STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 16, 2008
v	No. 278344 Calhoun Circuit Court
TONNIE HARRISON, Defendant-Appellant.	LC No. 07-000192-FC

Before: Markey, P.J., and Sawyer and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for four counts of third-degree criminal sexual conduct (CSC), MCL 750.520d(1)(b), and one count of assault with intent to commit CSC involving sexual penetration, MCL 750.520g(1).[1] Defendant was sentenced to 10 to 15 years imprisonment for each of his four CSC convictions, and to 76 to 120 months imprisonment for his assault conviction. We affirm.

I. Basic Facts

Defendant and the victim were acquaintances. In December 2006, the victim encountered defendant on the street and defendant told the victim that he would be coming to her apartment that evening. The victim did not respond. Defendant arrived at the victim's apartment at 2:00 a.m. the following morning and knocked on the back door. The victim, who had been watching television, went to the door and slightly opened it to discern who was outside. When the victim saw defendant, she tried to shut the door, but, according to the victim, defendant forced his way into the apartment. The victim then asked defendant to leave, but defendant refused. At that point, the victim's infant began to cry and the victim went upstairs to retrieve the child. The victim returned with the infant to where defendant stood because she believed that defendant "wouldn't try to do nothing." However, the victim testified that defendant seized the infant, pulled a box cutter from the pocket of his jeans, and held it to the child's throat.

[1] Defendant was charged with four counts of first-degree CSC, MCL 750.520b(1)(c), assault with intent to commit CSC, MCL 750.520g(1), first-degree home invasion, MCL 750.110a(2), and assault with a deadly weapon, MCL 750.82(1). Defendant was acquitted of the first-degree home invasion and assault with a deadly weapon charges.

According to the victim, defendant then commanded she go upstairs and follow his commands. The victim complied out of fear for her child. The victim testified that once upstairs, defendant placed the infant and the box cutter on the bed and proceeded to sexually penetrate the victim. Defendant allegedly asked the victim to perform fellatio on him and when she refused, defendant placed the box cutter approximately an inch from the victim's throat at which point the victim complied. Defendant then performed cunnilingus on the victim. The victim also testified that the defendant attempted to penetrate her anus, and that prior to doing so, defendant put a lit cigarette near her vagina. When defendant's attempt failed, defendant again proceeded to sexually penetrate the victim. Defendant alleges that these acts were consensual.

After trial, the jury convicted the defendant of four counts of third-degree CSC and one count of assault with intent to commit CSC. At sentencing the trial court scored offense variables, 4, 7, 9, and 10. On appeal, defendant argues that the evidence was insufficient to support his convictions and that the trial court erred because it miscalculated the four offense variables.

II. Standards of Review

In reviewing the sufficiency of the evidence, an appellate court views the evidence de novo in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). "A sentencing court has discretion in determining the number of points to be scored [under the relevant offense variables], provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Accordingly, we review the scoring of offense variables for an abuse of discretion. *Id*.

III. Sufficiency of the Evidence

Defendant asks this Court to overturn his convictions because the prosecution failed to produce sufficient evidence in support of his convictions. We disagree. In criminal cases, the prosecution must present evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt of the crimes charged. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). In this matter, the jury convicted defendant of four counts of third-degree CSC and one count of assault with intent to commit CSC, and, accordingly, we must determine whether the evidence was sufficient to uphold his convictions. The elements of third-degree CSC are (1) sexual penetration (2) that is accomplished by force or coercion. MCL 750.520d(1)(b). Sexual penetration is "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight . . . ." MCL 750.520a(o). Force or coercion includes actual physical force, or the threat to use force or to retaliate in the future coupled with the victim's belief that the actor has the ability to execute this force. See MCL 750.520b(1)(f)(i)-(iii). The elements of assault with the intent to commit CSC involving penetration are "(1) an assault, and (2) an intent to commit CSC involving sexual penetration." *People v Nickens*, 470 Mich 622, 627; 685 NW2d 657 (2004); MCL 750.520g(1). "An assault may be established by showing either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery." *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005).

In this matter, with respect to the four third-degree CSC convictions, defendant committed four acts of sexual penetration on the victim: two acts of sexual intercourse, one act of fellatio, and one act of cunnilingus. See MCL 750.520a(o). The evidence also reveals that defendant accomplished these acts by force or coercion. Defendant threatened to harm the victim's infant by placing a box cutter to the child's throat if the victim did not comply with his requests. See MCL 750.520b(1)(f)(iii). Plaintiff complied in fear that defendant would harm her child and during these events, the box cutter and the child remained on the bed within defendant's reach. See MCL 750.520b(1)(f)(ii)(iii). In addition, the victim testified that the defendant placed the box cutter at her throat when she initially refused to perform fellatio. See MCL 750.520b(1)(f)(ii). Regarding defendant's conviction for assault with the intent to commit CSC involving penetration, defendant manifested an intent to anally penetrate the victim when he placed a lit cigarette near her vagina, asked her to turn over, and attempted to put his penis in her anus. Given these facts, it is plain that defendant attempted to commit a sexual penetration, which the victim reasonably apprehended. See *Starks*, *supra* at 234. Accordingly, we conclude, after reviewing the evidence in the light most favorable to the prosecution, that the evidence was sufficient to allow a rationale trier of fact to conclude that defendant committed four counts of third-degree CSC and one count of assault with the intent to commit CSC involving penetration.

