STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 29, 2009
v	No. 286965 Bay Circuit Court
MICHAEL CHARLES COMTOIS, Defendant-Appellant.	LC No. 05-010619-FC

Before: Gleicher, P.J., and Fitzgerald and Wilder, JJ.

PER CURIAM.

A jury convicted defendant of first-degree criminal sexual conduct (CSC I), MCL 750.520b, and two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to enhanced, concurrent terms of 180 to 276 months in prison for the CSC I conviction and 60 to 180 months' imprisonment for the CSC II convictions. Defendant appeals as of right. We affirm, and decide this appeal without oral argument pursuant to MCR 7.214(E).

The convictions stem from defendant's assault of a 17-year-old victim. On the day of the assault, the victim met defendant at a park and he asked her to walk with him. The victim testified that she and defendant walked through some woods and that at some point he picked flowers for her. The victim recalled that defendant later touched her buttocks and that she objected, that he pushed her to the ground and got on top of her, and that he lifted up her shirt and bra and repeatedly touched her breasts.[1] The victim also described that defendant took her overalls and underwear off as she tried to resist, that he managed to push his pants partially down and move her legs apart, that he put his penis partly inside her, and that he placed handfuls of dirt in her mouth to prevent her from yelling for help and threatened to kill her if she screamed. After the assault, defendant told the victim not to tell anyone what had occurred, but the next day she told friends about the attack.

Defendant initially challenges the sufficiency of the evidence supporting his CSC I conviction, contending that the prosecution failed to present sufficient proof that his penis

[1] A nurse practitioner who examined the victim testified that the victim told her that defendant had also licked and sucked her breasts.

penetrated the victim's vagina. "The test for determining the sufficiency of evidence in a criminal case is whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000).

> The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. The scope of review is the same whether the evidence is direct or circumstantial. Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime. [*Id*. at 400 (internal quotation omitted).]

The Legislature has defined "sexual penetration" as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other 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(r).[2] Any intrusion, however slight, into the vagina or the labia majora constitutes penetration of the female genital openings under MCL 750.520a(r). *People v Whitfield*, 425 Mich 116, 135 n 20; 388 NW2d 206 (1986); *People v Bristol*, 115 Mich App 236, 237-238; 320 NW2d 229 (1981).

The victim testified that, after defendant had removed her shorts and underwear and moved her legs apart, he "stuffed his little penis inside my private area." When asked on direct examination whether defendant's penis went all the way in, the victim replied, "No, it was too little to go all the way in." The victim subsequently clarified that she used her "private area" "[t]o pee out of." During cross-examination, defense counsel inquired whether the victim had made a prior statement that defendant was not able to put his penis inside her, and she responded, "Not all the way, it was too short." The victim then answered affirmatively when defense counsel suggested that defendant's penis had been "too soft." In addition, the nurse practitioner who examined the victim testified that the victim had offered a similar account of defendant's assault. Given this testimony, a rational jury could reasonably have concluded beyond a reasonable doubt that defendant's penis penetrated the victim's labia majora, even if he did not completely enter the victim's vagina. We thus conclude that the evidence sufficiently supported defendant's CSC I conviction.

Defendant also raises several complaints concerning the trial court's scoring of the offense variables (OVs), specifically OV 10 (exploitation of victim vulnerability), OV 13 (continuing pattern of criminal behavior) and OV 19 (interference with the administration of justice). When scoring the guidelines, "[a] sentencing court has discretion in determining the number of points to be scored provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision "for which there is any evidence in support will be upheld." *Id*. (internal quotation omitted). We review scoring decisions "to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*,

[2] Formerly MCL 750.520a(o).

258 Mich App 635, 671; 672 NW2d 860 (2003). The interpretation and application of the sentencing guidelines present questions of law subject to de novo appellate review. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

Defendant asserts that the trial court misscored OV 10 at 15 points. In MCL 777.40, which governs the scoring of OV 10, the Legislature set forth, in pertinent part,

> (1) Offense variable 10 is exploitation of a vulnerable victim. Score offense variable 10 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) Predatory conduct was involved…. 15 points
>
> (b) The offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status…. 10 points
>
> * * *
>
> (2) The mere existence of 1 or more factors described in subsection (1) does not automatically equate with victim vulnerability.
>
> (3) As used in this section:
>
> (a) "Predatory conduct" means preoffense conduct directed at a victim for the primary purpose of victimization.
>
> (b) "Exploit" means to manipulate a victim for selfish or unethical purposes.
>
> (c) "Vulnerability" means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation. . . .

To properly score 15 points for "predatory conduct" under OV 10, the trial court must find affirmatively that (1) the offender engaged in conduct before the commission of the offense, (2) this conduct was directed at one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation, and (3) victimization was the offender's primary purpose for engaging in the preoffense conduct. *Cannon*, 481 Mich at 161-162. The Supreme Court in *Cannon* also explained that the factors "to be considered in determining whether a victim was vulnerable" include the victim's "mental disability" or "whether the offender exploited a victim by his or her difference in size or strength or both." *Id*. at 158.

The trial court found that defendant had engaged in preoffense conduct by talking to the victim in the park the day before the assault and arranging to meet with her the next day, taking her for a walk in the park, and leading her to a "desolate area in the park" before the assault. The trial court also found that the victim met the definition of a readily apparent vulnerable victim, noting that although the victim was 17 at the time of the assaults she suffered a mental impairment that left her with the "mentality of a 12-year-old," and that the victim's speech

impediment made her mental vulnerability readily apparent. The trial court further determined that defendant's primary purpose for engaging in the preoffense conduct of isolating the victim was to take her to a place where he could more easily assault her. The record amply substantiates the trial court's finding that defendant engaged in "predatory conduct" by luring the obviously vulnerable victim into the woods before the assault. Consequently, the trial court did not abuse its discretion by scoring 15 points for OV 10. *People v Witherspoon*, 257 Mich App 329, 336; 670 NW2d 434 (2003).

Defendant next submits that the trial court erred by assigning 25 points for OV 13. Pursuant to MCL 777.43(1)(c), a court may score OV 13 at 25 points when the scored "offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." For purposes of scoring this variable, "all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a). Here, the jury convicted defendant of three felonies against a person. Although he urges that the Legislature did not intend for the scoring of contemporaneous criminal activity, the plain language of MCL 777.43(2)(a) indicates to the contrary that a sentencing court must include contemporaneous crimes. *People v Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001). Because the evidence established that defendant engaged in sequential, yet distinct assaults of the victim, we conclude that his three contemporaneous convictions in this case supported the trial court's scoring of 25 points for OV 13.

Defendant lastly maintains that the trial court misscored OV 19 at 15 points. Under MCL 777.49(b), a court may assign 15 points when "[t]he offender used force or the threat of force against another person or the property of another person to interfere with, attempt to interfere with, or that results in the interference with the administration of justice or the rendering of emergency services." In *People v Endres*, 269 Mich App 414, 420-422; 711 NW2d 398 (2006), this Court held that the sentencing court had properly scored OV 19 at 15 points where the defendant had threatened to kill the victim, knowing that he would be the primary witness against the defendant if criminal charges were filed. The Court in *Endres* concluded, "There was sufficient evidence to conclude that because of defendant's threats, his victim might have been dissuaded from coming forward with accusations and testimony, thus preventing the discovery and prosecution of defendant's crimes." *Id*. at 421. Here, because the evidence of defendant's threat to kill the victim and his admonishment not to tell anyone supported the trial court's determination that he intended to interfere with a future criminal proceeding arising from the assault, we find that the trial court correctly assigned 15 points under OV 19.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder