STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 4, 2010
v	No. 286983 Wayne Circuit Court
THOMAS DIGGS, Defendant-Appellant.	LC No. 07-023679-FH

Before: Beckering, P.J., and Markey and Borrello, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of third-degree criminal sexual conduct, MCL 750.520d(1)(b), and was sentenced as an habitual offender, second offense, MCL 769.10, to a term of 15 to 22-1/2 years' imprisonment. He appeals as of right. For the reasons set forth in this opinion, we affirm defendant's conviction, but remand for further considerations by the trial court as to whether defendant engaged in excessive brutality under OV 7 while punching the complainant in the face and back of the head at least ten times. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The complainant testified that she and defendant were former coworkers and friends, who had socialized as part of a group on several occasions before the incident. On August 30, 2007, defendant called the complainant at approximately 11:30 p.m. and asked her if she wanted to go to a house party. She agreed and he picked her up in his car. On the way, they stopped at a liquor store and defendant bought cranberry juice, vodka, and beer. At approximately 1:00 a.m., defendant drove the complainant to a house, but no one was there. Defendant offered the complainant a drink and she accepted. The complainant believed that she had only one drink, but said in her statement to the police that she had a few. She believed that defendant had only one. They sat in the bedroom because that was the only place to sit down. The complainant asked defendant to take her to a store for some cigarettes, but he said he was unable to drive because he had been drinking, so they walked to a gas station together where complainant was unable to purchase cigarettes because the station would not accept credit cards.

As they got back to the house at approximately 1:30 a.m., complainant told defendant that she was ready to go. Defendant said he needed a couple of hours before he could drive. The complainant used his cell phone to call her aunt for a ride, but there was no answer. When the complainant asked defendant to call a cab, he seemed angry, refused, and told her she could walk to the gas station. The complainant began walking, and defendant stayed behind. On the way,

she encountered another man who asked her if she wanted to buy a necklace. She declined and asked the man for a phone, but he refused. On cross-examination, the complainant admitted telling the police that the man offered to make a phone call for her.

While the complainant was talking to the man, defendant approached from behind and asked her why she was talking to the other man. She responded that she was walking to the gas station and continued. Defendant grabbed her hair and punched her in the face and back of the head at least ten times. She fell to the ground, screamed, and urinated. Defendant then grabbed her by the hair, pulled her up, and told her to walk; he stated that she was in his neighborhood and that "nobody's going to care about [her]." The complainant walked with defendant to the house.

In the house, defendant told the complainant to take off her shoes and get comfortable. She testified that she complied because she was scared. She told him that she was going to the restroom and when the complainant returned, she saw that defendant had removed his pants and was wearing boxer shorts. He then asked her to show him the tattoo on her buttocks, which she had displayed on previous occasions at parties. She showed him the tattoo, and he said he wanted to see all of it. Complainant testified that when she refused, defendant came up from behind her, unbuttoned her pants, and pulled them down to her ankles. He then put his arm around her stomach and pushed her back on the bed. She asked what he was doing, and he told her to shut up. Defendant took off her pants, got on top of her and inserted his penis into her vagina. She tried to push him back, close her legs, and tell him to stop, but he would not. She believed that defendant ejaculated and got up. She went to the restroom, washed her face, and put on her clothes. At her request, defendant took her home. Defendant told her that if she said anything he would kill her and shoot up her house. When she got inside her house at approximately 4:30 or 5:00 a.m., she woke her mother and told her what had happened. The complainant's mother called the police and then took the complainant to the hospital. The complainant gave a statement to the police between 5:00 and 6:00 a.m., 45 to 90 minutes after she arrived at the hospital.

The complainant's mother testified that she was wakened by the complainant, who seemed visibly upset, and was shaking and crying. She had urinated in her pants, which were wet down to her ankles. Detroit Police Officer Davis testified that when he met the complainant at the hospital, she was crying and upset and appeared to have fresh bruises on her face. However, the medical records do not reflect any observation of bruising on her face. DNA testing of sperm cells from a vaginal swab taken from the complainant showed that the sample was consistent with defendant's profile.

