STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 19, 2010
v	No. 294141; 297505 Wayne Circuit Court
SHAWN JONES, Defendant-Appellant.	LC No. 09-008993-FH

Before: WILDER, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Defendant was convicted by a jury of fourth-degree criminal sexual conduct (CSC-IV), MCL 750.520e(1)(b), and acquitted of three counts of third-degree CSC (CSC-III), MCL 750.520d(1)(b). The trial court sentenced defendant as a habitual offender, fourth offense, MCL 769.12, to a prison term of 46 months to 15 years. Defendant appeals as of right. We affirm defendant's conviction and sentence, but remand for the ministerial task of amending the presentence report consistent with this opinion.

I. BACKGROUND

Defendant was originally charged with three counts of CSC-III and one count of CSC-IV stemming from an alleged assault of a coworker. On March 17, 2008, defendant and the victim were working together. Sometime between 9:00 a.m. and 10:00 a.m., defendant and victim were alone in the building. According to the victim's testimony, the following events occurred. Defendant approached the victim from behind while she was sitting at the desk and began "feeling all over on" the victim, rubbing her face, shoulders, back, and breasts. The victim testified that she told defendant "Stop, leave me alone." Defendant then swiveled the chair until the victim was facing him. The victim stood up and defendant stuck his hand down the front of the victim's work pants and digitally penetrated her vagina. The victim pushed against defendant's chest with both of her hands, but she was unable to move him away.

Defendant then removed his hand and pulled down the victim's pants and panties. In the victim's efforts to push defendant away from her, she fell back into the chair. Defendant then grabbed the victim's legs and pushed them up against her "in the position as if you were having a baby," with his arms "locked on the chair holding [her] legs." Defendant proceeded to perform oral sex on the victim for "[l]ess than 10 minutes, probably five." The victim told defendant to stop and proceeded to try to hit defendant with her arms, striking his "back, his shoulder,

whatever I could reach." The victim did not know why defendant finally stopped, but when he did, she got up from the chair and bent over to try and pull up her pants. As she bent over, defendant was behind her and he attempted to insert his penis into her vagina. The testimony was clear that there was not "full" penetration, but whether there was any penetration was questionable. The victim testified that she could "feel the head part . . . trying to be put in" and that she knew it touched her vagina, but she did not know whether it "entered."

It was uncontested that after leaving the building, the victim informed her co-workers, her boss, and the police, that she had been raped, and went to the hospital to have a rape kit taken. DNA evidence found defendant's saliva on the victim's panties.

Although defendant originally told police he had never had any sex with the victim, at trial, defendant's defense was that the incident was consensual. Defendant presented two witnesses: his wife and one of his friends.[1] Defendant's wife testified that defendant had been having an affair with the victim. Defendant's friend testified that he had witnessed defendant and the victim together, hugging and holding hands at social gatherings. On cross-examination, however, when questioned as to when he saw this, he indicated that it occurred in the late summer or fall of 2008, which was at least four months after the alleged assault.

The jury found defendant not guilty of all three CSC-III charges, but guilty of CSC-IV. The trial court then sentenced him as a fourth-offense habitual offender to 46 months to 15 years. The trial court subsequently granted defendant's request for resentencing based on errors in the scoring of his prior record variable (PRV), which would have lowered the guidelines. However, the OV scores were also recalculated and, based on the rescoring, the same minimum sentence range resulted, so the trial court imposed the same sentence.

II. INCONSISTENT VERDICT

Defendant first[2] argues that his conviction for CSC-IV must be vacated because it is inconsistent with the jury's acquittal of the three CSC-III charges. Defendant contends that the jury's inconsistent verdict can only be attributed to confusion about the law or compromise. We disagree.

First, Michigan law permits a jury to reach inconsistent verdicts. *People v Vaughn*, 409 Mich 463, 465-466; 295 NW2d 354 (1980). Indeed, it may convict a defendant of felony-firearm while acquitting him of the underlying felony. *People v Wakeford*, 418 Mich 95, 109 n 13; 341 NW2d 68 (1983).

> Juries are not held to any rules of logic nor are they required to explain their decisions. The ability to convict or acquit another individual of a crime is a

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[1] The friend was apparently the godfather of the victim's daughter from another relationship.

[2] We have elected to address defendant's issues in an order different from how they were presented on appeal.

> grave responsibility and an awesome power. An element of this power is the jury's capacity for leniency. Since we are unable to know just how the jury reached their conclusion, whether the result of compassion or compromise, it is unrealistic to believe that a jury would intend that an acquittal on one count and conviction on another would serve as the reason for defendant's release. These considerations change when a case is tried by a judge sitting without a jury. But we feel that the mercy-dispensing power of the jury may serve to release a defendant from some of the consequences of his act without absolving him of all responsibility. [*Vaughn*, 409 Mich at 466 (footnote omitted).]

