STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 14, 2010
v	No. 292425 Wayne Circuit Court
FAEZ ABBAS AL-AZAWI, Defendant-Appellant.	LC No. 06-005612

Before: FORT HOOD, P.J., and JANSEN and WHITBECK, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree criminal sexual conduct ("CSC"), MCL 750.520c(1)(c) (sexual contact during the commission of another felony), and assault with intent to commit criminal sexual conduct involving sexual contact, MCL 750.520g(2). He was acquitted of an additional count of kidnapping, MCL 750.349. He was sentenced to concurrent prison terms of 5 to 15 years for the second-degree CSC conviction and 23 months to 5 years for the assault conviction. He appeals as of right. We affirm defendant's convictions, but vacate his sentences and remand for resentencing.

Defendant was convicted of sexually assaulting a 13-year-old customer in a back storage room of a gas station where he was employed. The victim testified that defendant pushed her into the storage room and locked the door. Defendant later entered the room, grabbed the victim's breast, and tried to unzip her pants. The victim was eventually able to push past defendant and leave the gas station.

I. INCONSISTENT VERDICT

Defendant first argues that his second-degree CSC conviction must be reversed because the jury inconsistently convicted him of second-degree CSC under the theory that he engaged in sexual contact during the commission of another felony, but acquitted him of the other felony, kidnapping. We disagree.

To the extent that the jury's verdicts can be considered inconsistent, the inconsistency does not affect the validity of the verdicts. It is well established that juries may return inconsistent verdicts and, accordingly, such a verdict does not automatically require reversal of a defendant's conviction. *People v Lewis*, 415 Mich 443, 448-449; 453; 330 NW2d 16 (1982); *People v Vaughn*, 409 Mich 463, 465-466; 295 NW2d 354 (1980). Our Supreme Court has

explained that each count of a multi-count indictment is regarded as a separate indictment, *Vaughn*, 409 Mich at 465, and a jury "may reach *different* conclusions concerning an *identical* element of two different offenses." *People v Goss (After Remand)*, 446 Mich 587, 597; 521 NW2d 312 (1994) (emphasis in original). Inconsistent verdicts require reversal only where there is evidence, beyond the inconsistent verdict itself, that the jury was confused, did not understand the instructions, or did not know what it was doing. *Lewis*, 415 Mich at 450 n 9; *People v McKinley*, 168 Mich App 496, 510; 425 NW2d 460 (1988). Conversely, when a jury chooses not to convict because it has chosen to be lenient, the defendant "has no cause for complaint." *Lewis*, 415 Mich at 453. In this case, defendant has failed to show that juror confusion led to inconsistent verdicts.

Defendant acknowledged that, during its deliberations, the jury sent a note that stated:

> Can we vote not guilty on count one (kidnapping), but vote guilty on count two (criminal sexual conduct second degree)? This is only for a point of clarification.

After conferring with the parties, the trial court answered the jury's question by rereading certain portions of its instructions, including the directive that each crime is to be considered separately and that every element of each crime must be proven beyond a reasonable doubt. The trial court's response was consistent with the applicable law and did not vitiate the jury's power to return an inconsistent verdict. Contrary to defendant's implication, the jury's communication did not indicate that it was confused about the elements of the crimes or the court's instructions, or that it did not believe that the offense of kidnapping actually occurred. The jury's question was limited to whether "only for a point of clarification" it could convict defendant of only one of those two offenses. The trial court's response answered that question. Because there is no basis in the record for concluding that any inconsistency in the jury's verdicts was based on juror confusion rather than leniency, this issue does not afford a basis for appellate relief.

II. SUFFICIENCY OF THE EVIDENCE

Defendant further argues that the evidence was insufficient to sustain his conviction for second-degree CSC. Despite framing this issue as a challenge to the sufficiency of the evidence, defendant substantively again argues that it was inconsistent for the jury to convict him of second-degree CSC while acquitting him of kidnapping. As discussed in section I, *supra*, defendant's premise that his acquittal on the kidnapping charge prohibited his conviction of second-degree CSC is flawed. Further, an objective examination of the record reveals that the prosecution presented sufficient evidence to support the separate and distinct charge of second-degree CSC.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of

witnesses. *Wolfe*, 440 Mich at 514-515. Rather, "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).

The elements of the second-degree CSC offense are that the defendant engaged in sexual contact with another person under circumstances involving the commission of any other felony. MCL 750.520c(1)(c).[1] In this case, the "other felony" was kidnapping. As applicable to this case, a person is guilty of kidnapping if "he . . . knowingly restrains another person with the intent to . . . [e]ngage in criminal sexual penetration or criminal sexual contact with that person." MCL 750.349(1)(c). "Restrain" means

> to restrict a person's movements or to confine the person so as to interfere with that person's liberty without that person's consent or without legal authority. The restraint does not have to exist for any particular length of time and may be related or incidental to the commission of other criminal acts. [MCL 750.349(2).]

