

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
January 20, 2011

v

NATHANIEL JEFFREY GANZEVELD,

Defendant-Appellant.

No. 295303
Wayne Circuit Court
LC No. 09-015374-FH

Before: SAWYER, P.J., and WHITBECK and WILDER, JJ.

PER CURIAM.

Defendant Nathaniel Ganzeveld appeals as of right his jury conviction of assault with intent to commit second-degree criminal sexual conduct (CSC II),¹ for which the trial court sentenced him as a third habitual offender² to a prison term of 23 months to 10 years. We affirm. We decide this appeal without oral argument.³

I. FACTS

Anne Marie Ganzeveld, Nathaniel Ganzeveld's estranged wife, testified that in April 2009, she and her children lived at the marital home located in Dearborn. Nathaniel Ganzeveld had vacated the home pursuant to a court order and was living with his parents in Allen Park. On March 27, 2009, Anne Marie Ganzeveld obtained a personal protection order against Nathaniel Ganzeveld. The PPO was terminated on the morning of April 21, 2009.

Anne Marie Ganzeveld testified that shortly before 1:00 p.m. on April 21, 2009, she was at her home fixing lunch for her youngest son Anthony when she "heard loud banging on the [front] door." She looked through the front window curtain and saw that Nathaniel Ganzeveld was at the door. She ignored him and returned to the kitchen. However, Anthony opened the

¹ MCL 750.520g(2).

² MCL 769.11.

³ MCR 7.214(E).

door, and Nathaniel Ganzeveld tossed a garbage bag into the living room. Anne Marie Ganzeveld ran to the door and tried to lock the screen door, but Nathaniel Ganzeveld came back and opened the door with such force that it sliced open Anne Marie Ganzeveld's finger.

Anne Marie Ganzeveld went to the kitchen to get a paper towel for her finger. Nathaniel Ganzeveld followed her and "kept trying to help me" by "grabbing a band aid." Anne Marie Ganzeveld told him to get away from her because she did not want him there. Nathaniel Ganzeveld responded that "he had a right to be there, that it was his house. There was nothing that [she] could do, and that he was staying." Anne Marie Ganzeveld picked up the phone to call her parents, and Nathaniel Ganzeveld tried to take the phone away. Anne Marie Ganzeveld explained, "He grabbed my wrist. He was wrestling around with me, trying to grab the phone out, asking me who I was calling, why I was calling them." Anne Marie Ganzeveld stated that "[t]he phone ended up behind my head. And as he was pulling it, he ended up ripping my hair out in the very back, and he got the phone from me, and smashed it all over the floor." Anne Marie Ganzeveld then picked up her cell phone, but Nathaniel Ganzeveld wrestled with her trying to take it away. While reaching for the cell phone, Nathaniel Ganzeveld "accidentally punched me in the chin." Anne Marie Ganzeveld "kneaded him in the crotch." But Nathaniel Ganzeveld got a hold of the phone and smashed it all over the floor.

As Anne Marie Ganzeveld was piecing the cell phone back together, it began to ring. Anne Marie Ganzeveld answered it and learned it was her friend Nicole. But before Anne Marie Ganzeveld could say much of anything, Nathaniel Ganzeveld grabbed the phone again and smashed it to pieces. Anne Marie Ganzeveld then ran to the living room window and tried to open it. Nathaniel Ganzeveld came up behind her and asked, "[W]hat do you think you're doing?" He pulled Anne Marie Ganzeveld back by the shoulders and closed the window.

Anne Marie Ganzeveld kept telling Nathaniel Ganzeveld to leave, and he kept saying, "I have a right to be here. This is my house. You can't make me leave. There's nothing you can do." Anne Marie Ganzeveld told Nathaniel Ganzeveld, "I don't want to be with you anymore. I'm divorcing you." Nathaniel Ganzeveld then said, "Well, have sex with me one more time." Anne Marie Ganzeveld refused. Nathaniel Ganzeveld then pushed her down on the couch, causing her to strike her head. Anne Marie Ganzeveld testified that she "was crying and screaming for him to leave." Nathaniel Ganzeveld then said that he would leave if Anne Marie Ganzeveld performed fellatio on him. Anne Marie Ganzeveld refused, but Nathaniel Ganzeveld replied, "I'm going to be the last man in my bed, the last man to fuck my wife." Anne Marie Ganzeveld responded, "[N]o, you're not. I don't want to be with you." However, according to Anne Marie Ganzeveld, "He said, condom or no condom, how do you want it? I said, I want you to leave. He said, just remember, do you like it rough? You like it when we role play, and you always say no. I said, no, I don't, at all. I want you to leave."

