

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY LEE CADARETTE,

Defendant-Appellant.

UNPUBLISHED

October 23, 2008

No. 278701

Genesee Circuit Court

LC No. 04-014498-FC

Before: Wilder, P.J., and Jansen and Owens, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of first-degree home invasion, MCL 750.110a(2), two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(e), armed robbery, MCL 750.529, conspiracy to commit armed robbery, MCL 750.157a; MCL 750.529, possession of a firearm by a felon (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to prison terms of 13 to 20 years for the first-degree home invasion conviction, two to five years for the felon-in-possession conviction, two years for the felony-firearm conviction, and 45 $\frac{1}{2}$ to 70 $\frac{5}{6}$ years (546 to 850 months) for each of the remaining convictions.¹ We affirm, but remand for amendment of the judgment of sentence consistent with part IV of this opinion.

I

Defendant's convictions arose out of a home invasion that occurred in October 2003. At approximately 9:30 p.m., the victim responded to a knock at her front door and found a man, later identified as defendant, standing on her porch. Although the victim did not know defendant, defendant knew the victim's name and asked the victim about "B.T.," the person from whom she apparently rented her house. As the victim attempted to close the door, defendant sprayed her with mace. The victim then fought with defendant. Defendant hit her, pulled out a

¹ The trial court originally sentenced defendant to prison terms of 50 to 70 $\frac{5}{6}$ years (600 to 850 months) for the CSC I, armed robbery, and conspiracy convictions. However, the court subsequently resentenced defendant to prison terms of 45 $\frac{1}{2}$ to 70 $\frac{5}{6}$ years (546 to 850 months) for these convictions in accordance with the two-thirds rule of *People v Tanner*, 387 Mich 683; 199 NW2d 202 (1972).

gun, and forced himself inside the house. He also forced her to put a pillowcase over her head and took her cell phone. Defendant repeatedly called out to his partner, and a second man then entered the house. The victim was able to see the second man through the pillowcase while walking through the brightly lit kitchen. She recognized the second man as John Cadarette.

Defendant again asked the victim about B.T.'s whereabouts. He also asked for money, which the victim said she did not have. Defendant then led the victim outside and behind the garage, where he forced her to engage in oral, anal, and vaginal intercourse. During this criminal sexual activity, defendant's brother John held the gun. Defendant also forced the victim to perform oral sex on John before he took her underwear and tied her up. Defendant and his brother then left.

Sometime later, the victim identified defendant in a photographic lineup. Defendant gave a statement to the police admitting his involvement in the crimes.

II

Defendant first argues that several of the trial court's jury instructions denied him a fair trial. Because defense counsel expressly approved of the jury instructions, however, defendant has waived review of these claims of error. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

Nevertheless, we will address the merits of defendant's claims. Generally, jury instructions must fairly present the issues to be tried and sufficiently protect a defendant's rights. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). The instructions must include all elements of the charged offenses, and must not exclude relevant issues, defenses, and theories if supported by the evidence. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). "If the jury instructions, taken as a whole, sufficiently protect a defendant's rights, reversal is not required." *People v Huffman*, 266 Mich App 354, 371-372; 702 NW2d 621 (2005).

Defendant contends that the trial court erroneously instructed the jury that the conspiracy to commit armed robbery charge could be predicated on any of the other charged offenses. The trial court instructed the jury as follows:

THE COURT: I want to now give you the instruction involving conspiracy. The defendant is charged with the crime of conspiracy to commit armed robbery, and I assume it would apply to all of the charges with the exception of the conspiracy charge. Is that correct?

MS. HANSON [the prosecutor]: That's correct, your Honor.

THE COURT: Do you agree with that, Mr. Bremer?

MR. BREMER [defense counsel]: (No verbal response).

THE COURT: Anyone who normally agrees with someone else to commit armed robbery and any of the other charges that are listed, home invasion,

criminal sexual conduct in the first degree, felony firearm, felon in possession of a firearm, all of those particular offenses, is guilty of conspiracy.