The victim testified that defendant forcibly pushed her into a small storage room located at the back of the gas station, and then closed and padlocked the door, leaving her inside. Defendant later returned and attempted to touch the victim's breasts. The victim fought off defendant's advances and tried to escape. Defendant left, again leaving the victim inside the locked room. When defendant returned, he punched the victim in the face, knocking her to the floor, as she tried to resist his advances. While the victim was on the floor, defendant touched her breast over her clothing, and attempted to unzip her pants.

This evidence, viewed in a light most favorable to the prosecution, was sufficient for a rational jury to find beyond a reasonable doubt that defendant sexually assaulted the victim during the commission of a kidnapping. First, the "sexual contact" element was satisfied by the victim's unequivocal testimony that defendant touched her breast over her clothing. The victim's testimony that defendant also tried to unzip her pants further supported an inference that the touching was for a sexual purpose. Second, defendant's intentional confinement of the victim in a locked room without her consent, followed by his sexual assault of the victim, sufficiently established that defendant knowingly restrained the victim with the intent to engage in sexual penetration or contact, thereby establishing the commission of a kidnapping. Accordingly, there was sufficient evidence to support defendant's second-degree CSC conviction.

III. ADEQUACY OF THE POLICE INVESTIGATION

Next, defendant argues that the "grossly negligent" police investigation violated his due process rights. We disagree. Defendant did not preserve this issue by raising it in the trial court.

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[1] MCL 750.520a(q) provides that "sexual contact" includes "the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification[.]" See *People v Piper*, 223 Mich App 642, 645; 567 NW2d 483 (1997).

Accordingly, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

Defendant complains that the police investigation was inadequate because the police did not collect either his or the victim's clothing to examine them for DNA evidence, and because the police did not examine the back storage room to determine if the victim's fingerprints were there. At trial, defense counsel elicited these alleged deficiencies during his cross-examination of the investigating officer. Defendant testified at trial that if the police had checked the storage room for fingerprints, they would not have found the victim's prints. He further testified that if the police had examined either his or the victim's clothing, they would not have found any blood or other bodily fluids belonging to the other person. During closing argument, defense counsel argued that the police and the prosecution could have "easily" determined if the victim was credible by checking the interior door for her fingerprints, and could have determined if there had been any contact between defendant and the victim by collecting and testing their clothing.

Defendant's argument confuses the prosecutor's duty to disclose evidence to a defendant with a duty to develop evidence for a defendant. See *People v Coy (After Remand)*, 258 Mich App 1, 21-22; 669 NW2d 831 (2003). Here, defendant's argument is only that the police did not collect and test evidence that might have supported his version of events. In the absence of "a showing of suppression of evidence, intentional misconduct, or bad faith," due process does not require that the prosecution seek and find exculpatory evidence or test evidence for a defendant's benefit. *Id.* at 21.

In this case, defendant does not contend that any evidence was suppressed, and there is no basis in the record for finding any bad faith or intentional misconduct by the police or prosecutor. At trial, the investigating police officer testified that the police collect evidence that is considered significant. He further explained that the police have limited resources and, therefore, they cannot collect and analyze every possible piece of evidence. Rather, decisions regarding the need to analyze evidence and the types of analyses to perform are based on the known facts about a case. In this case, although defendant asserts that a fingerprint analysis may have shown that the victim was not in the back storage room, defendant admitted to an officer at the scene that the victim had been in the back room for a short time. Second, with regard to possible DNA evidence, the victim reported that defendant touched her breast over her coat, and tried to unzip her pants. The scenario described by the victim did not present circumstances where DNA would have likely been transferred between the parties. Accordingly, there is no basis for concluding that the police acted in bad faith. Thus, defendant's due process rights were not violated.

Within this issue, defendant argues that defense counsel was ineffective for failing to request an instruction regarding the missing evidence. A defendant is entitled to an adverse inference instruction regarding the loss of potentially exculpatory evidence only upon a showing of bad faith. *People v Davis*, 199 Mich App 502, 514-515; 503 NW2d 457 (1993). As discussed above, defendant has not demonstrated that the police acted in bad faith. Therefore, counsel was not ineffective for failing to request an adverse inference instruction. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (counsel is not required to make a futile request).

IV. IMPEACHMENT EVIDENCE

Defendant next argues that the trial court abused its discretion and thwarted his ability to effectively challenge a witness's testimony by precluding defense counsel from asking the witness how many times he had been convicted of armed robbery and home invasion. We disagree. "The trial court's decision to allow impeachment by evidence of a prior conviction is within its sound discretion and will not be reversed on appeal absent an abuse of that discretion." *People v Coleman*, 210 Mich App 1, 6; 532 NW2d 885 (1995). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008).

