

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES CORNELIUS FLANAGAN,

Defendant-Appellant.

UNPUBLISHED
November 29, 2012

No. 305762
Wayne Circuit Court
LC No. 10-009177-FH

Before: OWENS, P.J., and TALBOT and WILDER, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for felonious assault, MCL 750.82; domestic assault, MCL 750.81(2); and malicious destruction of personal property less than \$200, MCL 750.377a(1)(d). We affirm.

I. BACKGROUND

Defendant's convictions arise from a domestic dispute between him and the victim, who was his ex-girlfriend and the mother of his son. On the morning of July 26, 2010, defendant stood in the street and threw a steel brake drum, weighing approximately ten pounds, through the front windshield of the victim's car as she drove past him.

Before trial, the prosecution moved pursuant to MCL 678.27b and MRE 404(b) to admit evidence of four previous instances in which defendant allegedly committed domestic assault against the victim. The trial court granted the prosecution's motion under MCL 678.27b without addressing the evidence's admissibility under MRE 404(b).

At trial, defendant claimed self-defense and testified that he only threw the brake drum when the victim attempted to run him over with her car. The victim, on the other hand, testified that she did not attempt to run defendant over with her car or do anything to provoke him to throw the brake drum.

The jury convicted defendant of his three charged offenses, and defendant was sentenced to a minimum sentence of 48 months' imprisonment on the felonious assault conviction and time served for the two misdemeanor convictions.

II. ANALYSIS

Defendant first argues that MCL 768.27b conflicts with MRE 404(b) and infringes on the Supreme Court’s constitutional authority to establish the practice and procedure of the judiciary. We disagree. We review unpreserved claims of constitutional error for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

According to MCL 768.27b(1), “in 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.” This statute stands in stark contrast to MRE 404(b)(1), which requires a proponent to offer more than the transparency of a person’s character as justification for admitting evidence of other crimes or wrongs. [*People v Schultz*, 278 Mich App 776, 778; 754 NW2d 925 (2008).]

Because MCL 768.27b irreconcilably conflicts with MRE 404(b), “the question becomes which decree prevails – that of the Legislature or that of the judiciary.” *People v Watkins*, 491 Mich 450, 472; 818 NW2d 296 (2012) (analyzing MCL 768.27a). “A rule of evidence will prevail over a conflicting statute only if the statute unconstitutionally infringes on this Court’s authority under Const 1963, art 6, § 5 to ‘establish, modify, amend and simplify the practice and procedure in all courts of this state.’” *Id.* As defendant acknowledges in his brief on appeal, this Court has concluded that MCL 768.27b prevails over MRE 404(b) because it is a substantive rule that does not infringe upon the Supreme Court’s constitutional authority to enact administrative rules governing practice and procedure of the judiciary. *Schultz*, 278 Mich App at 779. We are bound by *Shultz* and must follow its precedence. MCR 7.215(C)(2) and (J)(1). Moreover, defendant has provided no explanation or reasoned argument as to why *Schultz* may have been improperly decided. And we note that in analyzing a sister statute, the Supreme Court recently “conclude[d] that MCL 768.27a^[1] is a valid enactment of substantive law to which MRE 404(b) must yield.” *Watkins*, 491 Mich at 475. Accordingly, defendant failed to establish any plain error.

Defendant next argues that the evidence of his alleged prior domestic assaults against the victim was irrelevant and unduly prejudicial under MRE 403. We disagree. “The trial court is in the best position to make MRE 403 determinations on the basis of ‘a contemporaneous assessment of the presentation, credibility, and effect of testimony’ Accordingly, we review its decisions admitting or excluding evidence under a deferential standard and will reverse only if we identify ‘a clear abuse of discretion.’” *People v Mardlin*, 487 Mich 609, 627; 790 NW2d 607 (2010) (citations omitted). “A trial court abuses its discretion when its decision falls outside the

¹ “[I]n a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant.” MCL 768.27a(1).

range of reasonable and principled outcomes.” *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008).

“The language of MCL 768.27b clearly indicates that trial courts have discretion ‘to admit relevant evidence of other domestic assaults to prove any issue, even the character of the accused, if the evidence meets the standard of MRE 403.’” *People v Cameron*, 291 Mich App 599, 609; 806 NW2d 371 (2011), quoting *People v Pattison*, 276 Mich App 613, 615; 741 NW2d 558 (2007). MRE 403 provides that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” MRE 403. “‘Relevant evidence’ means 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.” MRE 401.

