

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
March 25, 2014

v

ANDREW MICHAEL PENALOZA,

Defendant-Appellant.

No. 313631
Ottawa Circuit Court
LC No. 12-036418-FH

Before: GLEICHER, P.J., and HOEKSTRA and O'CONNELL, JJ.

PER CURIAM.

A jury convicted defendant Andrew Penaloza of two counts of unlawful imprisonment in violation of MCL 750.349b, for holding his ex-girlfriend and their young son captive against their wills, and one count of aggravated domestic assault, second offense in violation of MCL 750.81a(3), for biting, choking, and beating his ex-girlfriend during the incident. Defendant's challenge to the sufficiency of the evidence supporting his unlawful imprisonment conviction in relation to his son must fail because defendant did not have lawful authority to keep the child by restraining the toddler's mother and custodian or to hold either in a secret location. We therefore affirm defendant's convictions.

Defendant also challenges the sentences imposed by the circuit court following trial, in particular the court's scores for offense variables (OVs) 3, 8, and 10. Although the circuit court erred in failing to separately score the guidelines for each offense, we find no error affecting the length of defendant's sentences. Defendant further contends that pursuant to *Alleyne v United States*, ___ US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013), the circuit court was limited in scoring the guideline variables to facts that were found by the jury beyond a reasonable doubt. This Court has already concluded, however, that *Alleyne* does not render unconstitutional our legislative minimum sentencing guidelines. Accordingly, we must affirm defendant's sentences as well.

I. BACKGROUND

In the early evening of March 16, 2012, Tonya Ruiz drove to a bank with her toddler son, O, to use the ATM. While Ruiz was standing outside of the vehicle using the walkup machine, defendant approached on foot. Defendant and Ruiz had previously been romantically involved and defendant is the father of Ruiz's two children. They had broken up several months prior and approximately two weeks earlier Ruiz had secured a personal protection order (PPO) against

defendant and a temporary ex-parte order giving her full custody of their children. Defendant tried to enter Ruiz's car through the locked front passenger-side door, so she quickly reentered the vehicle and tried to drive away. The front driver-side window was down and defendant jumped through it, biting Ruiz on the nose and blocking her view. Ruiz drove through the bank's parking lot and across some landscaping before coming to rest in the roadway where the vehicle's engine stalled.

Defendant told Ruiz to follow him on foot. He took O from the car's backseat and walked to a nearby vehicle occupied by a man and a woman who were known to Ruiz as acquaintances of defendant. Ruiz followed and entered the vehicle. Once inside, defendant accused Ruiz of trying to kill him and placed her in a headlock to choke her. They travelled to an apartment building and defendant took Ruiz into a bedroom in an apartment for a private discussion. Defendant yelled at Ruiz and took her shoes to prevent her escape. He punched her in the left eye. When Ruiz tried to flee the room, defendant choked her until she fell to the floor. Defendant then restrained Ruiz and continued to punch her. After his female acquaintance interfered, defendant permitted Ruiz to tend to her injuries in the bathroom while he stood guard to prevent her escape.

Defendant's acquaintances then drove defendant, Ruiz and O to defendant's apartment. Defendant carried the child inside and Ruiz followed him. Ruiz and O remained in the apartment with defendant for several hours. Ruiz had apparently been driving with an invalid license and defendant threatened that she would be arrested if she tried to report the incident and would lose custody of the children.

In the meantime, Ruiz's new boyfriend, Danny Perales, became concerned when she did not return from the bank. He contacted the police approximately four hours after defendant took Ruiz and O. At 10:00 p.m., defendant telephoned Perales and told him that he had O. Defendant tried to ascertain the whereabouts of his other son and denied knowing Ruiz's whereabouts. Shortly thereafter, defendant allowed Ruiz to telephone Perales and instructed her to say that she was fine and would eventually return home.