Furthermore, even though the jury could reach an inconsistent verdict, we conclude that this verdict was not inconsistent. Where there is an interpretation that logically explains the jury's findings, the verdict is not inconsistent. *People v Tombs*, 472 Mich 446, 462-463; 697 NW2d 494 (2005).

Here, the record indicates that there was some dispute as to whether defendant's penis ever penetrated the victim's vagina, which could permit the jury to find reasonable doubt as to that count of CSC-III. There was also testimony that the victim was wearing a belt on her pants and that she did not tell her bosses or the police about the digital penetration, such that the jury might have found reasonable doubt as to that count of CSC-III. Finally, there was some testimony that the victim said "we had oral sex" and that she told defendant "my body may have been saying yes, but I was saying no." Those statements may have led the jury to find reasonable doubt as to whether the oral sex, for which there was DNA evidence, was consensual. However, given the multiple witnesses who testified that the victim was upset and immediately reported the incident to her co-workers, her boss, the police, and went to the hospital to have a rape kit taken, there was certainly sufficient evidence that defendant had sexually touched the victim using force and without consent to find him guilty of CSC-IV. Because this assessment of the evidence logically explains the jury's verdict,[3] it is not inconsistent. *Id.*

III. SENTENCING

Defendant next claims that offense variables (OV) 4 and 11 were improperly scored and that the trial court improperly considered evidence related to the three charges for which defendant was found not guilty when it sentenced him. When scoring the sentencing guidelines, a trial 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). "Scoring decisions for which there is any evidence in support will

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[3] We note that our ability to construct a logical explanation for the jury's verdict does not invalidate the trial court's conclusion that, by the preponderance of the evidence, the penetrations did, in fact, occur. Rather, our construction is one of many and is provided only to show that the evidence *could* be interpreted in a manner that is consistent with the verdict. The trial court's construction of the evidence that the penetrations did occur is an equally logical and valid construction of the evidence.

be upheld." *Id*. Questions involving statutory interpretation or application of the guidelines are reviewed de novo. *People v McGraw*, 484 Mich 120, 123; 771 NW2d 655 (2009).

A. OV 11

Defendant first argues that the trial court improperly scored OV 11, MCL 777.41, at 50 points. OV 11 relates to criminal sexual penetration. Defendant alleges that the trial court could not score him for penetration because the jury acquitted him of the CSC-III charges. We disagree.

"A sentencing court is allowed to consider the facts underlying uncharged offenses, pending charges, *and acquittals*." *People v Coulter*, 205 Mich App 453, 456; 517 NW2d 827 (1994) (emphasis added).

> Because the prosecution must prove controverted factual assertions underlying the scoring of the sentencing guidelines by a preponderance of the evidence rather than beyond a reasonable doubt, situations may arise wherein although the factfinder declined to find a fact proven beyond a reasonable doubt for purposes of conviction, the same fact may be found by a preponderance of the evidence for purposes of sentencing. [*People v Perez*, 255 Mich App 703, 713; 662 NW2d 446 (2003).]

Thus, so long as the trial court could conclude that the penetrations occurred under the preponderance of the evidence test, it could properly score them. See *id.* (concluding that where the defendant was charged with CSC-I, but found guilty of CSC-II, the trial court properly scored for penetration because the victim's testimony provided support for scoring OV 12 as if penetration occurred).

Under OV 11, fifty points are scored where "[t]wo or more criminal sexual penetrations occurred." MCL 777.41(1). "[A]ll sexual penetrations of the victim by the offender arising out of the sentencing offence" must be scored. MCL 777.41(2)(a). Although points are not scored "for the 1 penetration that forms the basis of a . . . third-degree criminal sexual conduct offense," MCL 777.41(2)(a), because defendant was not found guilty of any of the CSC-III charges, there need only be evidence of two penetrations.

The prosecutor pointed out that there was testimony of both digital penetration as well as oral sex during the assault on the victim. We agree. The record reveals that there was DNA evidence of defendant's saliva in the victim's panties as well as the victim's testimony regarding what occurred. Additionally, there were multiple witnesses who testified as to the victim's statements and demeanor, as well as evidence that the victim promptly reported the penetrations to her co-workers, her boss and the police, and went to the hospital to have a rape kit performed.

There was the testimony of three witnesses who heard defendant call the victim to apologize, one who heard the victim say "well, Shawn, I told you I don't like you like that," another who heard the victim tell defendant "my body might have been saying yes, but I was saying no," and one who heard defendant say that "he didn't mean for that to happen. He felt like an animal." There was also testimony from the officer who initially questioned defendant about the incident, who testified that defendant indicated that "nothing" happened between him

and the victim, denied performing oral sex with the victim on the date of the incident, and denied having ever had oral or vaginal sex with her at anytime, rather than asserting that the incident was consensual.

