

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT HEZEKIAH PRESCOTT,

Defendant-Appellant.

UNPUBLISHED

September 20, 2007

No. 270917

Ingham Circuit Court

LC No. 05-000934-FH

Before: Cavanagh, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction and sentence of five to 15 years in prison for assault with intent to do great bodily harm less than murder, MCL 750.84. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with assault with intent to do great bodily harm less than murder, third-degree fleeing and eluding, MCL 750.479a(3), and resisting and obstructing a police officer, MCL 750.81d(1). Complainant, defendant's girlfriend, testified that she and defendant argued, and that she told defendant she was leaving her home. Complainant stated that defendant told her to remain in the home, and struck her in the face with an open hand. Complainant stated that she left the home, and that defendant pursued her into the street, knocked her to the ground, and kicked her in the face with steel-toed boots. Complainant's daughter and another witness testified that defendant kicked complainant in the face while complainant was lying on the ground. Complainant sustained injuries to her face as a result of the incident, including a swollen cheek, a lacerated lower lip, and a broken tooth. She was taken to the hospital, but did not require overnight treatment.

Defendant acknowledged that he struck complainant with his hand when they argued inside the home, and that he pursued complainant when complainant left the house. Defendant maintained that complainant tripped and fell to the ground, and that he accidentally kicked her in the face as he attempted to step over her.

Two police officers testified that when they attempted to apprehend defendant, defendant resisted arrest. Defendant denied that he resisted arrest.

The trial court convicted defendant of assault with intent to do great bodily harm less than murder, and resisting and obstructing a police officer. The trial court acquitted defendant of third-degree fleeing and eluding.

At sentencing, the prosecutor contended that Offense Variable (OV) 10, MCL 777.40, exploitation of vulnerable victim, should be scored at ten points based on a finding that defendant exploited his domestic relationship with complainant. Defendant objected, and asserted that the fact that an argument occurred did not equate to exploitation of the domestic relationship. The trial court scored OV 10 at ten points. The revised guidelines, adjusted for defendant's status as a second habitual offender, MCL 769.10, recommended a minimum term range of 29 to 71 months for defendant's conviction of assault with intent to do great bodily harm less than murder. The trial court sentenced defendant to concurrent terms of five to 15 years in prison for assault with intent to do great bodily harm less than murder, and six months in jail for resisting and obstructing a police officer.

In calculating the sentencing guidelines the trial court has discretion to determine the number of points to be scored, provided that evidence in the record supports a particular score. A scoring decision for which there is any evidence in the record will be upheld. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). We review a trial court's scoring of the guidelines to determine whether that court properly exercised its discretion. We review the trial court's findings of fact for clear error. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

Offense Variable 10 is to be scored at ten points if the defendant "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). The term "exploit" is defined as "to manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(b). The term "vulnerability" is defined as "the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." MCL 777.40(3)(c).

Defendant argues that the trial court abused its discretion by scoring OV 10 at ten points. He asserts that no evidence supported a finding that complainant was particularly vulnerable, or that he exploited any such vulnerability. Defendant notes that the "mere existence of 1 or more factors described in subsection (1) does not automatically equate with victim vulnerability." MCL 777.40(2). Defendant observes that had OV 10 been properly scored at zero points, the guidelines would have recommended a minimum term range of 19 to 47 months, and concludes that because his minimum term for assault with intent to do great bodily harm less than murder exceeded the properly scored guidelines, he is entitled to resentencing on that conviction.¹ We disagree.

Defendant and complainant were in a romantic relationship at the time the incident occurred. Complainant testified that she and defendant argued at her home, and that defendant both ordered her to remain in the home, and physically attempted to prevent her from leaving her

¹ Defendant does not challenge his sentence for resisting and obstructing a police officer.

home. A police officer who took defendant to the hospital² testified that defendant acknowledged that his actions were wrong, but that defendant said that he acted as he did because complainant was cheating on him. This evidence supports a finding that defendant's actions were motivated by jealousy and a perceived threat to his relationship with complainant. Defendant's conduct toward complainant was selfish and unethical, and thus comports with the definition of "exploit" in MCL 777.40(3)(b).

The evidence in the record supported the scoring of OV 10 at ten points. *Hornsby, supra*. Defendant's minimum term of five years fell within the properly scored guidelines. Defendant is not entitled to resentencing.

In a pro se brief filed under Administrative Order 2004-6, Standard 4, defendant additionally argues that (1) he was deprived of his right to confrontation and cross examination of police officers reports regarding steel toe boots that were taken as evidence and used against him at trial, (2) he was deprived of a fair trial where a state's witness committed perjury and, (3) the cumulative effect of the errors deprived defendant of his right to a fair trial.

As to the first issue, Officer Sukovich testified that while at the hospital with defendant, Officer Burkhardt told him that defendant had kicked the victim in the face. Officer Sukovich further testified that while still at the hospital, a nurse removed a pair of steel-toed boots from defendant, then handed the boots to Officer Sukovich. Officer Burkhardt testified that she received a pair of steel-toed boots from Officer Sukovich.

Defendant challenges Officer Burkhardt's testimony and the boots admitted into evidence on the basis that Officer Burkhardt did not seize the boots herself, but instead relied on the information from Officer Sukovich that the boots were the ones used in the assault. According to defendant, both Officer Burkhardt's and Officer Sukovich's police reports should have been placed in evidence for the purpose of confrontation and cross-examination regarding the seized boots. However, both officers testified at trial and defendant unquestionably had the opportunity to question them regarding their direct testimony and any police they had authored. Moreover, defendant does not dispute that the boots belonged to him or were removed from his feet at the hospital, in the presence of a police officer, and then placed into police custody.

Defendant's second argument, that a state's witness committed perjury and deprived defendant of his right to a fair trial, also fails. Defendant contends that witness Ms. Contreras testified that she saw defendant kick the victim in the face at least ten times, while the victim herself and the victim's daughter testified that he kicked her in the face once. According to defendant, the only conclusion is that Ms. Contreras committed perjury and the fact that the trial court and the prosecutor relied on this perjured testimony deprived him of fair trial. Even absent Ms. Contreras testimony, however, there was sufficient evidence to fairly convict defendant of assault with intent to do great bodily harm.

² Defendant was taken to the hospital because he complained of chest pains after he was arrested.

A conviction for assault with intent to do great bodily harm less than murder, MCL 750.84, requires proof of: “(1) an attempt of threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder.” *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). An intent to do great bodily harm less than murder has been defined as an intent to do serious injury of an aggravated nature, *People v Mitchell*, 149 Mich App 36, 39; 385 NW2d 717 (1986), and can be inferred from the defendant's conduct, *Parcha, supra* at 239.

Several witnesses testified that defendant kicked the victim in the face with steel-toed boots. One kick in the face with such boots, alone, could be construed as an intent to inflict serious injury upon the victim. In addition, contrary to defendant's assertion otherwise, the victim did not unequivocally testify that defendant kicked her only once. The victim instead testified that she was *unsure* whether defendant kicked her more than once. Thus, an allegation that Ms. Contreras testified falsely is mere speculation, and if the testimony were false, there is nevertheless no indication that such false testimony deprived defendant of a fair trial.

The above being true, defendant's argument concerning the cumulative effect of any alleged errors is without merit.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto