STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 11, 1998
v	No. 204291 Calhoun Circuit Court
TIMOTHY KURVONN TAYLOR, Defendant-Appellant.	LC No. 97-000258 FH

Before: Griffin, P.J., and Neff and Bandstra, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree home invasion, MCL 750.110a; MSA 28.305(a), assault with intent to commit criminal sexual conduct involving sexual penetration, MCL 750.520g(1); MSA 28.788(7)(1), and second-degree criminal sexual conduct, MCL 750.520c(1)(f); MSA 28.788(3)(1)(f). The trial court sentenced defendant to concurrent sentences of ten to twenty years' imprisonment for the first-degree home invasion conviction, three to ten years' imprisonment for the assault with intent to commit criminal sexual conduct involving sexual penetration conviction, and three to fifteen years' imprisonment for the second-degree criminal sexual conduct conviction. Defendant now appeals as of right. We affirm defendant's convictions and sentences, but remand for the limited purpose of correcting the judgment of sentence to reflect the correct statutory citation for defendant's second-degree criminal sexual conduct conviction as MCL 750.520c(1)(f); MSA 28.788(3)(1)(f).

Defendant first argues that the prosecutor failed to present sufficient evidence to support his convictions. We disagree. This Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt. *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995). Reasonable inferences and circumstantial evidence may constitute satisfactory proof of the elements of the offense. *Id.*

In order to prove first-degree home invasion, the prosecution was required to prove beyond a reasonable doubt that defendant either broke and entered, or entered without permission, an occupied dwelling, intending to commit a felony or a larceny in the dwelling. MCL 750.110a; MSA 28.305(a);

People v Warren, 228 Mich App 336; 578 NW2d 692 (1998). The elements of assault with intent to commit criminal sexual conduct involving sexual penetration are: (1) there must have been an assault; (2) defendant must have intended an act involving some sexually improper intent or purpose; (3) the intended sexual act must have been one involving some actual entry of another person's genital or anal openings or some oral sexual act; and, (4) there must be some aggravating circumstances, such as the use of force or coercion. *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997); *People v Snell*, 118 Mich App 750, 754-755; 325 NW2d 563 (1982). To be convicted of assault with intent to commit criminal sexual conduct involving sexual penetration "it is not necessary to show that the sexual act was started or completed." *Snell, supra* at 755. Finally, the elements of second-degree criminal sexual conduct are: (1) that the defendant intentionally touched the victim's genital area / groin / inner thigh / buttock / or breast or clothing covering that area; (2) that this was done for sexual purposes or could reasonably be construed as having been done for sexual purposes; (3) that the defendant caused personal injury to the victim; and, (4) defendant used force or coercion to commit the sexual act. CJI2d 20.2; CJI2d 20.9

The victim testified that she opened the backdoor to her apartment to take out the trash when defendant rushed in and held her against the dryer. The victim tried to close the door when defendant rushed her, but he had his foot in the door. While she was pinned against the dryer, defendant closed the door with his foot, reached under her nightgown and tried to pull her underwear down with one hand while trying to unbuckle his pants with his other hand. The victim pulled her underwear up as defendant was pulling it down. Defendant wrestled with her, bit her breast, and hit her. The victim got away from defendant and tried to run upstairs, but defendant grabbed her by her underwear and pulled her back down the stairs. Defendant then pulled off her nightgown and bra and put her bra in his pocket. When defendant pinned her to the stairs, he told her to cry. The victim testified that defendant touched her breast and her vagina.

Viewing the evidence in the light most favorable to the prosecution, the victim was present in her residence when defendant entered the dwelling without permission intending to commit the felony crime of criminal sexual conduct. Further, defendant assaulted the victim with the intent to commit criminal sexual conduct involving sexual penetration as demonstrated by the prosecutor's evidence that as defendant was trying to take off the victim's underwear he was trying to unbuckle his own pants. Finally, defendant committed second-degree criminal sexual conduct by using force, causing the victim personal injury, to touch the victim's breast and vagina. The prosecution presented sufficient evidence on each element of each crime for a rational trier of fact to find defendant guilty beyond a reasonable doubt of the crimes for which he was convicted.

