW2d 415 (1993). A sentencing judge's determination of the number of points to be scored for an offense variable is reviewed for an abuse of discretion. *People v Day*, 169 Mich App 516, 517 (1988). Scoring decisions for which there is any evidence in support will be upheld. *People v Hernandez*, 443 Mich 1, 16; 503 NW2d 629 (1993).

Defendant first argues that, although after hearing defense counsel's argument that OV 6 should have been scored at zero rather than ten points the trial court agreed to so reduce the score, the sentencing information report (SIR) does not reflect the change. Alleged inaccuracies in an SIR need not be addressed in the same manner as inaccuracies in a PSIR. *People v Green*, 152 Mich App 16, 17-18; 391 NW2d 507(1986). There is no indication in the instant case that the sentencing judge did not take the reduction in points into consideration when determining defendant's guidelines range. Further, defendant's guidelines would not change even if the score for OV 6 remained at ten points. Accordingly, any error was harmless.

Defendant next argues that the sentencing court abused its discretion by scoring OV 2, physical attack and/or injury, at twenty-five points. A score of twenty-five points for OV 2 is warranted where the victim suffers bodily injury or is subjected to terrorism which is defined as "conduct that is designed to increase substantially the fear and anxiety that the victim suffers during the offense." Michigan Sentencing Guidelines (2d ed, 1988) at 44. In the instant case, complainant testified that defendant threatened her with a knife and an extension cord during the assault and told her that he would slit her throat with a razor if she moved toward the door. Defendant also threatened to tie up complainant and her son for seventy-two hours. Furthermore, complainant testified that she suffered "lots of bruises and a lump on the back of her head." Based on complainant's testimony, we find no abuse of discretion in scoring OV 2 at twenty-five points.

Finally, defendant argues that the sentencing court abused its discretion by scoring OV 7, which deals with the offender's exploitation of the victim's vulnerability, at five, rather than zero points. We disagree. A score of five points for OV 7 is warranted when the offender "exploits the victim through a difference in size/strength, or because the victim was intoxicated, under the influence of drugs, asleep, or

unconscious." Michigan Sentencing Guidelines (2d ed) at 45. Instruction A to OV 7 provides that "[t]he mere presence of one or more of these factors should not automatically be equated with victim vulnerability." *Id*. The test is whether the victim's vulnerability was typical of that of all victims of sexual assault. *People v Parlor*, 184 Mich App 236, 237; 457 NW2d 55 (1990). In the instant case, complainant was five feet, two inches tall and weighed one hundred and five pounds. Defendant was five feet nine inches tall and weighed one hundred and fifty pounds. Complainant testified that she could not resist defendant "because he's just a lot bigger." Furthermore, defendant used his superior strength to hold complainant down while he raped her. Complainant's testimony provides evidence to support a score of five points for OV 7. Further, even if OV 7 were scored at zero points, defendant's offense severity level would still fall into category IV and defendant's guidelines range would not be affected. Accordingly, any error was harmless.

Affirmed.

/s/ Peter D. O'Connell
/s/ Stephen J. Markman
/s/ Michael J. Talbot