To prove the defendant's guilt, the prosecutor must prove each of the following elements beyond a reasonable doubt. First, that the defendant and someone else agreed to commit any of the six offenses listed in the information with the exception of conspiracy. Second, that the defendant specifically intended to commit or helped commit that crime. Third, that this agreement took place or continued during the period from October 28th of 2003 at approximately, I believe, 9:30 to 11:30 p.m. on October 28th of 2003. And this instruction says now let me define the crimes of, and I'm going to go through and define the crimes for you when I get to them. In fact, we're going to start now with the crime of . . . possession of a firearm . . .

Although the information charged defendant with conspiracy to commit armed robbery, the trial court instructed the jury that to convict defendant of the conspiracy charge, it could find that "defendant and someone else agreed to commit any of the six offenses listed in the information with the exception of conspiracy." The trial court's instruction was accordingly technically erroneous because a conviction for conspiracy to commit armed robbery necessarily required the jury to determine that defendant and someone else agreed to commit armed robbery—not merely any one of the offenses with which defendant was charged. See MCL 750.157a; MCL 750.529.

Despite the trial court's error, however, reversal is not required. The erroneous instruction did not amount to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001). The verdict form specifically required the jury to find defendant "Not Guilty" or "Guilty as Charged of Conspiracy to commit Armed Robbery." Thus, notwithstanding the court's erroneous instruction, the verdict form limited the scope of the conspiracy charge to whether defendant and another person had conspired to commit armed robbery. Moreover, defendant admitted at trial that he conspired with his brother to rob a house known for drug activity and that the plan involved the use of guns. We cannot conclude that defendant was convicted despite his actual innocence or that the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of defendant's innocence. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

Defendant also challenges the trial court's jury instruction pertaining to the felony-firearm charge. Defendant argues that the trial court erroneously instructed the jury that it could convict him of felony-firearm in conjunction with *each* of the charged offenses if it determined that he possessed a firearm during *any* of the charged offenses.

The information charged defendant with felony-firearm pertaining to "CSC-First and/or Armed Robbery and/or Home Invasion-First and Felon in Possession." Consistent with this charge, the trial court instructed the jury in relevant part as follows:

The defendant is also charged with a separate crime of possessing a firearm at the time he committed or attempted to commit . . . any of the crimes listed, with the exception of felony firearm.

To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt. First, that the defendant committed or attempted to commit any one of the crimes listed in the information, which has been defined for you. . . . Second, that at the time the defendant committed or attempted to commit the crime, he knowingly carried or possessed a firearm.

Contrary to defendant's argument, the trial court did not instruct the jury that it could convict defendant of felony-firearm with respect to *each* of the charged offenses based on a finding that he possessed a firearm during the commission of any one of the offenses. Both the court's instructions and the verdict form allowed for only one felony-firearm conviction. Defendant's argument in this regard consequently lacks merit.

Defendant also challenges the trial court's jury instruction pertaining to the offense of armed robbery. Defendant argues that the trial court erred by providing a jury instruction consistent with the current, amended version of MCL 750.529, which now allows for conviction based on conduct that would not have allowed for conviction under the version of the statute in effect at the time of the instant offenses. Defendant correctly points out that the current version of MCL 750.529 allows for conviction even if the only assault occurred during the perpetrator's flight after the commission of the larceny. MCL 750.529 currently provides in relevant part:

A person who engages in conduct proscribed under section 530 and who in the course of engaging in that conduct, possesses a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon, or who represents orally or otherwise that he or she is in possession of a dangerous weapon, is guilty of a felony punishable by imprisonment for life or for any term of years.

Further, "section 530," MCL 750.530, the unarmed robbery statute, currently provides:

(1) A person who, in the course of committing a larceny of any money or other property that may be the subject of larceny, uses force or violence against any person who is present, or who assaults or puts the person in fear, is guilty of a felony punishable by imprisonment for not more than 15 years.

(2) As used in this section, "*in the course of committing a larceny*" includes acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property. [Emphasis added.]

