

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
October 10, 2013

v

PERNIS JOHNSON,

Defendant-Appellant.

No. 308993
Marquette Circuit Court
LC No. 10-048675-FH

Before: RIORDAN, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of prisoner in possession of a weapon, MCL 800.283(4). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 2 to 10 years' imprisonment, consecutive to his current term. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Defendant was an inmate at the Marquette Branch Prison. On the day of the incident, defendant was returning to his cell block from the mess hall when he and another inmate began to fight. Officer Dennis Vien bear hugged defendant and pinned him to the fence. When Officer Vien released defendant in order to handcuff him, defendant started "flailing" his arms and appeared to be trying to get rid of something. Officer Bill Gooseberry observed an object in defendant's left hand. Officer Gooseberry could not identify the object, but called "weapon" to alert the staff of a possible weapon. Officer Vien heard someone call "weapon." Officer Daniel Vizena, who was in the process of restraining the other inmate against the same fence, saw a white object fly through the air. Officer Gooseberry observed defendant throw the object over the prison fence, but the object bounced back into the prison yard and landed near Officer Gooseberry's feet. Officer Gooseberry retrieved the item and identified it as a "stick or a shank," which he described as an object used as a weapon by prisoners.

Michigan State Police Detective Todd Johnson testified that the object was constructed of common items that were available to prisoners. The object was created using one-and-a-half prison pens, wrapped with cardboard, and secured with string for a handle. Prison pens are rounded, have a tip, and are three to four inches long.

II. VOID-FOR-VAGUENESS

Defendant first argues that MCL 800.283(4) is unconstitutionally vague because it does not provide adequate notice of the prohibited conduct and it permits arbitrary enforcement by governmental officials. We disagree.

Defendant failed to preserve this issue for appellate review because he did not argue in the trial court that MCL 800.283(4) was unconstitutionally vague. See *People v Gratsch*, 299 Mich App 604, 609; 831 NW2d 462 (2013). Generally, unconstitutional claims are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764, 774; 597 NW2d 130 (1999). “This Court may, however, overlook preservation requirements with respect to a challenge to the constitutionality of a criminal statute.” *Gratsch*, 299 Mich App at 609. Whether a statute is constitutional under the void-for-vagueness doctrine is reviewed de novo by this Court. *Id.* A statute is presumed constitutional, and the party challenging the statute has the burden of proving its invalidity. *People v Sadows*, 283 Mich App 65, 67; 768 NW2d 93 (2009).

The void-for-vagueness doctrine is derived from the Due Process Clauses of the Fourteenth Amendment and Const. 1963, art. 1, § 17, which guarantee that the state may not deprive a person of life, liberty, or property, without due process of law. *People v Roberts*, 292 Mich App 492, 497; 808 NW2d 290 (2011). A statute may be challenged as unconstitutionally vague when

(1) it is overbroad and impinges on First Amendment freedoms; (2) it does not provide fair notice of the conduct proscribed; or (3) it is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether the law has been violated. [*Gratsch*, 299 Mich App at 610.]

“A statute provides fair notice when it gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited.” *Id.* In addition, “[a] statute may be unconstitutionally vague if it does not contain adequate standards to guide those who are charged with its enforcement or because it impermissibly gives the trier of fact unstructured and unlimited discretion in applying the law.” *Id.* at 615. When considering a statute challenged as unconstitutionally vague, this Court examines the entire text of the statute and gives the words of the statute their ordinary meanings. *People v Lockett*, 295 Mich App 165, 174; 814 NW2d 295 (2012). The party challenging a statute as unconstitutionally vague may not use a hypothetical that would cast doubt upon the statute. *People v Malone*, 287 Mich App 648, 659; 792 NW2d 7 (2010). Instead, “the analysis must center on whether the statute, as applied to the actions of the individual defendant, is constitutional.” *Id.*

MCL 800.283(4) provides:

Unless authorized by the chief administrator of the correctional facility, a prisoner shall not have in his or her possession or under his or her control a weapon or other implement which may be used to injure a prisoner or other person, or to assist a prisoner to escape from imprisonment.

