

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
May 14, 2013

v

BRIAN CHARLES SCHERER,
Defendant-Appellant.

No. 309532
Delta Circuit Court
LC No. 11-008500-FH

Before: FORT HOOD, P.J., and FITZGERALD and O'CONNELL, JJ.

PER CURIAM.

Following a jury trial, defendant appeals as of right his conviction of domestic assault, third offense, MCL 750.81(4). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to 46 months' to 15 years' imprisonment. We affirm.

Defendant's conviction arose from an altercation with the victim, who was his girlfriend. According to the victim, defendant became angry, grabbed her by the throat, and choked her. She did not know if she struggled, if she lost consciousness, or which hand he choked her with. Her next memory was of calling the police. Defendant specifically denied choking the victim. According to defendant the altercation started when the victim slapped him numerous times in the face with both hands. He said he grabbed her arms, pushed her against the bed, and asked her to stop. Defendant said he eventually released his grip and backed away, at which point the victim struck him with a piece of wall trim.

Defendant first argues there was insufficient evidence to convict him of domestic assault because, according to defendant, he presented substantial evidence that he was acting in self-defense. We disagree. We review de novo a claim of insufficient evidence. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). We consider whether the evidence, when viewed in the light most favorable to the prosecution, would allow a rational trier of fact to find that all of the elements of the charged crime were proven beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

Once evidence of self-defense is introduced, the prosecution must disprove self-defense beyond a reasonable doubt. *People v Dupree*, 486 Mich 693, 709-710; 788 NW2d 399 (2010). The defense requires a finding that the defendant "acted intentionally, but that the circumstances justified his actions." *Id.* at 707; see also MCL 780.972 (the Self-Defense Act).

Defendant testified that the victim, not he, initiated the physical altercation by repeatedly slapping him in the face. However, he never indicated that he was afraid for his safety. Although the victim's memory of the incident is incomplete, she did remember that defendant grabbed her throat and put her up against the wall, an action defendant denied. There was evidence of extensive bruising on the victim that did not exist before the assault. The jury could have concluded defendant was not credible, either in part or in whole, and could have rejected his testimony that the victim was the aggressor.

Viewing the evidence in the light most favorable to the prosecution, and deferring to the jury's superior ability to assess witness credibility, we conclude that sufficient evidence was adduced to disprove self-defense beyond a reasonable doubt.

Next, defendant argues that the trial court abused its discretion in denying his motion for a mistrial and his request for an adjournment. Defendant presented the motion because two subpoenaed witnesses failed to appear at trial. We review the trial court's decision for an abuse of discretion. *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003). A trial court's ruling on a defense request for an adjournment or continuance is also reviewed for abuse of discretion. *Id.* A court abuses its discretion when it chooses a result that falls outside the range of reasonable and principled outcomes. *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007).

Defendant's motion for mistrial or alternatively adjournment was focused solely on one witness. Accordingly, we address this issue with regard to that witness only. The trial court was under no duty to sua sponte grant an adjournment or mistrial with respect to the witness not cited in the motion. *People v Clark*, 453 Mich 572, 581 n 6; 556 NW2d 820 (1996).

A motion for adjournment must be based on good cause. *People v Jackson*, 467 Mich 272, 276; 650 NW2d 665 (2002). In *Coy*, this Court stated:

"Good cause" factors include "whether defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments." Even with good cause and due diligence, the trial court's denial of a request for an adjournment or continuance is not grounds for reversal unless the defendant demonstrates prejudice as a result of the abuse of discretion. [*Coy*, 258 Mich App at 18-19 (citation omitted).]

MCR 2.503(C) provides:

- (1) A motion to adjourn a proceeding because of the unavailability of a witness or evidence must be made as soon as possible after ascertaining the facts.
- (2) An adjournment may be granted on the ground of unavailability of a witness or evidence only if the court finds that the evidence is material and that diligent efforts have been made to produce the witness or evidence.

The record shows that diligent efforts were made to produce the witness. The witness was subpoenaed, and the trial court issued a bench warrant for her arrest when she failed to

appear. Officers used reasonable efforts in trying to locate the witness, and the court noted that authorities had some indication that the witness knew she was being sought.

Further, according to defendant's proffer of what the witness would testify to, her testimony would have been cumulative. It allegedly would have corroborated defendant's version of what happened between the time when he and the victim arrived at the victim's house and when the missing witness departed. However, those facts were established by defendant, and the victim did not deny them. Moreover, the proffered testimony does not shed any light on the events that occurred during the assault. Therefore, the trial court did not abuse its discretion in denying the adjournment request.