Reading MCL 750.529 and MCL 750.530 together, the current version of MCL 750.529 allows for conviction of armed robbery even if the only assault occurred after the larceny or while attempting to retain possession of the property taken. *People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007). In this respect, the current statute differs from the version in existence at the time that defendant committed the armed robbery in this case. Under the former version of MCL 750.529, the assault must have "occurred before, or contemporaneous with, the taking of the property." See *People v Scruggs*, 256 Mich App 303, 310; 662 NW2d 849 (2003).

The trial court erroneously instructed the jury in accordance with the amended version of MCL 750.529 because that version did not take effect until July 1, 2004, after defendant committed the offenses at issue in this case. See *Chambers*, *supra* at 7 n 3. Reversal is not required, however, because the evidence showed that defendant used a dangerous weapon contemporaneously with the taking of the victim's cell phone.² The victim testified that defendant sprayed her with mace and struck her on her head while she was standing in her doorway. Defendant then pulled out a gun and forced himself inside the victim's home.³ Once inside, defendant took the victim to her bedroom and told her to place a pillowcase over her head. While she did so, defendant took her cell phone. This evidence showed that defendant used force and a dangerous weapon to accomplish the taking, and not merely after he committed the larceny. Accordingly, the erroneous instruction informing the jury that it could convict based on force that occurred after the larceny did not affect defendant's substantial rights. *Carines*, *supra* at 763.

Defendant next challenges the trial court's jury instruction pertaining to one of the CSC I charges. Defendant argues that count three of the information charged him with penile penetration only and that the trial court's instruction including digital penetration as a basis for conviction was therefore erroneous. Although we agree with defendant, we conclude that the error does not warrant reversal because the evidence showed that defendant engaged in penile penetration with the victim. The victim testified that defendant pulled her pants and underwear down and attempted to vaginally penetrate her with his penis. She maintained that, while she was trying to fight back to prevent defendant from doing so, he was able to penetrate her "a couple of times." She also testified that when she sat up to wipe mud and leaves from her face, defendant struck her and said, "I told you if you acted funny, something would happen." The victim testified that she then "stopped fighting and stopped moving a little bit, so that he could just get done with what he was doing and leave [her] alone." At trial, defendant initially denied penetrating the victim, but on cross-examination he admitted, "I ain't sayin' I didn't." Because the evidence showed that defendant engaged in penile penetration with the victim, and this evidence supported the jury's verdict, we cannot conclude that defendant was convicted of the CSC I charge despite his actual innocence or that the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of defendant's innocence. *Knox*, *supra* at 508.

Defendant also argues that the trial court failed to instruct the jury regarding count two of the information, charging him with CSC I based on oral penetration. The record does not support defendant's argument. Rather, the record shows that the trial court instructed the jury as follows:

² Although defendant contends that the armed robbery charge was based on his taking of the victim's cell phone and underwear, the information charged defendant with armed robbery based only on his taking of the victim's cell phone.

³ It is axiomatic that a firearm constitutes a dangerous weapon for purposes of the armed robbery statute. Mace can also constitute a dangerous weapon for purposes of the armed robbery statute. See *People v Norris*, 236 Mich App 411, 416-419; 600 NW2d 658 (1999).

I want to now talk about the charges under counts two and three involving criminal sexual conduct in the first degree. And remember, count two involves oral sexual conduct. . . .