At some point during the argument, Anne Marie Ganzeveld got up off the couch. During the argument, Nathaniel Ganzeveld kept pulling at Anne Marie Ganzeveld's clothes and partially pulled down her pants, but she was able to pull them back up. Eventually Nathaniel Ganzeveld pushed Anne Marie Ganzeveld into the bedroom and onto the bed.

Anne Marie Ganzeveld testified that she was laying on the bed, and Nathaniel Ganzeveld climbed on top of her and began pulling her clothes off, leaving her naked from the waist down.

Anne Marie Ganzeveld could feel Nathaniel Ganzeveld's erect penis pushing against her thigh. She "was pushing at him, I was grabbing his wrists away from me, telling him, screaming, no, crying." Anne Marie Ganzeveld got a leg free and kicked Nathaniel Ganzeveld in "the neck and chest area" and was able to break free. She "jumped up," put on her panties and pants, and ran out to the living room. Nathaniel Ganzeveld "followed me out there" and ran out the door, but then came back in.

As soon as Nathaniel Ganzeveld left, Anne Marie Ganzeveld used the bedroom phone to call Nathaniel Ganzeveld's father and her mother. "After I hung up, he came up behind me, ripped my glasses off my face, and broke them in half, and threw them." Nathaniel Ganzeveld then noted that the police had arrived, and Anne Marie Ganzeveld "ran to the front door and opened it for them."

Anne Marie Ganzeveld testified that the incident left her feeling "scared." She now placed objects against the door to barricade it, was afraid to go out, and found it "harder to concentrate while I'm in school." She filed for divorce on April 29, 2009.

Christopher Reppenhagen testified that on the afternoon of April 21, 2009, he walked to a friend's house for band practice. Reppenhagen's friend lived on the Ganzevalds' street. En route, Reppenhagen saw Nathaniel Ganzeveld "at the door of his house causing a ruckus, pounding on the door, and kicking it in." Nathaniel Ganzeveld was yelling to be let inside. Reppenhagen testified that after 15 to 20 minutes of practice, he and his friend went outside for a cigarette break and walked down the street. As they passed Nathaniel Ganzeveld's house, Reppenhagen could hear a woman screaming. Because "it was just a very shrill scream, as in someone in distress," Reppenhagen called the police.

Police officers Kyle Wiles and Marvin Sanders were dispatched to the scene. Upon arrival, Officer Wiles was approached by a person who said that someone had just kicked in a door to a house. Officer Wiles went up to the front door, which was ajar, and "could hear a woman crying inside." The woman sounded as if she were in distress. Officer Wiles pushed open the front door and was met by Nathaniel Ganzeveld, who looked frightened and nervous, and said, "I live here, I live here." Anne Marie Ganzeveld appeared behind him and said, "Please get him out of here[.]" Ganzeveld was teary-eyed and looked very scared and nervous. Officer Wiles took Nathaniel Ganzeveld outside to talk to him. At that point, Officer Sanders arrived and went inside to speak to Anne Marie Ganzeveld, whom he described as crying and hysterical.

After Officer Sanders spoke with Anne Marie Ganzeveld, the two officers arrested Nathaniel Ganzeveld. Officer Wiles saw pieces of a broken house phone on a counter and on a table, a broken cell phone on the floor, and a pair of broken glasses on the floor. In the master bedroom, the mattress was partially pushed off the box spring "and the blankets pushed to one side." Anne Marie Ganzeveld had a long scratch on the right side of her neck and another scratch on her inner right wrist. That completed the proofs.

The trial court dismissed the charge of malicious destruction of property on Nathaniel Ganzeveld's motion and instructed the jury on CSC II and the lesser offenses of assault with

intent to commit CSC II, fourth-degree CSC, and domestic assault. The jury found Nathaniel Ganzeveld guilty of assault with intent to commit CSC II.