This Court addressed the constitutionality of MCL 800.283(4) in *People v Herron*, 68 Mich App 381; 242 NW2d 584 (1976), and *People v Osuna*, 174 Mich App 530; 436 NW2d 405 (1988). In *People v Herron*, 68 Mich App at 382, the defendant was convicted of violating MCL

800.283, which at the time provided that “[a] convict without authorization, shall not have on his person or under his control or in his possession any weapon or other implement which may be used to injure any convict or other person, or to assist any convict to escape from imprisonment.”¹ The defendant possessed a compass that was bent, sharpened at one end, and unfit for normal use, and the Court concluded that “it was an object of weapon-like qualities that could be used to harm others.” *Id.* at 383. The defendant argued that the statute was void for vagueness because under the language of the statute, a prisoner could be convicted for possessing items such as a pencil, ball point pen, shoestrings, and religious paraphernalia. *Id.* In concluding that the statute was constitutional on its face, and as applied to defendant, the *Herron* Court held that it would not strike down a provision “simply because the Legislature failed to list each and every ‘implement’ imaginable.” *Id.* The Court concluded that the statute “may not be attacked on the basis of a hypothetical situation” and that the statute was not so vague that a person of ordinary intelligence must guess at its meaning and application. *Id.*

This Court subsequently followed *Herron* in *Osuna*, 174 Mich App at 531, in which the defendant was convicted of transporting a hypodermic syringe into a correctional facility in violation of MCL 800.283. The statute prohibited the bringing a “weapon or other implement which may be used to injure a prisoner or other person, or in assisting a prisoner to escape from imprisonment,” into a correctional facility.” *Id.* The *Osuna* Court rejected the defendant’s argument that MCL 800.283 was unconstitutionally vague. *Id.* at 531-532. The Court determined that “the statute was intended to prohibit weapons and objects similar to weapons which might be used to harm others or make an escape from being brought into correctional facilities.” *Id.* at 532. The syringe was “an object with weapon-like qualities that could have been used to harm others or make an escape.” *Id.* Moreover, in rejecting defendant’s argument that he possessed the syringe because of his narcotics problem, the *Osuna* Court determined that “the element which transforms an unauthorized article into a weapon is its potential to cause injury, not the inmate’s subjective intent.” *Id.*, citing *Acrey v Dep’t of Corrections*, 152 Mich App 554, 559; 394 NW2d 415 (1986).

Most recently, in *Gratsch*, 299 Mich App at 613, this Court rejected a void-for-vagueness challenge to a substantively identical statute, MCL 801.262(2). The statute provided:

Unless authorized by the chief administrator of the jail, a prisoner shall not possess or have under his or her control any weapon or other item that may be used to injure a prisoner or other person, or used to assist a prisoner in escaping from jail.

¹ “This is the version of the statute as amended by 1972 PA 105, which subsequently was held to violate the title-object limitation of Const. 1963, art. 4, § 24. See *People v. Stanton*, 400 Mich. 192, 193, 253 N.W.2d 650 (1977). The Legislature enacted 1982 PA 343, containing the current version of MCL 800.283, to comply with the title-object limitation.” *Gratsch*, 299 Mich App at 611 n 3.

The *Gratsch* Court recognized that MCL 800.283(4) and MCL 801.262(2) are substantively identical, in that MCL 801.262(2) uses the phrase “any weapon or other item that may be used to injure a prisoner or other person,” while MCL 800.283(4) uses the phrase “a weapon or other implement which may be used to injure a prisoner or other person.” *Id.* at 612-613. The defendant possessed a Q-tip with a sharpened paperclip at the end of the object. *Id.* at 609. The Court determined that “a person of ordinary intelligence would understand that an unauthorized, sharpened fragment of metal attached to the end of a Q-tip is a ‘weapon or other item that may be used to injure a prisoner or other person, or used to assist a prisoner in escaping from jail.’” *Id.* at 613, quoting *Roberts*, 292 Mich App at 497. The Court concluded that, “consistently with the reasoning of *Herron* and *Osuna*...the language of MCL 801.262(2) is not unconstitutionally vague.” *Id.* The Court also struck down the defendant’s argument that MCL 801.262(2) was unconstitutionally vague because it allowed arbitrary enforcement. *Id.* at 615. The Court concluded that “a statute cannot be determined to confer unstructured and unlimited discretion unless the wording of the statute itself is vague. *Id.*

We reject defendant’s claim that MCL 800.283(4) is void because it is unconstitutionally vague. Defendant possessed an implement that was created using one-and-a-half prison pens (totaling six inches long), wrapped with cardboard, and secured with string for a handle. A person of ordinary intelligence would have a reasonable opportunity to know that the object “may be used to injure a prisoner or other person.” See MCL 800.283(4); *Gratsch*, 299 Mich App at 610. The object, often referred to as a “stick or a shank,” had weapon-like qualities that could be used to harm others. See *Herron*, 68 Mich App at 383. Thus, the object that defendant possessed was a “weapon or other implement” within the meaning of MCL 800.283(4).