The defendant is charged with the crime of first-degree criminal sexual conduct. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt. First, that the defendant engaged in a sexual act that involved, A, entry into the victim's genital opening and/or anal opening by the defendant's penis or finger. Any entry, no matter how slight, is enough. It does not matter whether the sexual act was completed or whether semen was ejaculated and/or entry into the complainant's mouth by the defendant's penis. Any entry, no matter how slight, is enough. It does not matter whether the sexual act was completed or whether semen was ejaculated. C, entry by any part of one's body into the genital or anal opening of another person's body

As the trial court's instructions to the jury show, defendant's argument in this regard is meritless. The trial court did, indeed, instruct the jury that it could convict defendant of CSC I on the basis of "entry into [the victim's] mouth by the defendant's penis."⁴

Defendant next challenges the trial court's jury instruction pertaining to the charge of first-degree home invasion. Defendant argues that although the information charged him with home invasion based on the intent to commit armed robbery, the court's instruction erroneously allowed the jury to convict him of home invasion if it found that he broke and entered the victim's home with the intent to commit *any* of the charged felonies. Again, although defendant correctly argues that the trial court's instruction was technically erroneous, reversal is not warranted because the evidence established that defendant forced himself inside the victim's home with the intent to commit armed robbery. Indeed, defendant admitted during trial that he and his brother traveled to the Flint area intending to break and enter a home, while armed with guns, with the intent to rob the occupants of money, drugs, and possibly firearms. Because the uncontroverted evidence supported defendant's conviction of first-degree home invasion based on the intent to commit armed robbery, defendant has not established that the trial court's error affected his substantial rights. *Carines, supra* at 763.

III

Defendant next argues that defense counsel's failure to object to the alleged instructional errors denied him the effective assistance of counsel. Because defendant failed to raise this issue in a motion for a new trial or evidentiary hearing, our review is limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

⁴ We note that the trial court's instruction concerning the charge of CSC I based on oral penetration, although sufficient, would likely have been more effective if it had been stated more clearly and fully separated from the trial court's instruction concerning the other CSC I charge. However, defendant does not challenge the particular form or substance of the instruction. He merely argues that the court wholly failed to instruct the jury with regard to the charge of CSC I based on oral penetration. As noted above, the record belies defendant's argument.

As previously discussed, the result of the proceedings would not have been different had defense counsel objected to the jury instructions on the bases argued on appeal. Defendant's challenges to the trial court's instructions are either meritless or amount to harmless error. Therefore, defendant was not prejudiced by counsel's failure to object and was not denied the effective assistance of counsel. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Moorner*, 262 Mich App 64, 75-76; 683 NW2d 736 (2004).

IV

Defendant argues that he was denied his constitutional rights to a jury trial and to due process of law when the trial court ordered that his felony-firearm sentence be served consecutive to all of his remaining sentences, which the trial court ordered to be served concurrently. Defendant concedes that he did not raise this issue in the trial court. Therefore, our review is limited to plain error affecting his substantial rights. *Carines*, *supra* at 763.

The felony-firearm statute, MCL 750.227b, provides in relevant part:

A term of imprisonment prescribed by this section is in addition to the sentence imposed for the conviction of the felony or the attempt to commit the felony, and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony.

In *People v Clark*, 463 Mich 459, 463; 619 NW2d 538 (2000), our Supreme Court held that “[f]rom the plain language of [this] statute, it is evident that the Legislature intended that a felony-firearm sentence be consecutive only to the sentence for a specific underlying felony.” The Court further stated that “[n]o language in the statute permits consecutive sentencing with convictions other than the predicate offense.” *Id.* at 464.

As previously recognized, the information charged defendant with felony-firearm pertaining to “CSC-First and/or Armed Robbery and/or Home Invasion-First and Felon in Possession.” In accordance with the “and/or” language in the information, the trial court instructed the jury that it could convict defendant of the felony-firearm charge if it found that defendant possessed a firearm during the commission or attempted commission of “any one” of the offenses charged. The court did not require the jury to indicate on the verdict form which charge served as the basis for the felony-firearm conviction. Because it is unclear which offense the jury determined to be the predicate felony for defendant's felony-firearm conviction, defendant argues that the trial court lacked authority to order that his felony-firearm sentence be served consecutive to any of the other sentences imposed.

Defendant fails to recognize our Supreme Court's directive in *Clark*, *supra* at 464 n 11, stating:

At the discretion of the prosecuting attorney, the complaint and the information could have listed additional crimes as underlying offenses in the felony-firearm count, or the prosecutor could have filed more separate felony-firearm counts.

