

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
June 19, 2014

v

DAVID ANTHONY NEAL,  
Defendant-Appellant.

No. 314788  
Washtenaw Circuit Court  
LC No. 12-000641-FC

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

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84; assault with a dangerous weapon, MCL 750.82(1); unlawful imprisonment, MCL 750.349b; and interference with the reporting of a crime, MCL 750.483a(1)(b). The trial court sentenced defendant as a second-offense habitual offender, MCL 769.10, to concurrent terms of 10 to 15 years' imprisonment on the unlawful imprisonment and AWIGBH convictions, and lesser concurrent terms for the remaining convictions. Defendant appeals as of right his conviction for unlawful imprisonment and his sentences. We affirm.

Defendant's convictions arose out of an incident that occurred while he and the complainant were using crack cocaine together. The complainant alleged that over the course of several hours, defendant bound and gagged her, held a knife to her throat, beat her, raped her, and then put her in the trunk of a car. Defendant denied the allegations and contended that any sexual acts between him and the complainant were consensual.

Defendant first argues that the trial court erred when it failed to give the jury a specific unanimity instruction with regard to the charge of unlawful imprisonment. Because defendant specifically agreed to the instructions as given, including a general unanimity instruction, he has waived this issue on appeal. *People v Kowalski*, 489 Mich 488, 504-505; 803 NW2d 200 (2011). Nevertheless, we have reviewed the issue and find that it is without merit.

Michigan provides criminal defendants the right to a unanimous jury verdict. Const 1963, art 1 § 14; MCR 6.410(B). "In order to protect a defendant's right to a unanimous verdict, it is the duty of the trial court to properly instruct the jury regarding the unanimity requirement." *People v Cooks*, 446 Mich 503, 511; 521 NW2d 275 (1994). A specific unanimity instruction may be required in cases where "more than one act is presented as evidence of the actus reus of a

single criminal offense” and either 1) the alternative acts are conceptually distinct or there are distinct proofs regarding each alternative; or 2) there is a genuine possibility of juror confusion or disagreement. *Id.* at 512-513, 524.

In this case, no specific unanimity instruction was required because there were no distinct proofs of separate acts, and there was no risk of jury confusion. A person commits unlawful imprisonment when he: 1) “knowingly restrains” the victim 2) under any of three aggravating circumstances, including by means of a weapon or dangerous instrument, by means of secret confinement, or in order to facilitate the commission of another felony or flight following the commission of another felony. MCL 750.349b(1). The prosecution in this case did not present multiple separate acts as evidence of the actus reus of unlawful imprisonment, but rather evidence of a single act of restraint which occurred over the course of several hours. Moreover, evidence of the various aggravating circumstances did not warrant a unanimity instruction. Accord, *People v Chelmicki*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_; Docket No. 313708, slip op at 5 (April 24, 2014) (no specific unanimity instruction required on charge of unlawful imprisonment). The general unanimity instruction was thus sufficient, and there was no error.

Alternatively, defendant asserts that he was denied the effective assistance of counsel because his counsel did not request a specific unanimity instruction. But, as we have already noted, a specific unanimity instruction was not warranted in this case and, therefore, defendant’s trial counsel was not ineffective for failing to request it. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (“Trial counsel is not required to advocate a meritless position”).

Defendant next argues that the trial court erred in scoring offense variable (OV) 7 and OV 8 of the sentencing guidelines for his unlawful imprisonment conviction. We disagree. We review a trial court’s factual determinations under the sentencing guidelines for clear error to determine if they are supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). “Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation” which we review de novo. *Id.*

Defendant first contends that the trial court erred in scoring OV 8, which provides that 15 points may be scored where the defendant (1) transported the victim “to another place of greater danger or to a situation of greater danger,” or (2) held the victim “captive beyond the time necessary to commit the offense.” MCL 777.38(1)(a). The statute also provides that zero points must be scored if the sentencing offense is kidnapping. MCL 777.328(2)(b). Defendant’s sole argument on appeal is that because unlawful imprisonment is a form of kidnapping, OV 8 must also be scored at zero points when the sentencing offense is unlawful imprisonment. This Court recently rejected the same argument in *People v Kosik*, 303 Mich App 146, 158-159; 841 NW2d 906 (2013), lv app pending. The *Kosik* panel held that a sentencing court could assess 15 points under OV 8 when the sentencing offense is unlawful imprisonment. *Id.* at 159. Accordingly, the trial court in this case did not err in scoring 15 points under OV 8.

Defendant also contends that the trial court erred in scoring OV 7, which provides, in relevant part, that 50 points may be scored where “[a] victim was treated with . . . conduct designed to substantially increase the fear and anxiety [the] victim suffered during the offense.”

