STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 29, 2007
v	No. 271167 Ingham Circuit Court
MOUHAMMED MAHMOND SHAKER, Defendant-Appellant.	LC No. 05-001273-FH

Before: Donofrio, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2), and assault with intent to commit criminal sexual penetration, MCL 750.520g(1). He was sentenced to 40 months to 20 years' imprisonment for the home invasion conviction and 12 months in jail for the assault conviction. Defendant appeals the assault conviction and the trial court's scoring of the sentencing guideline factors as of right. Because we conclude that the evidence presented at trial was sufficient to support defendant's assault conviction, that this conviction was not against the great weight of the evidence and the trial court's scoring of the sentencing guidelines was proper, we affirm.

Defendant was convicted of breaking into the complainant's home and attempting to engage her in sexual relations. The 14-year-old complainant was babysitting her four younger siblings overnight while her parents were out of town. Defendant was a friend of the family who had helped with various projects around their home, and the complainant's father had told defendant that the complainant and her siblings would be home alone that evening. The complainant testified that she was awakened by defendant in the middle of the night and repeatedly asked by him to engage in fellatio. When the complainant refused, defendant wrote his telephone number on some paper and told the complainant to call him so they could have sex. As the complainant led defendant to the front door and told him to get out, defendant pushed the complainant onto a couch and climbed on top of her. The complainant screamed and her younger sister emerged from an adjacent bedroom, after which defendant ran from the house. Defendant admitted being present at the complainant's home but claimed he was there only because he was investigating some suspicious men he saw near the house. He claimed that the front door was already open when he went to knock on it. He denied entering the complainant's bedroom, asking her for a sexual act, or assaulting her.

Defendant first argues that there was insufficient evidence to support his conviction for assault with intent to commit criminal sexual penetration. In determining whether sufficient evidence has been presented to sustain a conviction, an appellate court is required to view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

Assault with intent to commit criminal sexual conduct involving penetration requires (1) an assault, (2) with the intent to commit criminal sexual penetration. *People v Nickens*, 470 Mich 622, 627; 685 NW2d 657 (2004). Defendant argues that there was insufficient evidence that he intended to commit criminal sexual penetration when he assaulted the complainant by pushing her onto the couch. We disagree.

Shortly before the assault, defendant confronted the complainant and repeatedly asked her to engage in fellatio, which by statutory definition is a form of sexual penetration. MCL 750.520a(p). He also gave the complainant his telephone number and requested that she call him for sex. After the complainant left the bedroom where she had been sleeping with a younger brother, defendant pushed her onto a couch, climbed on top of her, and attempted to suppress her screams. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the jury to find beyond a reasonable doubt that defendant intended to commit criminal sexual penetration when he assaulted the complainant.

We also reject defendant's claim that he is entitled to a new trial because his assault conviction is against the great weight of the evidence. Although defendant asserts that there were inconsistencies in the testimony of the complainant and other witnesses, "[c]onflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998). Because the testimony at trial did not contradict indisputable physical facts or defy physical realities, and was not impeached to the point were it was deprived of any probative value or must be considered unbelievable, the trial court properly determined that it was the jury's responsibility to determine the credibility of the witnesses. *Id*. at 637. The evidence did not preponderate so heavily against the jury's verdict that it would be a miscarriage of justice to allow it to stand. *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003). Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial on this ground. *People v Gonzalez*, 178 Mich App 526, 532; 444 NW2d 228 (1989).

Defendant next argues that the sentencing guidelines were erroneously scored. We disagree.

A sentencing court has discretion in determining the number of points to be scored, provided the evidence adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "'Scoring decisions for which there is any evidence in support will be upheld.'" *Id*., quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

The trial court scored ten points for offense variable (OV) 10, based on its finding that defendant exploited the victim's youth. See MCL 777.40(1)(b). The evidence showed that defendant assaulted a 14-year-old complainant by breaking into her home when he knew that her

parents were out of town, and that defendant requested sexual favors from the young complainant. This evidence was sufficient to support the ten-point score for OV 10.

Defendant's sole challenge to the scoring of prior record variable 7 is that a ten-point score for a "concurrent conviction," MCL 777.57(1)(b), would not be proper if the assault conviction is reversed. Because we have found no basis for reversing that conviction, we reject this claim of error.

Affirmed.

/s/ Pat M. Donofrio
/s/ Joel P. Hoekstra
/s/ Jane E. Markey