Here, the prosecutor listed every crime charged, with the exception of the conspiracy charge, as a predicate felony for the felony-firearm charge. In accordance with the directive in *Clark*, every offense except conspiracy to commit armed robbery was linked as a possible predicate felony to the felony-firearm charge, and it was appropriate for the trial court to order that defendant's felony-firearm sentence be served consecutive to the sentences imposed for those offenses. Because conspiracy to commit armed robbery was not listed as a predicate offense for the felony-firearm charge, however, the trial court erred by ordering that defendant's felony-firearm sentence be served consecutive to his sentence for conspiracy. Accordingly, we remand this case to the trial court for the limited purpose of amending the judgment of sentence on this basis.

V

Defendant next argues that he was denied his constitutional rights to a jury trial and to due process of law because the trial court sentenced him for conspiring to commit armed robbery even though he was never convicted of that offense. Because defendant did not raise this issue in the trial court, our review is limited to plain error affecting his substantial rights. *Carines, supra* at 763.

Although, as previously recognized, the trial court's jury instruction pertaining to conspiracy to commit armed robbery was erroneous, defendant's conviction and sentence for that offense did not constitute plain error affecting his substantial rights. *Id.* The verdict form specifically indicates that the jury found defendant "Guilty as Charged of Conspiracy to commit Armed Robbery." Moreover, defendant admitted to conspiring with his brother to rob a house known for drug activity, and admitted that the plan involved the use of guns. Defendant was not convicted despite his actual innocence and has not shown that any error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of his innocence. *Knox, supra* at 508. Contrary to defendant's position on appeal, he was, indeed, properly convicted of conspiracy to commit armed robbery.

VI

Defendant next argues that the trial court abused its discretion by departing from the sentencing guidelines range with respect to his sentences for CSC I, armed robbery, and conspiracy to commit armed robbery. We disagree. In reviewing a departure from the sentencing guidelines range, we review the existence of a particular factor supporting a departure for clear error, the determination whether the factor is objective and verifiable de novo, and whether a reason is substantial and compelling for an abuse of discretion. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003). An abuse of discretion occurs if the decision of the trial court falls outside the permissible range of principled outcomes. *Id.* at 269. We review the extent of a departure for an abuse of discretion. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003).

Under MCL 769.34(3), a trial court may depart from the sentencing guidelines range "if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." A substantial and compelling reason must be objective and verifiable, must "keenly" or "irresistibly" grab the court's attention, and must be recognized as being "of considerable worth" in deciding the length of a sentence." *Babcock, supra* at 257, quoting *People v Fields*, 448 Mich 58, 67; 528 NW2d 176 (1995). The "objective and verifiable"

requirement “mean[s] that the facts to be considered by the court must be actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed.” *Abramski, supra* at 74. Further, a departure may not be based on characteristics already taken into account in determining the appropriate sentencing guidelines range unless the court determines from facts in the record that the particular characteristic at issue has been given inadequate or disproportionate weight. MCL 769.34(3)(b); *Abramski, supra* at 74.

The trial court upwardly departed from the sentencing guidelines range of 171 to 285 months, stating in pertinent part:

I want to indicate that I do believe that it’s appropriate to exceed the guidelines on all these offenses because of the prior record that this Defendant has. His prior record involves armed robberies; it involves assaultive offenses; and the guidelines did not take that into consideration. The guidelines also have not taken into consideration the treatment that he and his brother inflicted on this victim not once, but twice; and the fact that they put this pillow case over her head so she wouldn’t see or know what was happening to her, the fact that they took her out into a secluded area where, you know, she certainly was not in any position to get any help or to seek any help, in my opinion, all of these are reasons to exceed the guidelines; and, if any one of them is a reason to exceed the guidelines, I would have exceeded the guidelines on the Defendant.

