

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC JAMES ATCHISON,

Defendant-Appellant.

UNPUBLISHED

June 29, 2010

No. 291671

Calhoun Circuit Court

LC No. 2008-002609-FC

Before: MURRAY, P.J., and SAAD and M.J. KELLY, JJ.

PER CURIAM.

Following a bench trial, the trial court convicted defendant of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(d), and two counts of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(b). The trial court sentenced defendant as a second habitual offender to 360 to 600 months in prison for each of the CSC I convictions and 200 to 270 months in prison for each of the CSC III convictions. For the reasons set forth below, we affirm.

I. SUFFICIENCY OF THE EVIDENCE

Defendant claims that the prosecutor presented insufficient evidence to support his convictions.¹ He cites part of the trial court's findings of fact and conclusions of law to argue

¹ As this Court recently opined in *People v Railer*, ___ Mich App ___, ___ NW2d ___ (Docket No. 291817, issued April 20, 2010), slip op, pp 2-3:

Due process requires that, to sustain a conviction, the evidence must show guilt beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). In determining the sufficiency of the evidence, this Court reviews the evidence de novo in the light most favorable to the prosecution. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). We do not consider whether any evidence existed that could support a conviction, but rather, we must determine whether a rational trier of fact could find that the evidence proved the essential elements of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992), citing *People v*

(continued...)

that the court's decision was based on speculation and supposition. However, the brief, abridged excerpt cited by defendant does not accurately reflect the trial court's decision. In fact, the trial court made a substantial record of its findings of fact and conclusions of law. Over several pages of the transcript, the trial judge described the evidence presented and discussed the credibility of the witnesses. After reviewing all of the testimony, the judge observed that the case essentially amounted to a credibility contest between the victim and defendant and the judge concluded that he believed the victim's version of events. The judge rejected as incredible the testimony of defendant's witnesses based on their close relationships to defendant, because their testimony was contradicted by other evidence, and because they failed to tell police about what they allegedly witnessed. The judge also rejected defendant's theory that the victim fabricated the rape allegations because someone stole her cellular phone or because she wanted to hide her sexual activities from another man. The court further observed that uncontradicted testimony from prosecution witnesses tended to support the victim's testimony, including Detective Janette Richmond's testimony about the victim's demeanor after the rape and Detective Scott Kipp's testimony about the physical evidence he found at the scene.

Moreover, as a review of the complete record shows, the trial judge did not equivocate about the verdict, but merely expressed his thoughts about what may have led to the forced sexual penetrations of the victim. As the judge made clear, his theory about what defendant and the other perpetrators may have been thinking in no way influenced the court's analysis of the evidence and he stated that he believed the victim's testimony that the men had sex with her against her will. And, contrary to defendant's assertions, the trial judge's statements do not establish that it lacked sufficient evidence to convict defendant. Nothing in the judge's comments suggests that defendant and the other men did not accomplish the sexual penetration through force or coercion. Rather, the court's remarks indicate that, while defendant and his friends may not have *planned* the rape ahead of time, they nonetheless forced the victim to engage in sexual intercourse without her consent. This conclusion is supported by ample evidence that, though she told the men to let her go and pleaded for them to stop, the men physically restrained the victim while they raped her. It is well settled that, in reviewing a sufficiency of the evidence claim, this Court must defer to the credibility determinations of the factfinder. Moreover, "a reviewing court is required to 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). Other than characterizing the trial court's findings as speculative and arguing that the victim had reasons to lie, defendant does not explain how the prosecutor failed to meet the elements of CSC I and CSC III. Accordingly, and because the trial court provided a detailed recitation of the facts, law, and legal conclusions, and because this Court defers to the credibility determinations of the trial court, we affirm defendant's convictions.

II. SENTENCE

(...continued)

Hampton, 407 Mich 354, 366 (opinion by Coleman, CJ); 285 NW2d 284 (1979). "[C]ircumstantial evidence and reasonable inferences arising from th[e] evidence can constitute satisfactory proof of the elements of a crime." *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000) (citation omitted).