The core of witness Aaron Rutherford's testimony was that the gas station's front door was locked around the time the victim was inside, he saw no one inside at that time, and he later saw the victim leaving the gas station. On cross-examination, defendant sought to impeach Rutherford's credibility by introducing evidence of his prior convictions under MRE 609. In response to questioning, Rutherford admitted that he had been convicted of armed robbery and attempted second-degree home invasion, but the trial court precluded defense counsel from inquiring whether Rutherford had been convicted of more than one count of those offenses, finding that it was not relevant.

On this record, there was no abuse of discretion. Evidence that Rutherford was convicted of a crime involving theft was probative of his veracity, *People v Cross*, 202 Mich App 138, 146; 508 NW2d 144 (1993), and the trial court allowed that impeachment evidence. It was the fact that Rutherford had been convicted of the crimes that was probative of his credibility. Additional information concerning the number of counts of which he was convicted would not have been further probative of his credibility.

Moreover, contrary to defendant's claim, the trial court's ruling did not prejudice his ability to effectively challenge Rutherford's credibility. In addition to impeaching Rutherford with evidence of his prior convictions for both armed robbery and attempted second-degree home invasion, Rutherford testified that he was currently serving a prison sentence and had come to court directly from prison. He testified before the jury clothed in his blue and orange prison uniform. Rutherford also explained how he did not want to get involved on the day of the incident because he was on probation and had absconded. In addition, Rutherford admitted to having numerous aliases, giving aliases to the police, and lying when it benefited him. Under the circumstances, the trial court's decision to preclude inquiry into the number of Rutherford's prior convictions did not limit defendant's ability to effectively challenge Rutherford's credibility and was not an abuse of discretion. *Coleman*, 210 Mich App at 6.

V. SCORING OF OFFENSE VARIABLES 3, 4 and 19

Defendant lastly argues that he is entitled to resentencing because the trial court erroneously scored offense variables (OV) 3, 4, and 19 of the sentencing 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 Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). A scoring decision "for which there is any evidence in support will be upheld." *Id.* (citation omitted).

A. OV 3

Five points may be scored for OV 3 where "[b]odily injury not requiring medical treatment occurred to a victim." MCL 777.33(1)(e). In this case, the victim testified at trial that defendant hit her in the eye with his fist, knocking her to the floor. She was in pain and suffered a black eye. This evidence supports the trial court's finding that the victim suffered a bodily injury. Accordingly, the trial court's score of five points for OV 3 was not an abuse of discretion.

B. OV 4

Ten points may be scored for OV 4 where "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). "There is no requirement that the victim actually receive psychological treatment." *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004). In this case, the victim testified at trial that she believed that defendant was going to kill her. After the incident, the victim was afraid of defendant's retribution and wanted to move away from her home. The victim explained that she suffers nightmares, lacks trust in any adults, and does not like being around men. At sentencing, the victim's mother recounted how the victim's personality had dramatically changed since the offense, noting that she had lost self-confidence, was afraid to be alone, and was distrustful of everyone. She explained how the victim had continuously suffered throughout the three years since the assault and that she still has nightmares. Further, the trial court noted that when observing the victim during trial, it noticed

> much of the effect that the mother has described that the victim, you know, is experiencing. It's clear in her face, in her eyes, her body language. There is injury here.

Considering the nature of the offense, the continuing psychological effects of the assault on the victim, and the evidence of the victim's demeanor at trial, the trial court did not err in finding that the victim had sustained a serious psychological injury that may require professional treatment. Thus, the trial court did not abuse its discretion in scoring ten points for OV 4.

C. OV 19

Ten points may be scored for OV 19 where "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). Here, the trial court scored ten points for OV 19 because defendant failed to appear at his first scheduled trial in 2006 and fled the country for two years. Plaintiff concedes that based on our Supreme Court's decision in *People v McGraw*, 484 Mich 120, 133, 135; 771 NW2d 655 (2009), the trial court erroneously scored ten points for OV 19 by relying on conduct that occurred after the offenses were completed. If OV 19 is correctly scored at zero points, defendant's total OV score decreases from 55 to 45 points. This scoring adjustment moves defendant from OV level V (50 to 74 points) to OV level IV (35 to 49 points), and lowers defendant's guidelines range from 36 to 71 months to 29 to 57 months. MCL 777.64. Because the scoring error affects the appropriate guidelines range, defendant is entitled to resentencing. *People v Francisco*, 474 Mich 82, 88-92; 711 NW2d 44 (2006).

Affirmed in part and remanded for resentencing. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Kathleen Jansen
/s/ William C. Whitbeck