In this case, the victim testified that she and defendant got into an argument on July 26, 2010, that culminated with defendant throwing a brake drum, without provocation, through the front windshield of the car she was driving. Defendant testified that the victim was the aggressor and that he was acting in self-defense. In each of defendant’s four alleged prior domestic assaults, he acted as the aggressor and assaulted the victim during a domestic dispute. Thus, the evidence of defendant’s alleged prior domestic assaults demonstrated his propensity to commit acts of violence against the victim and tended to show it was more probable than not that the victim testified truthfully. *Cameron*, 291 Mich App at 612 (holding that evidence of the defendant’s prior acts of domestic violence was relevant under MCL 768.27b to show his propensity to commit such acts and to establish the witness’ credibility). Therefore, the evidence was relevant.

The evidence was also not unduly prejudicial under MRE 403.

All relevant evidence is prejudicial; it is only unfairly prejudicial evidence that should be excluded. Unfair prejudice exists when there is a tendency that evidence with little probative value will be given too much weight by the jury. This unfair prejudice refers to the tendency of the proposed evidence to adversely affect the objecting party’s position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury’s bias, sympathy, anger, or shock. [*People v McGhee*, 268 Mich App 600, 613-614; 709 NW2d 595 (2005) (citations and quotations omitted).]

Although “[p]ropensity evidence is prejudicial by nature, and it is precisely the danger of prejudice that underlies the ban on propensity evidence in MRE 404(b),” in the context of MCL 768.27b, courts must weigh the propensity inference *in favor* of the evidence’s probative value, rather than its prejudicial effect. See *Watkins*, 491 Mich at 486-487 (analyzing MCL 768.27a).

Here, evidence of defendant’s similar acts of domestic assault against the victim demonstrated his propensity to engage in such conduct and was probative to whether or not he assaulted the victim on July 26, 2010. Moreover, because defendant and the victim provided contradictory testimony about whether defendant was the aggressor or was acting in self-defense, evidence that made it more probable that the victim was testifying truthfully was highly probative. *Pattison*, 276 Mich App at 615-616 (holding that evidence of the defendant’s other

domestic assaults was “more probative than prejudicial” where the evidence “tend[ed] to bolster the credibility of [the victim], which is the most critical issue in the case”). Further, defendant failed to demonstrate that the challenged evidence “stir[red] the jurors to such passion . . . as to [be swept] beyond rational consideration of [the defendant’s] guilt or innocence of the crime on trial.” *People v Starr*, 457 Mich 490, 503; 577 NW2d 673 (1998) (quotation omitted). Accordingly, we find that the trial court did not abuse its discretion by determining that the evidence’s probative value was not substantially outweighed by the danger of unfair prejudice.

Because the trial court properly admitted the challenged evidence under MCL 768.27b, we need not review whether the evidence was also admissible under MRE 404(b). *Pattison*, 276 Mich App at 616.

Defendant next argues that the prosecution failed to present sufficient evidence to disprove his claim of self-defense. We disagree. This Court reviews de novo a claim of insufficient evidence. *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006). “[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court 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 Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Moreover, “when reviewing claims of insufficient evidence, this Court must make all reasonable inferences and resolve all credibility conflicts in favor of the jury verdict.” *People v Solmonson*, 261 Mich App 657, 661; 683 NW2d 761 (2004).

“Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt.” *People v Roper*, 286 Mich App 77, 86; 777 NW2d 483 (2009) (quotation omitted). Here, the trial court instructed the jury on self-defense involving deadly force, i.e., throwing the brake drum through the front windshield of the victim’s moving car. In order to establish self-defense so as to justify the use of deadly force, the defendant must show that “under all the circumstances, he honestly and reasonably believes that he is in imminent danger of death or great bodily harm and that it is necessary for him to exercise deadly force.” *People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002). In this case, it was uncontroverted that defendant introduced evidence of self-defense and, thus, the prosecution was required to present sufficient evidence to prove beyond a reasonable doubt that defendant was not acting in self-defense. *Id.*; *Roper*, 286 Mich App at 86. Defendant asserts that the prosecution failed to meet its burden because his testimony that he acted in self-defense “was un rebutted” at trial. Reviewing the record before this Court, defendant’s assertion is meritless. The victim testified that she did not attempt to run defendant over with her car and she did nothing to provoke defendant to throw the brake drum through her windshield. “Juries, not appellate courts, see and hear witnesses and are in a much better position to decide the weight and credibility to be given to their testimony.” *Wolfe*, 440 Mich at 515 (quotation omitted). Thus, viewing the evidence in the light most favorable to the prosecution and making all reasonable inferences and resolving all credibility conflicts in favor of the jury verdict, as we are required to do, we find that the prosecution presented ample evidence from which a jury could find beyond a reasonable doubt that defendant was not acting in self-defense when he threw the brake drum through the victim’s windshield.

