

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GERALD ALAN SHORT,

Defendant-Appellant.

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UNPUBLISHED

October 25, 2007

No. 266368

Kent Circuit Court

LC No. 05-000708-FH

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

SAWYER, J. (*concurring in part and dissenting in part*).

I concur with the majority's opinion, which affirms defendant's conviction and the scoring of OV 8, MCL 777.38. However, I dissent from the majority's conclusion that the trial court did not err when it scored 50 points for OV 7, MCL 777.37.

Here there is minimal proof that defendant "slugged" the victim during the sexual act; the victim testified that the last thing she remembers is defendant raising his arm. From her testimony, the trial court inferred that defendant hit her, rendering her unconscious. I do not believe that this conduct rose to the level of sadism, torture or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense. MCL 777.37(1)(a). Therefore, I believe the trial court abused its discretion by scoring defendant 50 points for OV 7 when there was no record evidence to support the scoring decision. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

I would affirm but remand for resentencing.

/s/ David H. Sawyer