Defendant next claims that the trial court abused its discretion by denying defendant's motion for a new trial on the ground of newly discovered evidence. We disagree. Whether to grant a new trial is within the trial court's discretion, and its decision will not be reversed absent a clear abuse of that discretion. *People v Daoust,* 228 Mich App 1, 16; 577 NW2d 179 (1998). To justify a new trial on the basis of newly discovered evidence, the moving party must show that: (1) the evidence itself, and not merely its materiality, is newly discovered; (2) the evidence is not cumulative; (3) including the new evidence on retrial would probably cause a different result; and, (4) the party could not with reasonable

diligence have discovered and produced the evidence at trial. *People v Miller*, 211 Mich App 30, 46-47; 535 NW2d 518 (1995).

Defendant failed to mention to his counsel, until after the jury returned its verdict, that the police had gone to the bar where defendant had been on the evening in question. From the police report, defendant was allegedly able to identify other people who could support defendant's alibi. Because there is no explanation for defendant's failure to take any reasonable action at the time of trial, no relief is justified. Further, defendant and two defense witnesses testified that defendant did not leave the bar until after 1:00 a.m., the approximate time that the victim was attacked. The testimony of more witnesses as to defendant's departure time would be merely cumulative and would not justify a new trial on the basis of newly discovered evidence. *Miller, supra*.

Defendant's final argument is that his sentence for his first-degree home invasion conviction violates the principle of proportionality. We disagree. Appellate review is limited to whether the sentencing court abused its discretion. *People v Albert*, 207 Mich App 73, 74; 523 NW2d 825 (1994). A sentencing court abuses its discretion when it violates the principle of proportionality. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990); *People v Paquette*, 214 Mich App 336, 344-345; 543 NW2d 342 (1995). The principle of proportionality requires that sentences be proportionate to the seriousness of the matter for which punishment is imposed. *Id.*

The trial court in the instant case sentenced defendant to ten to twenty years' imprisonment for the first-degree home invasion conviction.[1] Defendant argues that this sentence is disproportionate, maintaining that he is the father of three young daughters and has a fiancé, who also has two young daughters. Defendant supports all five children and cares for his father who suffered a stroke. Defendant further argues that the offense was short in duration and that he left the victim's home of his own volition. However, defendant's presentence investigation report reflects an extensive criminal record, consisting of fourteen prior misdemeanor convictions starting in 1984 and continuing up to the time of the present offenses. Considering defendant's extensive criminal record and the seriousness of this crime, the trial court did not abuse its discretion in rendering its sentence. Defendant's sentence is proportionate to the offense and the offender. *Milbourn, supra*.

Affirmed and remanded for the limited ministerial purpose of correcting the judgment of sentence to reflect the correct statutory cite for defendant's second-degree criminal sexual conduct conviction as MCL 750.520c(1)(f); MSA 28.788(3)(1)(f). Cf. *People v Tyson (After Remand)*, 199 Mich App 62, 63-64; 501 NW2d 225 (1993). We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Janet T. Neff
/s/ Richard A. Bandstra

[1] Where there are multiple convictions for a single defendant, the trial court must calculate the sentencing guidelines for the conviction that carries the highest statutory maximum. Michigan Sentencing Guidelines (2d ed, 1988), p 1. There are no sentencing guidelines for the crime of home invasion, which carries a higher maximum sentence than second-degree criminal sexual conduct (CSC II). Consequently, the trial

court calculated a sentencing guidelines range of 36 to 180 months based on defendant's CSC II conviction. Since defendant's minimum sentence of ten years for the home invasion offense fit within the guidelines for CSC II, the action of the trial court in "borrowing" the CSC II guidelines was appropriate.