At trial, defendant did not present any evidence. Defense counsel argued that the evidence indicated that defendant and the complainant "had some sort of sexual relation within a period of time," but that the complainant's account was not credible. The jury disagreed and found defendant guilty as charged of third-degree criminal sexual conduct.

Defendant argues that the evidence was insufficient to support his conviction because the complainant's account contained inconsistencies such as how many drinks she consumed, whether she provided information in the police report concerning defendant's tattoos, and whether the man she saw before defendant grabbed her hair offered to call the police. Defendant

contends that her account was not credible and could not justify a determination of guilt beyond a reasonable doubt.

When reviewing a challenge to the sufficiency of the evidence, this Court views the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Here, defendant's challenge is not to the elements of the crime, but to the complainant's credibility. However, the complainant's credibility was a matter for the jury to resolve. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). As a reviewing court, this Court must "draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Although no other witness was available to corroborate the complainant's account that the sexual penetration was not consensual, corroboration was not necessary and the complainant's account was sufficient by itself to support defendant's conviction. Cf. *People v Drohan*, 264 Mich App 77, 88-89; 689 NW2d 750 (2004), affirmed 475 Mich 140 (2006), cert den 549 US 1037; 127 S Ct 592; 166 L Ed 2d 440 (2006).

Defendant next argues that resentencing is required because the trial court erred in scoring 50 points for offense variable ("OV") 7. Pursuant to MCL 777.37(1)(a), 50 points are to be scored for OV 7 where a victim is "treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." In this case, over defendant's objection, the trial court scored 50 points for OV 7, explaining, "I find that there was excessive force. The woman had left the dwelling to extensively [sic] seek help or refuge and was brought by the hair back to the dwelling where the rape occurred and the criminal sexual contact was completed."

To the extent that a challenge to the scoring of a variable involves a question of statutory interpretation, this Court reviews de novo questions of statutory interpretation. *People v Osantowski*, 481 Mich 103, 107; 748 NW2d 799 (2008), lv den 476 Mich 866 (2006), cert den ___ US ___; 129 S Ct 574; 172 L Ed 2d 435 (2008). To the extent that the challenge involves the trial court's findings of fact, this Court reviews the trial court's findings for clear error. *Id*. at 111-112. As recently stated in *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009), "[t]his Court reviews a trial court's scoring decision under the sentencing guidelines to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." (Citations and internal quotation marks omitted.) "A trial court's scoring decision for which there is any evidence in support will be upheld." *Id.* (citations and internal quotation marks omitted).

Here, the trial court scored 50 points on the basis that there was "excessive force," but OV 7 permits a score of 50 points only when 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) (emphasis added). The sentencing guidelines do not define "excessive brutality." According to *Random House Webster's College Dictionary* (1997), "excessive" means "going beyond the usual, necessary, or proper limit or degree; characterized by excess." "Brutality" means "the quality of being brutal; cruelty; savagery." *Id*. The definitions of "brutal" include "savage, cruel, inhuman." *People v James*, 267 Mich App 675, 677, 680-681; 705 NW2d 724 (2005), lv den 474 Mich 982 (2005), and *People v Wilson*,

265 Mich App 386, 396-398; 695 NW2d 351 (2005), lv den 474 Mich 945 (2005), are cases that illustrate the type of conduct that would warrant a 50-point score for this variable.

In *James*, 267 Mich App at 677, 680-681, the defendant punched the victim twice, causing him to fall to the floor where he remained immobilized. The defendant then repeatedly stomped the unconscious victim's face and chest. The victim was deprived of oxygen for several minutes, which resulted in brain damage.

In Wilson, 265 Mich App at 396-398, the defendant choked, hit, punched, and kicked the victim, and then attacked her with a broken glass candleholder and a butcher knife. She suffered several hematomas covering her face and body and a four-inch laceration of her right hand. The attack took place over several hours.