Finally, defendant argues that he is entitled to resentencing because the trial court erred in scoring offense variable (OV) 1, OV 3, and OV 19. We disagree. “Our review of sentencing guidelines calculations is very limited.” *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991). “A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. Scoring decisions for which there is any evidence in support will be upheld.” *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

We find that there was adequate evidence of record to support the trial court’s scoring of 5 points for OV 3. Under OV 3, “[i]f a ‘bodily injury not requiring medical treatment occurred to a victim,’ then a trial court is to score five points. MCL 777.33(1)(e). Here, the victim testified at trial that she sustained small cuts on her face and neck from the shattered windshield glass and no evidence of record refutes these injuries. Thus, the trial court did not abuse its discretion by scoring OV 3 at five points. *Hornsby*, 251 Mich App at 468.

We also find that the trial court did not err in scoring 15 points for OV 19. “Fifteen points should be assessed for OV 19 if a defendant ‘used force or the threat of force . . . to interfere with, attempt to interfere with, or that results in the interference with the administration of justice or the rendering of emergency services.’” *People v McDonald*, 293 Mich App 292, 299; 811 NW2d 507 (2011), quoting MCL 777.49(b). “The phrase ‘interfered with or attempted to interfere with the administration of justice’ is broad. It includes acts constituting obstruction of justice, but is not limited to those acts.” *People v Steele*, 283 Mich App 472, 492; 769 NW2d 256 (2009). The victim testified at trial that defendant threatened her in the court parking lot following her testimony at the August 26, 2010, preliminary examination and no evidence was presented at trial to refute the victim’s account. Thus, the trial court did not abuse its discretion by scoring 15 points for OV 19. See *People v Passage*, 277 Mich App 175, 179-181; 743 NW2d 746 (2007) (affirming the trial court’s scoring of 15 points for OV 19 where the defendant threatened a potential witness, “which could have dissuaded the [witness] from testifying against defendant”); *People v Endres*, 269 Mich App 414, 420-422; 711 NW2d 398 (2006) (affirming the trial court’s scoring of 15 points for OV 19 where “[t]here was sufficient evidence to conclude that because of defendant’s threats, his victim might have been dissuaded from coming forward with accusations and testimony, thus preventing the discovery and prosecution of defendant’s crimes”).

However, we find that the trial court incorrectly scored five points for OV 1. A trial court properly scores OV 1 at five points where the defendant displayed or implied a weapon. MCL 777.31(1)(e). But a trial court must not score five points where the conviction offense is felonious assault, MCL 750.82, as it was in the present case. MCL 777.31(2)(e); *People v Greene*, 477 Mich 1129, 1129-1130; 730 NW2d 478 (2007). Without the scoring error, defendant’s minimum guidelines range would have been lowered to 12 to 48 months’ imprisonment. Thus, defendant’s minimum sentence of 48 months’ imprisonment is within the appropriate recommended minimum sentence range. If a sentence is within the appropriate guidelines range, then it can be appealed only if the issue was raised (1) at sentencing, (2) in a motion for resentencing, or (3) in a motion to remand. MCL 769.34(10); *People v Francisco*,

474 Mich 82, 89 n 8; 711 NW2d 44 (2006); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). Here, there is no evidence that defendant raised the issue at sentencing,² in a motion for resentencing, or in a motion to remand. Therefore, this Court must affirm the sentence.

Affirmed.

/s/ Donald S. Owens

/s/ Michael J. Talbot

/s/ Kurtis T. Wilder

² Defendant never argued below that the trial court should not score OV 1 at five points because his conviction offense was felonious assault, which is the claim of error he now raises on appeal. “An objection based on one ground is usually considered insufficient to preserve an appellate attack based on a different ground.” *Kimble*, 470 Mich at 309. Accordingly, defendant did not preserve his claim of error regarding the scoring of OV 1. See *id.* (finding that the defendant did not preserve his claim of error where “[a]lthough defendant argued at sentencing that OV 16 should be scored at one point instead of five points, defendant did not raise the argument that OV 16 should not have been scored at *all* until he filed his application for leave to appeal with the Court of Appeals”).