# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>November 9, 2004 |
| v | No. 248958<br>Oakland Circuit Court |
| TOMA DIONE BELL,<br><br>Defendant-Appellant. | LC No. 2002-186783-FC |

Before: Murray, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of two counts of criminal sexual conduct in the first degree (CSC I), the victim being under thirteen years of age, MCL 750.520b(1)(b), entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Complainant testified that defendant, who was a friend of his older brother, performed fellatio on him on two occasions when he was eleven years old. Complainant's older brother testified that he and defendant worked at the same group home, and that defendant left town after complainant's allegations came to light. The police searched for defendant for several weeks, but were unsuccessful in locating him or his vehicle.

The trial court declined the prosecutor's request to read CJI2d 4.4, the instruction dealing with flight, but allowed the prosecutor to draw inferences from evidence that defendant could not be located. The jury found defendant guilty as charged. At sentencing, over defendant's objection, the trial court scored Offense Variable (OV) 11, MCL 777.41, criminal sexual penetration, at twenty-five points based on a finding that one criminal sexual penetration occurred in addition to the penetration that formed the basis of each sentencing offense.

In reviewing a sufficiency of the evidence question, we view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the elements of the offense were proven beyond a reasonable doubt. We do not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992). It is for the trier of fact, rather than this Court, to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Reasonable inferences may be made from direct or

circumstantial evidence in the record. *People v Vaughn*, 186 Mich App 376, 379-380; 465 NW2d 365 (1990).

A person is guilty of CSC I if he engages in sexual penetration with another person who is under thirteen years of age. MCL 750.520b(1)(a). "Sexual penetration" includes any "intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body." MCL 750.520a(1).

Defendant argues that the evidence was insufficient to support his convictions because complainant's testimony was inconsistent and inherently implausible. We disagree. Complainant's testimony was inconsistent in some respects regarding dates, places, etc. However, the jury was entitled to determine the credibility of the witnesses, and to conclude that complainant's testimony, that on two occasions defendant performed fellatio on him, was worthy of belief. In determining whether the evidence was sufficient to support a conviction, we do not resolve credibility questions anew. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). And the testimony of a sexual assault complainant need not be corroborated. MCL 750.520h. We find that the evidence, when viewed in a light most favorable to the prosecution, was sufficient to support defendant's convictions of CSC I. *Wolfe*, *supra*.

Defendant argues that the trial court erred in allowing the prosecutor to argue that evidence that he could not be located supported an inference that he had fled the jurisdiction, and that the prosecutor engaged in misconduct by so arguing. We disagree. We review a trial court's determination of an evidentiary issue for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995).

A prosecutor may not make a statement of fact that is not supported by the evidence, but may argue the evidence and all reasonable inferences arising therefrom as they relate to his theory of the case. *Id.* at 282. And evidence of flight has long been held to be admissible to show consciousness of guilt. *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001). Here, the evidence that defendant left town and could not be located after complainant made his allegations supported an inference that he did not wish to be located. Thus, the trial court did not abuse its discretion by allowing the prosecutor to so argue. Also, defendant expressed satisfaction with the jury instructions as read, and cannot now claim that the trial court's failure to read CJI2d 4.4 denied him a fair trial. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (waiver extinguishes any error).

Lastly, defendant argues that the trial court erred in scoring OV 11. A sentencing court has discretion in determining the number of points to be scored when calculating the sentencing guidelines. A decision for which there is any evidence in the record will be upheld. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). We review a question of statutory interpretation de novo. *People v Schaub*, 254 Mich App 110, 114-115; 656 NW2d 824 (2002).

OV 11 provides that twenty-five points should be scored if one criminal sexual penetration occurred other than the penetration that formed the basis of a first-degree criminal sexual conduct offense. MCL 777.41(1)(a) and (2)(c). Defendant argues that the trial court erred in scoring OV 11 at twenty-five points because the second penetration, i.e., the one that did not form the basis for each sentencing offense, did not arise out of the sentencing offense. MCL 777.41(2)(a). We disagree. A penetration that forms the basis of each conviction cannot be

scored under OV 11. MCL 777.41(2)(c). However, the preclusion of a point assessment for a penetration that formed the basis of a conviction applies only to the penetration that forms the basis for the conviction for which the sentence is being imposed, and not to contemporaneous penetrations that formed the basis for additional convictions. *People v McLaughlin*, 258 Mich App 635, 675-678; 672 NW2d 860 (2003). The trial court correctly scored OV 11 at twenty-five points for each conviction. Defendant is not entitled to resentencing.

Affirmed.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ Michael R. Smolenski