In the present case, the trial court apparently misspoke when it referred to "excessive force," rather than "excessive brutality," as a basis for scoring OV 7. In spite of the discrepancy in terminology, the facts on which the court relied involved defendant pulling complainant's hair to bring her back to the apartment before the assault. Even if this conduct could be deemed "excessive force," or even "brutality," the hair pulling does not amount to "excessive brutality." Thus, the trial court may have erred in scoring 50 points for OV 7.

The prosecutor's argument on appeal with respect to the scoring of OV 7 does not rely on "excessive force" as found by the trial court, but rather on conduct that increased the victim's anxiety. The prosecutor argued:

> Taking the victim to an unfamiliar area, refusing to take her home when she requested, and then physically attacking her caused the victim fear. Defendant increased the victim's anxiety by forcing her to return to the house after causing her to fear that no one would help her and knowing that she could not go home unless she complied with his wishes, and believing that she possibly could be beaten again. Defendant further increased that anxiety by threatening the victim with death and the possible shooting of anyone inside her house. The effect on the victim was fear to the point that she urinated on herself, was crying, shaking, and allowed herself to be raped.

We note from the outset that the prosecutor's assertions have not provided the basis on which this Court may determine whether the trial court's scoring was improper. Moreover, consideration of the impact of threats defendant may have made while driving the complainant home may be improper under *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009). MCL 777.37(1)(a) refers to conduct designed to substantially increase the fear and anxiety a victim suffered "*during the offense*." (Emphasis added.) Consideration of threats made after the sexual assault, as defendant was driving the complainant home, were not designed to increase her fear and anxiety "during the offense." In *McGraw*, the Court held that "[o]ffense variables are properly scored by reference only to the sentencing offense except when the language of a particular offense variable statute specifically provides otherwise." 484 Mich at 135.

While the trial court may have erred by solely relying on the use of the term "excessive force" for its scoring of OV 7, an issue remains whether complainant's testimony that defendant punched her in the face and back of the head at least ten times before forcing her back to the

apartment would be adequate to support the scoring of 50 points under OV 7 for excessive brutality. However, whether the punching occurred and whether it would qualify as "excessive brutality" would be a matter for the prosecution to assert and the trial court to decide in the first instance, not a determination that this Court should make initially at the appellate level.

In order to make an initial determination of whether such conduct constituted excessive brutality, in lieu of resentencing, this Court adopts the remedy ordered in *People v Cannon*, 481 Mich 152, 163; 749 NW2d 257 (2008). In *Cannon*, the Court determined that the trial court "failed to properly apply" OV 10, which concerns exploitation of vulnerable victims, to the facts of the case. 481 Mich at 163. After providing guidance concerning the proper analysis of the variable, the Court remanded the case to the trial court "to reconsider whether defendant engaged in predatory conduct as defined in OV 10 and for resentencing if he did not." 481 Mich at 163. In the present case, we conclude that the trial court failed to correctly apply OV 7 to the facts of the case because the court examined whether the victim was treated with "excessive force," which is not a basis for the scoring of the variable. We therefore remand to the trial court to reconsider whether OV 7 should have been scored at 50 points using the proposed analysis as set forth in this opinion and to resentence defendant if it should not have been.

Finally, defendant argues that his sentence constitutes cruel and unusual punishment, particularly in light of the "questionable reliability" of the conviction. However, the sentence is within the sentencing guidelines range of 117 to 200 months and, therefore, is presumed proportionate. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008), lv den 482 Mich 974 (2008) (citations omitted). A proportionate sentence is not cruel or unusual. *Id*., 278 Mich App at 323. Defendant does not offer any basis for overcoming the presumptive proportionality of his sentence other than to disparage the "quality of the evidence" and the reliability of his conviction. But these factors have no bearing on whether the sentence is proportionate. Because defendant has not overcome the presumption of proportionality, his claim that his sentence is cruel and unusual punishment necessarily fails. *Id*., 278 Mich App at 324.

We affirm defendant's conviction, but we remand this case to the trial court to reconsider whether defendant engaged in excessive brutality as defined in OV 7 and for resentencing if he did not. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Jane E. Markey
/s/ Stephen L. Borrello