Although defendant argues that virtually any item may be considered a weapon under MCL 800.283(4), and as applied to defendant, the statute may not be attacked on the basis of a hypothetical situation. See *Id.* Moreover, defendant’s argument that the statute permits arbitrary enforcement by governmental officials is meritless because “a statute cannot be determined to confer unstructured and unlimited discretion unless the wording of the statute itself is vague.” See *Gratsch*, 299 Mich App at 615. Given that the object was a prohibited item under MCL 800.283(4), defendant failed to comply with the statute, and his vagueness claim must fail. See *id.*

III. JURY INSTRUCTIONS

Defendant next argues that the trial court erred by failing to instruct the jury that a necessary element of the charged offense requires proof that defendant intended the use the object as a weapon. We disagree.

Defendant failed to raise his challenge of the jury instructions in the trial court. We review defendant’s unpreserved claim for plain error affecting substantial rights. See *People v Gonzalez*, 468 Mich 636, 642-643; 664 NW2d 159 (2003); *Carines*, 260 Mich at 763. “The determination of the necessary elements of a crime presents a question of law that we review de novo.” *Gratsch*, 299 Mich App at 615, citing *People v Mass*, 464 Mich 615, 622; 628 NW2d 540 (2001).

We reject defendant's contention that MCL 800.283(4) requires that a defendant have the intent to use the object as a weapon. "[T]he distinction between specific intent and general intent crimes is that the former involve a particular criminal intent beyond the act done, while the latter involve merely the intent to do the physical act." *People v Nowack*, 246 Mich 392, 405-406; 614 NW2d 78 (2000), quoting *People v Beaudin*, 417 Mich 570, 573-574; 339 NW2d 461 (1983). Here, "the element which transforms an unauthorized article into a weapon is its potential to cause injury, not the inmate's subjective intent." *Osuna*, 174 Mich App at 532. Because MCL 800.283(4) is a general intent crime, the trial court did not err by failing to instruct the jury that defendant must have had the specific intent to use the object as a weapon.

IV. OFFENSE VARIABLE (OV) 9

Defendant argues that the trial court erred in assessing 10 points for OV 9 because defendant's possession of the item presented no danger of physical injury or death to two to nine victims. We disagree.

At trial, defendant did not object to the scoring of OV 9. However, this Court granted defendant's motion to remand for resentencing with this Court and remanded to the trial court to determine whether offense variable (OV) 9 was improperly scored. *People v Johnson*, unpublished order of the Court of Appeals, entered October 26, 2012 (Docket No. 308993). On remand, the trial court denied defendant's motion for sentencing. Therefore, the issue is preserved for appellate review. See MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004).

"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." *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 an appellate court reviews de novo." *Id.*

MCL 777.39(1)(c) requires a trial court to score 10 points for OV 9 when "[t]here were 2 to 9 victims who were placed in danger or physical injury or death[.]" The trial court should "[c]ount each person who was placed in danger of physical injury or life . . . as a victim." MCL 777.39(2)(a). "OV 9 is scored only on the basis of the defendant's conduct during the sentencing offense." *Gratsch*, 299 Mich App at 623 (original citation omitted). In scoring OV 9, a trial court must not consider conduct after an offense has been completed. *People v McGraw*, 484 Mich 120, 122, 133-134; 771 NW2d 655 (2009).

In this case, Officer Vien testified that he bear hugged defendant after defendant and another inmate exchanged blows. There is no dispute that defendant possessed the object while he fought with the other inmate and was restrained by Officer Vien. At a minimum, the trial court had adequate facts to conclude that at least two victims, i.e., the other inmate and Officer

Vien, were placed in danger of physical injury.² See MCL 777.39(1)(c). Accordingly, the trial court did not err in assessing 10 points for OV 9.

Affirmed.

/s/ Michael J. Riordan
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly

² We further note that there was record evidence that others were standing nearby, and thus, were “placed in danger of injury or loss of life” by defendant’s possession of the object. “A person may be a victim under OV 9 even if he or she did not suffer actual harm; a close proximity to a physically threatening situation may suffice to count the person as a victim.” *Gratsch*, 299 Mich App at 624, citing *People v Morson*, 471 Mich 248, 262; 685 NW2d 203 (2003).