

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT LAWRENCE WILKENS, JR.,

Defendant-Appellant.

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FOR PUBLICATION

August 23, 2005

9:00 a.m.

No. 254668

Washtenaw Circuit Court

LC No. 03-000371-FH

Official Reported Version

Before: Cooper, P.J., and Bandstra and Kelly, JJ.

COOPER, P.J. (*concurring in part and dissenting in part*).

I agree with the majority's determination to affirm defendant's convictions. However, I would find that the trial court improperly assessed ten points for Offense Variable (OV) 4, as there was no evidence anywhere in the record to support this score.<sup>1</sup> I would, therefore, remand for resentencing.

I agree that the facts in this case are very disturbing. However, we, as judges of this Court, cannot substitute our personal belief systems for the facts on record. There was no evidence that either of the participants in the videotape suffered a serious psychological injury requiring professional treatment. They voluntarily participated in these sexual acts on a casual basis. In fact, there is evidence that the female victim felt that the prosecution of defendant was unfounded.<sup>2</sup> The prosecution presented no testimony from a psychologist or any other mental health professional, nor was there any psychological information reflected in the presentencing investigation report. While these individuals are not paragons of virtue, we cannot impose our own standards of morality upon the participants and presume that they suffered serious psychological injury requiring professional treatment, as contemplated by the statute.<sup>3</sup>

/s/ Jessica R. Cooper

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<sup>1</sup> *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

<sup>2</sup> During a taped interview with defense counsel's detective, which was played at trial, the victim stated that defendant had done nothing wrong and that she voluntarily participated in the sexual acts depicted in the videotape.

<sup>3</sup> MCL 777.34.