Defendant concedes that his prior criminal convictions and juvenile adjudications from Canada may justify a departure, but argues that they do not justify the extent of the departure imposed. The trial court based its departure not merely on defendant’s previous extensive Canadian criminal history, but also on the fact that defendant’s Canadian and American criminal history involved armed robberies and assaultive offenses—a fact not taken into consideration by the guidelines. Although a sentencing court may not rely on Canadian convictions in scoring the prior record variables, foreign convictions may give rise to substantial and compelling reasons justifying a departure from the sentencing guidelines range. *People v Price*, 477 Mich 1, 5; 723 NW2d 201 (2006). The trial court properly determined that the sentencing guidelines did not account for the nature of defendant’s prior foreign offenses, some of which involved robberies and assaultive crimes. See MCL 769.34(3)(b); *Abramski, supra* at 74. We conclude that defendant’s objective and verifiable prior Canadian criminal record constituted a substantial and compelling reason to upwardly depart from the sentencing guidelines in this case.

We are cognizant that “the statutory guidelines require more than an articulation of reasons for a departure; they require justification for the *particular* departure made.” *People v Smith*, 482 Mich 292, 303; 754 NW2d 284 (2008) (emphasis in original). But although the departure in this case was extensive, we cannot conclude that it was an abuse of discretion. *Abramski, supra* at 74. Defendant’s minimum sentencing range—which did not include consideration of his prior Canadian criminal convictions and juvenile adjudications—was 171 to 285 months. As noted earlier, a court may not consider criminal convictions and juvenile adjudications from foreign countries when scoring a defendant’s prior record variables. *Price, supra* at 5. However, we cannot omit mention of the fact that defendant’s Canadian criminal convictions and juvenile adjudications—if entered in another American state rather than in a

foreign country—would have entitled the court to impose the very sentence given to defendant in this case.

As found by the trial court, defendant's total prior record variable (PRV) score was 35 and defendant's total offense variable (OV) score was 215. This placed defendant in cell D-VI, calling for a minimum sentence of between 171 and 285 months. MCL 777.62. However, if the trial court had been permitted to score defendant's prior Canadian convictions and adjudications, defendant's PRV score would have been much higher. For example, defendant had two prior adult robbery convictions in Canada. Had these high-severity felony convictions occurred in an American state rather than in a foreign country, the court would have been entitled to score 50 points for PRV 1. MCL 777.51. Similarly, defendant had two prior juvenile adjudications for robbery in Canada. Had these high-severity juvenile adjudications occurred in an American state rather than in a foreign country, the court would have been entitled to score 25 points for PRV 3. MCL 777.53. Further, defendant had numerous other juvenile adjudications in Canada, including adjudications for theft over \$1,000, multiple counts of breaking and entering, discharging a firearm, unlawful possession of a firearm, use of a firearm during the commission of an offense, multiple counts of possession of stolen property, mischief and destruction of property over \$1,000, and escaping from a juvenile detention facility. Had these low-severity juvenile adjudications occurred in an American state rather than in a foreign country, the court would have been entitled to score 20 points for PRV 4. MCL 777.54. In short, had the trial court been entitled to consider defendant's prior Canadian convictions and adjudications when scoring defendant's prior record variables, defendant's PRV score would have been well over 75. This would have placed defendant in cell F-VI, calling for a minimum sentence of between 270 and 450 months, or life. See MCL 777.62.

Moreover, unlike the sentencing guidelines, which do not allow for the consideration of convictions and adjudications from foreign countries, *Price, supra* at 5, the habitual offender statutes appear to permit consideration of previous felony convictions from foreign nations. See MCL 769.10; MCL 769.11; MCL 769.12. Indeed, MCL 769.11(1) provides that a defendant may be sentenced as a third habitual offender if he or she “has been convicted of any combination of 2 or more felonies or attempts to commit felonies, whether the convictions occurred in this state or would have been for felonies or attempts to commit felonies in this state if obtained in this state, and that person commits a subsequent felony within this state” We detect no language in MCL 769.11 that disallows the consideration of previous felony convictions from foreign countries, so long as those convictions “would have been for felonies or attempts to commit felonies in this state if obtained in this state” Clearly, defendant's two Canadian adult convictions of robbery “would have been for felonies . . . if obtained in this state.”⁵ Therefore, had the prosecution properly sought enhanced habitual-offender sentencing, MCL 769.13, we perceive no reason why the trial court could not have sentenced defendant within cell F-VI as a third habitual offender to a minimum sentence of between 270 and 675 months, or life. MCL 777.21(3)(b); MCL 777.62.

