

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY HEARNS,

Defendant-Appellant.

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UNPUBLISHED

November 19, 2002

No. 237508

Wayne Circuit Court

LC No. 00-012692

Before: Talbot, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Defendant was charged with three counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(F) (causing personal injury to the victim and force and coercion used to accomplish sexual penetration). Following a bench trial, defendant was convicted of one count of first-degree criminal sexual conduct and acquitted of the other two counts. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to thirty to sixty years' imprisonment. Defendant appeals of right. We affirm.

Defendant asks us to vacate his conviction on the ground that the trial court rendered inconsistent verdicts. Defendant contends that his conviction of one count of first-degree criminal sexual conduct is inconsistent with the trial court's findings and with his acquittal of the other two counts of first-degree criminal sexual conduct. He argues that the court could not have, consistent with fact or logic, believed the victim's testimony as it pertained to one incident and not as it pertained to the other incidents. We disagree.

We review de novo questions of law and questions of application of law to the facts. *People v Barrera*, 451 Mich 261, 269 n 7; 547 NW2d 280 (1996); *People v Aldrich*, 246 Mich App 101, 116; 631 NW2d 67 (2001). In doing so, we give due deference to the trial court in determining the weight of the evidence and the credibility of witnesses. *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988).

A judge who sits without a jury in a criminal case must make specific findings of fact and state conclusions of law. *People v Shields*, 200 Mich App 554, 558; 504 NW2d 711 (1993). The verdict reached in a bench trial must be consistent with the trial court's findings of fact. See *People v Smith*, 231 Mich App 50, 53; 585 NW2d 755 (1998). Although juries "are not held to any rules of logic" and possess the "capacity for leniency," "[t]hese considerations change when a case is tried by a judge sitting without a jury." *People v Vaughn*, 409 Mich 463, 466; 295

NW2d 354 (1980). The courts do “not normally enjoy the freedom to be inconsistent or to compromise.” *People v Burgess*, 419 Mich 305, 310-311; 353 NW2d 444 (1984). For verdicts to be inconsistent, the factual findings underlying the verdicts must be inconsistent. *Smith, supra* at 53.

The verdicts are not inconsistent. The victim testified that defendant sexually assaulted her three times, twice forcing her to perform fellatio on him and once forcing her to engage in sexual intercourse. The court found that defendant repeatedly struck the victim in the head and then penetrated her vagina with his penis against her will. These findings support defendant’s conviction of first-degree criminal sexual conduct based on sexual intercourse, MCL 750.520b(1)(F), and are not inconsistent with defendant’s acquittal of the other charges. The trial court could logically and consistently find that the victim’s testimony was sufficient to establish that defendant engaged in sexual intercourse with complainant, and at the same time find that the alleged acts of oral penetration were not established beyond a reasonable doubt. The factfinder, whether the judge or the jury, “may choose to believe or disbelieve any witness or any evidence presented in reaching a verdict.” *People v Cummings*, 139 Mich App 286, 294; 362 NW2d 252 (1984). Under these circumstances, in the absence of any factual inconsistency, we will not reverse defendant’s conviction of an offense of which he was clearly found guilty beyond a reasonable doubt. *Smith, supra* at 53.

Defendant next contends that he is entitled to be resentenced because the trial court incorrectly scored Offense Variables (OV) 7, 10, and 11. Defendant failed to challenge the guidelines calculations at or before sentencing, and there is no indication that the inaccuracy could not have been discovered prior to that time. Accordingly, despite defendant’s motion to remand on this basis, this issue is not preserved. *People v Wilson*, 252 Mich App 390, 392-393; \_\_\_ NW2d \_\_\_ (2002); MCR 6.429(C). However, this Court may still review for plain error, i.e., clear or obvious error, which affected defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Kimble*, 252 Mich App 269, 275-276; 651 NW2d 798 (2002). If there is evidence to support the trial court’s scoring of sentencing guidelines, this Court will uphold the trial court’s scoring. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002); *People v Phillips*, 251 Mich App 100, 108; 649 NW2d 407 (2002).

First, defendant contends that the trial court misscored OV 7. Offense Variable 7 provides for a score of fifty points, which the variable was scored in the present case, where “[a] victim was treated with terrorism, sadism, torture, or excessive brutality.” MCL 777.37(1)(a). There was evidence of excessive brutality or terrorism as contemplated by the guidelines sufficient to support the scoring of fifty points under OV 7. At the time of the offense, the victim was recovering from surgery on her leg and she was not supposed to bear weight on her leg. Upon the victim’s arrival at defendant’s mother’s home, defendant seized her crutches, slapped her, and commanded her to walk into the house without the crutches. Inside the house, defendant beat the victim and forced her to walk into a bedroom without her crutches. Defendant then forced her to engage in sexual intercourse. As a result of the beatings, the victim had a swollen left eye, scratches on her forearm, back and chin, and a bruised forehead. We find no plain error in the scoring of fifty points for OV 7.

Offense Variable 10 provides for a score of five points where “[t]he offender exploited a victim by his or her difference in size or strength, or both. . . .” MCL 777.40. In light of the

victim's existing leg injury, when defendant seized her crutches and beat her, he created a pronounced difference in strength which he exploited to prevent the victim's escape and make her submissive. Thus, there was no plain error in the scoring of five points for OV 10.

Lastly, defendant challenges the scoring of twenty-five points under OV 11, which corresponds to "[o]ne criminal sexual penetration occurred," MCL 777.41(1)(b), in addition to the one penetration that forms the basis of the first-degree criminal sexual conduct offense. MCL 777.41(2). Defendant argues that because he was acquitted of the other counts, the additional allegations of penetration cannot be used for the purposes of the guidelines scoring. We disagree. The standard of proof in sentencing differs from that necessary for a criminal conviction; a fact can be established for the purpose of guidelines calculations even though it was not found for the purpose of conviction. *People v Ratkov (After Remand)*, 201 Mich App 123, 126; 505 NW2d 886 (1993). Calculations may be based on criminal activity for which the defendant was acquitted. *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991). See *People v Mutchie*, 251 Mich App 273, 281; 650 NW2d 733 (2002) ("All other sexual penetrations of the victim and by the offender 'arising out of the sentencing offense' may be scored under MCL 777.41(2)(a), regardless of whether the sexual penetrations result in separate convictions."). We find no error in the scoring of twenty-five points under OV 11 for an additional sexual penetration that arose out of the sentenced offense.

Defendant has not established plain error. Defendant was sentenced within the recommended range of the sentencing guidelines, and he has not established a scoring error or shown that his sentence was based on inaccurate information. Accordingly, the sentence must be upheld. *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000).

Affirmed.

/s/ Michael J. Talbot  
/s/ Janet T. Neff  
/s/ E. Thomas Fitzgerald