On appeal, defendant argues that the victim's testimony was "inherently incredible and perjured" and could not support defendant's convictions because the jury could not reasonably believe it.[2] We disagree. In support of his contention, defendant points to inconsistencies in the victim's testimony, as well as the victim's initial failure to disclose that she saw defendant the day before the incident. Our review of the record reveals that some of the alleged flaws in the victim's testimony resulted from the victim's feelings of humiliation related to the incident and her fear that no one would believe her. On cross-examination, defense counsel ensured that the jury was aware of these inconsistencies. In any case, the victim's testimony was not inherently unbelievable and merely created an issue of her credibility and the weight to be accorded to her testimony. Such questions are left to the trier of fact and we will not resolve these issues anew. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002); *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

Defendant also argues that the victim's failure to flee indicates that the sexual acts were consensual. Again, we do not agree. Contrary to the victim's testimony, defendant's theory of the case was that the encounter was consensual. The question of consent, then, was an issue of witness credibility that the jury resolved when it believed the victim and convicted defendant. As noted, questions of credibility are left to the trier of fact. *Avant*, *supra* at 506.

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[2] Although defendant presents his argument as a sufficiency of the evidence issue, it is also akin to a great weight of the evidence argument. However, defendant did not preserve this issue for appeal and, accordingly, we review it for plain error affecting substantial rights. See *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). Generally, conflicting testimony and witness credibility are not grounds for granting a new trial on this basis, except in exceptional instances where the testimony is so far impeached that it lacks all probative value, where it is unbelievable, or where it disputes irrefutable physical realities or physical facts. See *People v Lemmon*, 456 Mich 625, 642-643, 645-646; 576 NW2d 129 (1998). Such is not the case here and we cannot conclude that an error occurred affecting defendant's substantial rights.

IV. Sentencing Factors

Defendant next argues that the trial court erred when it scored offense variables 4, 7, 9, and 10. We disagree. "Scoring decisions for which there is any evidence in support will be upheld." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). In this case, the court scored OV 4 at 10 points, OV 7 at 50 points, OV 9 at 10 points, and OV 10 at 5 points.

OV 4 may be scored at 10 points if the victim "[s]erious psychological injury requiring professional treatment . . . ." MCL 777.34(1)(a). The points may be scored if the injury "require[s] professional treatment," though "[w]hether the victim has sought treatment is not conclusive." MCL 777.34(2). In this case, the victim testified that she feared for her and her child's safety when defendant placed the box cutter at her child's throat and later used the cutter against her. Given this testimony, we cannot agree with defendant's statement that evidence of psychological injury is "pure speculation." We find that this evidence was sufficient to support the court's decision to score OV 4 at 10 points.

OV 7 may be scored at 50 points if "[a] victim was treated with 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). Sadism is defined as "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.37(3). Record testimony showed that both the victim and the victim's child were threatened with a box cutter, that the box cutter remained within defendant's reach during the incident, and that defendant placed a lit cigarette near the victim's vagina. The trial court reasonably inferred that these acts were designed to increase the victim's fear and anxiety and were done in the furtherance of humiliating the victim for defendant's gratification. The trial court did not abuse its discretion when it scored OV 7 at 50 points.

Defendant, however, argues that OV 7 was improperly scored because the jury convicted defendant of third-degree CSC, and therefore defendant's conduct does not constitute aggravated physical abuse because no weapon was used. We disagree. It is not necessary that a defendant use a weapon to subject a victim to aggravated physical abuse under this variable. See *People v Kegler*, 268 Mich App 187, 191; 706 NW2d 744 (2005). Further, as noted, *supra*, adequate record evidence supported the trial court's determination and, accordingly, we cannot conclude that the court abused its discretion. See *Hornsby*, *supra* at 462.

OV 9 may be scored at 10 points if "2 to 9 victims were placed in danger of physical injury or death." MCL 777.39(1)(c). Record testimony indicates that defendant's actions placed the victim and her child in physical danger. Thus, evidence adequately supports the trial court's decision to score OV 9 at 10 points. We find irrelevant defendant's argument that because the jury did not believe the box cutter was involved, the court should not have scored the variable. "Scoring decisions for which there is *any* evidence . . . will be upheld." *Endres*, *supra* at 417 (emphasis added).

OV 10 may be scored at 5 points if "[t]he offender exploited a victim by his or her difference in size or strength, or both . . . ." MCL 777.40(1)(b). The disparity in size and strength between defendant and the victim was apparent to the jury and the trial court and is evident from the victim's testimony. Accordingly, the evidence adequately supports the trial court's decision to score OV 10 at 5 points.

Lastly, defendant argues that Michigan's sentencing scheme violates his Sixth Amendment rights. We cannot agree. Where the statutory maximum for a defendant's conviction has not been exceeded, as is the case here, a sentencing court may use "judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict" without violating the defendant's constitutional rights. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). To conclude, our review of the record reveals that the evidence adequately supports the trial court's scoring decisions and, therefore, we find that court did not abuse its discretion. See *Hornbsy, supra* at 468.

Affirmed.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ Kirsten Frank Kelly