Assault with intent to commit CSC II is a Class E offense subject to the legislative guidelines.⁴ After scoring challenges were resolved, Nathaniel Ganzeveld's score placed him in the E-II cell of the applicable sentencing grid, for which the minimum sentence range is 10 to 23 months.⁵ For a third habitual offender, the upper limit is increased by half, making the minimum sentence range 10 to 34 months,⁶ although no one seemed to recognize that fact at sentencing. Because the upper limit of the guidelines exceeded 18 months and the lower limit was 12 months or less, the trial court had the option to impose a prison sentence within the minimum sentence range or to impose an intermediate sanction.⁷ In light of the fact that Nathaniel Ganzeveld had several prior convictions and "at least two probation violations," and that his record was "getting progressively more assaultive," the trial court imposed a prison sentence of 23 months to 10 years. Nathaniel Ganzeveld now appeals.

II. SENTENCING

A. STANDARD OF REVIEW

A trial court must impose a minimum sentence within the sentencing guidelines range unless a departure from the guidelines is permitted.⁸ A scoring decision "for which there is any evidence in support will be upheld."⁹

B. OV 4

Nathaniel Ganzeveld argues that the trial court erred in scoring 10 points for offense variable (OV) 4 of the sentencing guidelines.¹⁰ The scoring of the guidelines variables is determined by reference to the record, using the preponderance of the evidence standard.¹¹ "A sentencing court has discretion in determining the number of points to be scored provided that evidence of record adequately supports a particular score."¹²

⁴ MCL 777.16y.

⁵ MCL 777.66.

⁶ MCL 777.21(3)(b).

⁷ MCL 769.34(4)(c).

⁸ MCL 769.34(2).

⁹ *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

¹⁰ MCL 777.34.

¹¹ *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).

¹² *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

OV 4 considers “psychological injury to a victim.”¹³ A trial court is authorized to score 10 points when “[s]erious psychological injury requiring professional treatment occurred to a victim.”¹⁴ The instructions provide that the trial court is to score 10 points “if the serious psychological injury *may* require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive.”¹⁵

In this case, Anne Marie Ganzeveld testified at trial that the assault left her feeling “scared” and afraid to go out, caused her to barricade her door, and affected her ability to concentrate. This evidence was sufficient to support the trial court’s scoring of 10 points for OV 4.¹⁶

C. SENTENCING DEPARTURE AND PROPORTIONALITY

Nathaniel Ganzeveld argues that the trial court improperly departed from the sentencing guidelines range without stating substantial and compelling reasons for a departure, resulting in a disproportionate sentence. We find no merit to this issue. As Nathaniel Ganzeveld concedes, the sentencing guidelines range for his conviction was 10 to 34 months. A guidelines range of 10 to 34 months means that the *minimum* sentence must fall within that range, not that the *maximum* sentence is limited to 34 months. The trial court sentenced Nathaniel Ganzeveld within the guidelines range to a prison term of 23 months to 10 years. Thus, because the minimum sentence—23 months—was between 10 to 34 months, there was no departure. The trial court sentenced Nathaniel Ganzeveld within the guidelines range; thus, there was no error in the scoring of the guidelines. Additionally, Nathaniel Ganzeveld does not contend that the trial court relied on inaccurate information at sentencing. Therefore, we must affirm Nathaniel Ganzeveld’s sentence, and it is not subject to review for proportionality.¹⁷

III. POLYGRAPH EXAMINATION

We decline to consider Nathaniel Ganzeveld’s claim of error regarding denial of the right to a polygraph examination. Nathaniel Ganzeveld attempted to raise this issue in a pro se brief filed pursuant to Supreme Court Administrative Order No. 2004-6, which “revised minimum standards for indigent criminal appellate defense services.” Because Nathaniel Ganzeveld is not indigent and is represented by retained counsel, this Court declined to accept his Standard 4

¹³ MCL 777.34(1).

¹⁴ MCL 777.34(1)(a).

¹⁵ MCL 777.34(2) (emphasis added).

¹⁶ See *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004) (where this Court held that the evidence presented was sufficient to support the trial court’s decision to score 10 points for OV 4 because the victim testified that she was fearful during the encounter with the defendant).

¹⁷ MCL 769.34(10); *People v Pratt*, 254 Mich App 425, 429-430; 656 NW2d 866 (2002).

brief. Defense counsel has not separately briefed the issue and, accordingly, we deem it abandoned.¹⁸

We affirm.

/s/ David H. Sawyer
/s/ William C. Whitbeck
/s/ Kurtis T. Wilder

¹⁸ *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).