Defendant claims that the trial court erroneously scored some of his offense variables and that this wrongly increased the length of his prison sentence.²

Defendant argues that the trial court should not have scored OV 3 at 10 points. MCL 777.33 provides that 10 points should be scored for OV 3 if the victim sustained “bodily injury requiring medical treatment.” The statute specifically provides that, “[a]s used in this section, ‘requiring medical treatment’ refers to the necessity for treatment and not the victim’s success in obtaining treatment.” MCL 777.33(3). Here, evidence showed that the medical staff at Oaklawn Hospital gave the victim pills to prevent or diminish the impact of sexually transmitted diseases (STDs) that were or may have been introduced during the sexual assault. In light of the sexual assault itself and the reality that the prophylactic treatment of STDs through medication was considered necessary by the hospital, we hold that the trial court correctly scored 10 points for OV 3.

Defendant also claims that OV 7 was misscored at 50 points. MCL 777.37 states that 50 points should be scored 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.” Evidence showed that, during the rape, defendant threatened to break the victim’s jaw if she yelled and the men threatened to take the victim’s children away and sell them if she did not submit to the sexual assaults. Evidence also showed that defendant raped the victim in front of one of her children, the men repeatedly chased her around her apartment, prevented her from moving or getting dressed, and they stole her phone so that she could not call for help. This was sufficient to establish that defendant’s conduct was “designed to substantially increase the fear and anxiety” the victim suffered during the offense and the trial court correctly scored OV 7.

OV 11, MCL 777.41, states that 50 points should be scored if two or more criminal sexual penetrations occurred. Subsection 2 provides:

All of the following apply to scoring offense variable 11:

² As this Court recently explained in *People v Huston*, ___ Mich App ___; ___ NW2d ___ (Docket No. 288843, issued May 13, 2010), slip op, p 1:

A trial court’s findings of fact at sentencing are reviewed for clear error. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). This 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.” *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005), quoting *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). A trial court’s scoring decision for which there is any evidence in support will be upheld. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). This Court reviews the interpretation of the statutory sentencing guidelines de novo. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009).

(a) Score all sexual penetrations of the victim by the offender arising out of the sentencing offense.

(b) Multiple sexual penetrations of the victim by the offender extending beyond the sentencing offense may be scored in offense variables 12 or 13.

(c) Do not score points for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense.

Defendant argues that, because defendant was charged separately for all four sexual penetrations, the trial court should not have scored 50 points under the statute. Our Court rejected defendant's interpretation of MCL 777.41 in *People v McLaughlin*, 258 Mich App 635, 676-677; 672 NW2d 860 (2003). Under *McLaughlin*, the trial court was required to score points based on other charged or uncharged offenses that arise out of the same assault. Here, the court could count any additional sexual penetrations that occurred during the same criminal episode, but could not count the penetration forming the basis of the sentencing offense. Evidence showed that defendant penetrated the victim multiple times during a short period of time on the late evening of March 18, 2008 or early morning of March 19, 2008. Thus, for the first offense, during which defendant placed his penis in the victim's vagina in her living room, the trial court could not include that penetration in scoring OV 11, but could include the three other penetrations that occurred in her bedroom when the men dragged her upstairs shortly after defendant raped her the first time. Likewise, for the second CSC I offense, when defendant raped the victim upstairs, the court could count the rape downstairs and the two other penetrations that occurred in the victim's bedroom. A similar analysis would apply to the other assaults. Accordingly, the trial court correctly scored 50 points for OV 11.

Finally, defendant asserts that he was not "a leader in a multiple offender situation" for purposes of OV 14, MCL 777.44(1)(a). The statute provides that, "[i]f 3 or more offenders were involved, more than 1 offender may be determined to have been a leader." MCL 777.44(2)(b). Evidence showed that defendant invited himself and the other perpetrators into the victim's apartment, defendant was the first to rape the victim while the other men held her down and that, when the men dragged her upstairs, defendant again raped the victim before the other two men assaulted her. It is well settled that if there is any evidence to support a trial court's scoring decision, this Court will uphold that decision. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). Accordingly, we hold that the trial court correctly scored OV 14.

Affirmed.

/s/ Christopher M. Murray

/s/ Henry William Saad

/s/ Michael J. Kelly