Based on these conversations, police officials travelled to defendant's apartment. Defendant refused to answer the door and the officers were forced to secure a search warrant. Inside, they found O sitting on a bed and Ruiz hiding in a closet. Ruiz claimed that she hid because of the threats defendant had made about her losing her children. The officers observed that Ruiz's face showed signs of being "severely beaten," with swelling, bruises, and scratches.

II. SUFFICIENCY OF THE EVIDENCE

Defendant contends that the prosecutor presented insufficient evidence to support his conviction for unlawfully imprisoning young O. Defendant contends that he never received notice of the ex parte order granting full custody of the children to Ruiz and that Ruiz had allowed him to see the children even after obtaining the order. Accordingly, defendant argues, he did not knowingly restrain the child without lawful authority.

We review de novo a criminal defendant's challenge to the sufficiency of the evidence. *People v Erickson*, 288 Mich App 192, 195; 793 NW2d 120 (2010). In doing so, we must view

the evidence in the light most favorable to the prosecutor to determine if a rational jury could find the elements of the offense established beyond a reasonable doubt. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). This case also involves the proper interpretation and application of the unlawful imprisonment statute. This is a legal issue that we review de novo. *People v Zajackowski*, 493 Mich 6, 12; 825 NW2d 554 (2012).

MCL 750.349b proscribes unlawful imprisonment, in relevant part, as follows:

(1) A person commits the crime of unlawful imprisonment if he or she knowingly restrains another person under any of the following circumstances:

(a) The person is restrained by means of a weapon or dangerous instrument.

(b) The restrained person was secretly confined.

(c) The person was restrained to facilitate the commission of another felony or to facilitate flight after commission of another felony.

* * *

(3) As used in this section:

(a) “Restrain” means to forcibly restrict a person’s movements or to forcibly confine the person so as to interfere with that person’s liberty without that person’s consent or without lawful authority. The restraint does not have to exist for any particular length of time and may be related or incidental to the commission of other criminal acts.

(b) “Secretly confined” means either of the following:

(i) To keep the confinement of the restrained person a secret.

(ii) To keep the location of the restrained person a secret.

The record evidence supports that defendant interfered with O’s liberty without lawful authority as contemplated in MCL 750.349b(3)(a). Defendant removed O from Ruiz’s car after physically attacking Ruiz and preventing her from escaping in her vehicle. He was only able to remove the helpless toddler from the car because he first subdued the child’s mother. Contrary to defendant’s argument on appeal, it is completely irrelevant whether defendant knew of the ex parte custody order at the time of the incident. Even if a father has shared custody with a child’s mother, he cannot legally remove the child from the mother’s care by means of physical assault.

After defendant restrained O, he took the child to a place of secret confinement. Defendant held O and Ruiz at his apartment for several hours before telephoning Perales. Defendant thereafter continued to hold O, along with the child’s mother, until police arrived and forced their release. Based on the record evidence, the jury could conclude beyond a reasonable doubt that defendant’s actions amounted to unlawful imprisonment of the child.

III. APPLICABILITY OF OVS

Defendant challenges the circuit court's decision to score three OVs in relation to the convicted offenses.

Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. 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 an appellate court reviews de novo. [*People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).]

Defendant did not object to the scoring of these variables at sentencing, and our review is limited to plain error affecting defendant's substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004).

A. OV 3

Defendant challenges the circuit court's score of 10 points for OV 3, physical injury to the victim. MCL 777.33(1)(d) provides for a score of 10 points when "Bodily injury requiring medical treatment occurred to a victim." Here, Ruiz was clearly injured and she received medical treatment after being transported to a hospital. Defendant's belated contention that Ruiz's injuries were so minor that the medical treatment provided was not "required" has no support in law or logic. The record evidence revealed that defendant's blows caused Ruiz's eyes to swell shut and produced significant bruising. Only medical examination could reveal that Ruiz suffered no broken or fractured bones, concussion, or other internal injury.