We also reject defendant's argument that the prosecutor committed misconduct in closing argument to the jury. We evaluate the prosecutor's remarks in context. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). "The propriety of a prosecutor's remarks depends on all the facts of the case." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

During closing argument, the prosecutor recounted that the women who testified about being choked by defendant "experienced the manner in which [defendant] commits his violence, and that is going for the throat." The prosecutor went on to argue as follows:

Now actually, there's a lot of phrases about the throat. You know, got a frog in your throat. But, you know, the phrase, "Go for the throat," it's used in sort of everyday discussion to basically describe kind of going for a sensitive area or a topic. You might hear it . . . during a candidate's debate, the one candidate went for the throat of the other candidate, and, of course, that just describes going for a sensitive area. But the phrase actually comes from observations of animals, because animals in the wild will go for the throat of their prey. In fact, maybe some of you have seen, sometimes, dogs fighting, and one will submit by rolling over on the back and bearing his throat.

Defense counsel objected, arguing that "these comments are highly improper to be comparing my client to an animal out in the wild that goes for the throat," and that the comments would inflame the jury. The trial court disagreed.

Although a prosecutor is not required to "confine argument to the blandest possible terms," *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007), a prosecutor is not permitted to appeal to the fears of the jury, *People v Cooper*, 236 Mich App 643, 651; 601 NW2d 409 (1999), as in the case of resorting to a civic duty argument, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). The prosecutor's statements might be taken as hyperbole. Further, the trial court properly instructed the jury that they were to decide the case based on the properly admitted evidence and that the lawyer's comments were not evidence. Jurors are presumed to follow their instructions. See *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Finally, defendant argues that offense variables (OVs) 3 and 4 were improperly scored. We again disagree. We review for clear error the sentencing court's determinations on offense variables. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). A scoring decision

is not clearly erroneous if the record contains evidence in support of the decision. *People v Lockett*, 295 Mich App 165, 182; 814 NW2d 295 (2012).

OV 3 addresses physical injury to the victim. MCL 777.33(1). The court must assess ten points if a “bodily injury requiring medical treatment occurred to a victim,” MCL 777.33(1)(d), and five points if a “bodily injury not requiring medical treatment occurred to a victim,” MCL 777.33(1)(e). An injury requiring medical treatment refers to the necessity for treatment and not the victim’s success in obtaining treatment. MCL 777.33(3). Additionally, the assessment of points under OV 3 requires factual causation, in that but for the defendant’s criminal actions the injury to the victim would not have occurred. *People v Laidler*, 491 Mich 339, 345; 817 NW2d 517 (2012). However, the defendant’s conduct need not have been the exclusive cause of the injury. *Id.* at 346.

The victim testified that her entire body hurt when photographs of her injuries were taken. She had an injury to her throat and bruises on her arms, legs, hips, and back. She testified that with the exception of a bruise on her elbow, none of the bruises existed prior to the assault. She also testified that she urinated blood for about two weeks after the incident, but she did not seek medical treatment because she was humiliated. The trial court determined:

I would conclude that once [the victim] had the injury to the kidney, evidenced by the urinating of blood, she did need medical treatment. It would not matter whether she got it or didn’t get it, she needed it because there was evidence, as I said, of an internal injury, most likely an injury to her kidney.

That determination is supported by the victim’s testimony and other evidence describing the extent of her injuries.

OV 4 addresses psychological injury to a victim. MCL 777.34(1). Under OV 4, the court must assess ten points if “serious psychological injury requiring professional treatment occurred to a victim.” MCL 777.34(1)(a). In making this determination, the fact that treatment has not been sought is not conclusive. MCL 777.34(2). However there must be some evidence of psychological injury on the record to justify the assessment of the points. *Lockett*, 295 Mich App at 183. A victim’s expression of fearfulness can be sufficient to satisfy the statute. *People v Davenport (After Remand)*, 286 Mich App 191, 200; 779 NW2d 257 (2009).

The evidence established that the victim was distraught and fearful when the police arrived at her home. She testified that the entire incident was terrifying, and one individual who was living in her home testified that she was frantic and scared after the assault. The victim’s impact statement indicates that she continued to experience anxiety and that the offense devastated her. Moreover, in her impact statement, she indicated that she planned to seek counseling. Based on those facts, the trial court did not err in its scoring of OV 4.

Affirmed.

/s/ Karen M. Fort Hood
/s/ E. Thomas Fitzgerald
/s/ Peter D. O’Connell