⁵ The definition of robbery contained in the *Criminal Code of Canada* is substantially similar to the definition of robbery under Michigan law. See RSC 1985, C-46, § 343; see also *R v CD*, 3 SCR 668, 689 (2005).

In sum, had the trial court been permitted to consider defendant's prior Canadian criminal convictions and juvenile adjudications when calculating defendant's guidelines score, and had the prosecution sought an enhanced sentence on the basis of defendant's prior Canadian robbery convictions, the trial court would have been well within the guidelines by imposing the very sentence handed down in this case. In light of this fact, we simply cannot conclude that the extent of the departure at issue in this case constituted an abuse of discretion. *Abramski, supra* at 74.

The trial court cited additional reasons for departing from the sentencing guidelines as well. For instance, the court stated that "[t]he guidelines . . . have not taken into consideration the treatment that [defendant] and his brother inflicted on this victim not once, but twice." It is not entirely clear what the court meant by this statement. However, although the trial court's exact reasoning in this regard is unclear, resentencing is not required because the record shows that the trial court would have imposed the same sentence regardless of this factor. *Babcock, supra* at 260. To reiterate, the trial court made clear that it would have exceeded the guidelines to the same extent on the basis of any one of the identified departure factors.

Moreover, defendant contends that his acts of putting a pillowcase over the victim's head and taking the victim to a secluded area did not justify the upward departure imposed in this case because these matters were already taken into consideration when calculating his OV scores. Defendant correctly points out that the facts that he placed a pillowcase over the victim's head and that he removed the victim from her home to a secluded area were already taken into consideration under OV 7 and OV 8. In justifying a score of 50 points under OV 7, MCL 777.37, the court stated:

I think, also, terrorism is appropriate under this variable, because the conduct that—that was displayed toward the victim was designed to substantially increase the fear and anxiety that she would suffer during the offense. She had—they had put a pillowcase over her head. Um, they had separated her from her home and from her child, who was in the home at the time, or children that were in the home. They had taken her out back to this secluded area in the back of her home I think on two separate occasions. She was, uh—so, given all the facts, without having to state everything here on the record, I don't think that there's any question that the facts of this case support that the Defendant should be scored for this variable, and I would just indicate to any Court of Appeals that's looking at this to certainly take a look at the testimony of the victim and the, uh—and the circumstances surrounding the home, when they take into consideration whether this victim should have been, um—whether this victim's fear and anxiety should have been significantly increased by the Defendant's conduct.

Further, in scoring 15 points under OV 8, MCL 777.38, the court stated, "[c]learly, uh, [the victim] was taken to a place of greater danger. She was taken to a secluded area in the back end of the property."

It is clear that the scoring of OV 7 and OV 8 already accounted for the facts that defendant forced the victim to put a pillowcase over her head and that defendant took the victim to a secluded area. Therefore, these reasons could not constitute a basis for a departure from the sentencing guidelines in this case. MCL 769.34(3)(b); *Abramski, supra* at 74. Notwithstanding

the fact that these factors were already taken into consideration, however, resentencing is not required. As previously stated, the trial court made clear that it would have imposed the same sentence on the basis of any one of the articulated reasons for departure. *Babcock, supra* at 260.

Affirmed, but remanded for amendment of the judgment of sentence consistent with part IV of this opinion to reflect that defendant's felony-firearm and conspiracy sentences shall be served concurrently. We do not retain jurisdiction.

/s/ Kurtis T. Wilder

/s/ Kathleen Jansen

/s/ Donald S. Owens