Defendant raises a separate claim that no points should have been scored in relation to his offense against O as it is undisputed that O was not injured. The prosecutor charged defendant of two separate acts of unlawful imprisonment—one in relation to Ruiz and a second in relation to O. The circuit court did not score these two offenses separately. This was error pursuant to MCL 777.21(2) and *People v Johnigan*, 265 Mich App 463, 470; 696 NW2d 724 (2005). If a defendant is convicted of multiple offenses, the court is required to separately score each offense.¹ *Id.* at 472.

The circuit court's error was harmless, however, and does not require a remand for resentencing. Had the circuit court separately scored defendant's offense of unlawfully imprisoning O, the court still could have scored 10 points for OV 3. MCL 777.33(1)(d) provides for this score when "a" victim is injured, not when "the" victim is injured. Accordingly, the injuries suffered by Ruiz would be sufficient support for a score of 10 points in relation to the unlawful imprisonment of O.

¹ This is a separate concern from MCL 777.14, which requires the Department of Corrections to only prepare one presentence investigation report in relation to the highest class crime. *Johnigan*, 265 Mich App at 470.

B. OV 8

Defendant argues that the court could not score any points for OV 8, asportation of the victim because unlawful imprisonment is a type of kidnapping, a crime not to be scored under the variable. The court scored 15 points for OV 8. MCL 777.38(1)(a) provides for such a score when “[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense[.]” A court is required to score zero points for OV 8 “if the sentencing offense is kidnapping.” MCL 777.38(2)(b).

This Court recently rejected defendant’s argument in *People v Kosik*, 303 Mich App 146, 158-159; ___ NW2d ___ (2013). In 2006, the Legislature amended MCL 750.349, proscribing kidnapping, and enacted MCL 750.349b, designating unlawful imprisonment as a distinct crime. *Id.* at 158. The Legislature did not, however, amend MCL 777.38 to bar the scoring of OV 8 when the underlying offense is unlawful imprisonment. *Id.* This Court held, “[W]e conclude that the Legislature intended that MCL 777.38(2)(b) only exempt the particular crime of kidnapping.” *Id.* at 159. Accordingly, the circuit court committed no error in scoring 15 points for OV 8.

C. OV 10

The circuit court scored 5 points for OV 10, which takes into consideration exploitation of a vulnerable victim. Specifically, MCL 777.40 provides:

(1) Offense variable 10 is exploitation of a vulnerable victim. Score offense variable 10 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

* * *

(b) The offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status..... 10 points

(c) The offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious..... 5 points

(d) The offender did not exploit a victim's vulnerability..... 0 points

(2) The mere existence of 1 or more factors described in subsection (1) does not automatically equate with victim vulnerability.

(3) As used in this section:

* * *

(b) “Exploit” means to manipulate a victim for selfish or unethical purposes.

(c) “Vulnerability” means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation. . . .

First, as noted above, the circuit court erred in failing to separately score the unlawful imprisonment offenses against Ruiz and O. When scoring this variable in relation to O, the court would have been within its right to score 10 points. O is defendant’s son and was a helpless toddler under the age of two at the time of the offense. The court could have found that defendant exploited O’s youth or their domestic relationship in taking and secretly confining him. The addition of five points to defendant’s total offense variable score would not affect his offense level. Therefore, despite that the court erred in failing to separately score defendant’s unlawful imprisonment conviction in relation to O and that the court could have imposed more points for this variable, we need not remand for resentencing.

Second, we find no error in the court’s scoring of 5 points in relation to Ruiz. Defendant claims that Ruiz went with him voluntarily and therefore no exploitation occurred. Yet, the record reveals that Ruiz followed defendant because he had physical control over their young son and it was her duty as the child’s mother to protect him. Ruiz did not flee with O from defendant’s hold because of defendant’s continued threats. At a minimum, defendant used his larger size and strength to hold Ruiz and her young son captive against the mother’s will, supporting a score of 5 points. And as noted above, the court could have selected a higher score based on the parties’ domestic relationship. Ultimately, defendant is not entitled to resentencing.