MCL 777.37(1)(a). The statute requires a score of zero points if no such conduct occurred. MCL 777.37(1)(b). In *Hardy*, 494 Mich at 442-443, our Supreme Court stated:

Since the “conduct designed” category only applies when a defendant’s conduct was designed to substantially *increase* fear, to assess points for OV 7 under this category, a court must first determine a baseline for the amount of fear and anxiety experienced by a victim of the type of crime or crimes at issue. To make this determination, a court should consider the severity of the crime, the elements of the offense, and the different ways in which those elements can be established. Then the court should determine, to the extent practicable, the fear or anxiety associated with the minimum conduct necessary to commit the offense. Finally, the court should closely examine the pertinent record evidence, including how the crime was actually committed by the defendant. [Citations omitted, emphasis in original.]

The Court summarized the analysis into two relevant inquiries: “(1) whether the defendant engaged in conduct beyond the minimum required to commit the offense; and if so, (2) whether the conduct was intended to make a victim’s fear or anxiety greater by a considerable amount.” *Id.* at 443-444.

The trial court found, and we agree, that defendant’s conduct warranted the 50-point assessment under OV 7. Unlawful imprisonment occurs when a defendant “knowingly restrains” the victim either by means of a weapon or dangerous instrument, by secret confinement, or to facilitate the commission of another felony or flight therefrom. MCL 750.349b. “Restrain” is defined in the statute as “forcibly restrict[ing] a person’s movements” or “forcibly confin[ing] the person so as to interfere with that person’s liberty[.]” but “[t]he restraint does not have to exist for any particular length of time[.]” MCL 750.349b(3)(a). Thus, to commit the offense, defendant needed only to confine the complainant for a brief moment, and could have done so, for example, by simply locking all the doors, taking away her cellular telephone so she could not call for help, or threatening her harm if she tried to escape. However, the evidence established that, over a period of several hours, defendant cut the complainant with a knife, choked her to the point of unconsciousness, hit her in the head with a roll of duct tape, pulled her hair, dragged her through the house, broke her cellular telephone, bound her wrists and ankles with duct tape and an extension cord, covered her eyes and mouth with duct tape and a blanket, and placed her inside the trunk of her own vehicle. Defendant’s conduct clearly went beyond the minimum required to commit the offense.

We also conclude that defendant’s conduct was designed to increase the complainant’s fear and anxiety by a “considerable amount.” *Hardy*, 494 Mich at 444. By choking her, beating her, cutting her, binding her hands and feet, and putting her in a trunk, among other things, defendant “demonstrated . . . that he was willing to follow through on his threat to harm [the complainant], and he placed [her] in a place of increased vulnerability, where escape was almost impossible.” *Id.* at 446-447. It is “more probable than not” that defendant “engaged in this conduct to frighten [the complainant] into compliance[.]” *id.* at 447, because most of the bodily harm inflicted upon her occurred either during the course of the alleged sexual assaults or in response to her attempts to alert authorities and escape. Given these circumstances, the trial court did not err in scoring 50 points under OV 7.

Defendant next argues that the trial court unlawfully departed from the sentencing guidelines when it imposed a concurrent 10 to 15 year sentence for his AWIGBH conviction, despite the fact that the guidelines, if scored for that offense, would have resulted in a recommended minimum sentence range of only 34 to 83 months' imprisonment. We disagree. This Court has held that when a defendant is convicted of multiple offenses and receives concurrent sentences, the trial court is only required to score the offense in the highest crime class. *People v Mack*, 265 Mich App 122, 125-128; 695 NW2d 342 (2005), citing MCL 777.14(2)(e)(ii). Here, the trial court scored the unlawful imprisonment conviction, a Class C crime against a person carrying a maximum penalty of 22-1/2 years' imprisonment, after taking into account defendant's status as a second-offense habitual offender. MCL 750.349b; MCL 777.16q; MCL 769.10(1)(a). Conversely, AWIGBH is a Class D crime against a person carrying a maximum penalty of 15 years' imprisonment after accounting for defendant's habitual offender status. MCL 750.84(1)(a); MCL 777.16d; MCL 769.10(1)(a). Thus, the trial court did not err in scoring only the unlawful imprisonment conviction or in imposing a concurrent sentence of 10 to 15 years' imprisonment for the AWIGBH conviction without articulating substantial and compelling reasons for the departure. *Mack*, 265 Mich App at 125-128.

Finally, defendant argues that the trial court engaged in judicial factfinding that increased his minimum sentence in violation of the Sixth Amendment, as interpreted by the Supreme Court's recent decision in *Alleyne v US*, \_\_\_ US \_\_\_; 133 S Ct 2151; 186 L Ed 2d 314 (2013). This Court recently rejected the same argument in *People v Herron*, 303 Mich App 392, 405; 845 NW2d 533 (2013), lv app pending. We are bound to follow the *Herron* holding.

Affirmed.

/s/ Peter D. O'Connell  
/s/ E. Thomas Fitzgerald  
/s/ Jane E. Markey