IV. ALLEYNE

Finally, defendant contends that allowing judges to engage in fact-finding when scoring a defendant’s sentencing guidelines is unconstitutional pursuant to *Alleyne*, 133 S Ct 2151. We review de novo such questions of constitutional law. *People v Herron*, ___ Mich App ___; ___ NW2d ___ (Docket No. 309320, issued December 12, 2013), slip op at 3.

In *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), and *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), the United States Supreme Court held that a defendant’s *maximum* sentence cannot be adjusted according to judicially determined facts. Rather, a maximum sentence must be calculated based on facts that have been proven to a jury beyond a reasonable doubt. *Herron*, slip op at 4. Our Supreme Court considered the constitutionality of Michigan’s sentencing guidelines and found *Apprendi* and *Blakely* to be inapplicable. Specifically, a defendant’s maximum sentence under our guidelines is not indeterminate; it is set by statute and is imposed based on the jury verdict or defendant’s plea. *Herron*, slip op at 4, citing *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006).

In 2013, the United States Supreme Court considered the constitutionality of judicial factfinding in calculating a criminal defendant’s minimum sentence. In doing so, it overruled its previous decision in *Harris v United States*, 536 US 545; 122 S Ct 2406; 153 L Ed 2d 524 (2002), which had permitted judicial factfinding that increases a defendant’s mandatory minimum sentence. *Alleyne*, 133 S Ct at 2155. In doing so, the Supreme Court held:

Harris drew a distinction between facts that increase the statutory maximum and facts that increase only the mandatory minimum. We conclude that

this distinction is inconsistent with our decision in *Apprendi* [] and with the original meaning of the Sixth Amendment. Any fact that, by law, increases the penalty for a crime is an “element” that must be submitted to the jury and found beyond a reasonable doubt. . . . Mandatory minimum sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum is an “element” that must be submitted to the jury. [*Alleyne*, 133 S Ct at 2155.]

In *Herron*, slip op at 7, this Court held that *Alleyne* does not impact our minimum sentencing guidelines legislation:

We conclude that defendant’s argument fails in light of the pains the Supreme Court took in Part III-C of its opinion to distinguish judicial fact-finding to establish a mandatory minimum floor of a sentencing range from the traditional wide discretion accorded judges to establish a minimum sentence within a range authorized by law as determined by a jury verdict or a defendant’s plea. We hold that judicial fact-finding to score Michigan’s guidelines falls within the “wide discretion” accorded a sentencing judge “in the sources and types of evidence used to assist [the judge] in determining the kind and extent of punishment to be imposed within limits fixed by law.” *Alleyne*, [] 133 S Ct at 2163 n 6, quoting *Williams v New York*, 337 US 241, 246; 69 S Ct 1079; 93 L Ed 1337 (1949). Michigan’s sentencing guidelines are within the “broad sentencing discretion, informed by judicial factfinding, [which] does not violate the Sixth Amendment.” *Alleyne*, [] 133 S Ct at 2163.

Other judges of this Court have questioned the reasoning employed in and conclusion of *Herron*. *People v Lockridge*, ___ Mich App ___; ___ NW2d ___ (Docket No. 310649, issued February 13, 2014) (Beckerling and Shapiro, JJ, concurring). That opinion did not seek a conflict panel. The defendant in *Herron* has filed an application for leave to appeal to our Supreme Court, which has yet to be considered. A similar application will likely follow from the defendant in *Lockridge*. Until the Supreme Court resolves this dispute, we are bound to follow *Herron* and hold that *Alleyne* does not render our sentencing guidelines unconstitutional.

We affirm.

/s/ Elizabeth L. Gleicher
/s/ Joel P. Hoekstra
/s/ Peter D. O’Connell