Given that the trial court was in a better position to assess witness credibility, we cannot say that the trial court erred in concluding that two penetrations occurred by the preponderance of the evidence. Where the evidence supported the conclusion that two penetrations occurred, 50 points was appropriately scored. *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004).

B. OV 4

Defendant also argues that OV 4 was improperly scored at 10 points because there was no evidence that the victim suffered serious psychological injury. Ten points are scored under OV 4 where "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(a). Defendant contends that because the jury found him not guilty of the three charges of CSC-III, it must have concluded that the conduct between him and the victim was consensual and, therefore, it could not have resulted in serious psychological injury. We disagree.

First, there is evidence in the record that the victim sought and received counseling. It makes no difference the duration of the counseling because, as defendant's counsel conceded before the trial court, a victim need not seek counseling for OV 4 to be properly scored at 10 points. See MCL 777.34(2) ("[T]he fact that treatment has not been sought is not conclusive."). Second, as before, defendant's acquittal on the three CSC-III charges did not preclude the trial court from concluding, based on a preponderance of the evidence, that the incident was nonconsensual. Finally, defendant was convicted of CSC-IV, which by itself indicates nonconsensual contact that could result in psychological harm.

As previously noted, a preponderance of the evidence suggested that the incident was nonconsensual. There was DNA evidence of defendant's saliva in the victim's panties, the victim's testimony regarding what occurred, and the statements of the multiple witnesses the victim spoke with immediately after the incident occurred and who indicated that she was clearly upset, crying, and hysterical. Although defendant's wife testified that defendant was having an affair with the victim, other evidence indicated that defendant was having an affair with a different coworker, not the victim. Defendant's other witness who testified that defendant and the victim appeared to be boyfriend and girlfriend testified that he saw them together in the fall of 2008, which was extremely unlikely given that was at least four months *after* the assault took place.

Where the trial court was convinced by the trial testimony that the multiple counts of CSC-III had occurred, and a preponderance of the evidence in the record supports that conclusion, the trial court could properly conclude that defendant's actions caused serious psychological injury requiring professional treatment to the victim. Because there is evidence to support the scoring, this Court must uphold the scoring of 10 points for OV 4. *Endres*, 269 Mich App at 417.

C. *BLAKELY*

Defendant finally argues that having the trial court utilize a preponderance of the evidence standard violates his Constitutional rights under *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, our Supreme Court has concluded that *Blakely* does not affect Michigan's sentencing scheme. *People v Drohan*, 475 Mich 140, 160; 715 NW2d 778 (2006).

IV. PRESENTENCE REPORT

Finally, defendant argues that the trial court erred in failing to strike various inaccurate information disputed from his presentence investigative report (PSIR). We review a sentencing court's response to a claim of inaccuracy in a defendant's PSIR for an abuse of discretion. *People v Uphaus* (*On Remand*), 278 Mich App 174, 181; 748 NW2d 899 (2008). An abuse of discretion occurs when a trial court makes a ruling that falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Defendant complains first regarding information in his employment record. At sentencing, defense counsel requested that the following language be omitted from pages one and two of the PSIR because it was inaccurate:

> The defendant reported last working at ICON in May of 2007; however, this contradicts the defendant being employed at ICON at the time of the instant offense. According to the defendant's spouse, he has been unemployed since 2008 after he was fired from ICON as a result of the within offense.

Defense counsel also noted that a similar statement appeared on page 7: "He was last employed at ICON Family Services as a Residential Specialist from 2002 until he was fired in 2008 due to the within offense. . . . The defendant's wife has supported him financially after he was fired from his job." Defendant indicated that he was not fired "as a result of this offense" and that after he was terminated, his wife did not financially support him. The trial court responded, "Okay, I'll remove that. It has no bearing whatsoever on the sentencing in this case. I'll take that out." Because the trial court agreed to remove it, defendant is entitled to have it removed. See MCL 771.14(6); MCR 6.425(E). Accordingly, we agree with defendant that the trial court erred in failing to remove the disputed facts. However, neither statement must be removed in its entirety. As to page two, only "as a result from the within offense" need be omitted; as to page 7, "due to the within offense" should be omitted, as should the final sentence that "The defendant's wife has supported him financially after he was fired from his job." The remainder of the statements went undisputed and may remain.

Defendant also challenges the inclusion on page two in the agent's description of the offense, any facts related to the CSC-III charges for which he was acquitted. Defendant argues that because he was acquitted of those charges, it is unfair to include them because they will form the basis of what he must admit he did to the parole board. It is true that "[c]ritical decisions are made by the Department of Corrections regarding a defendant's status based on the information contained in the presentence investigation report." *People v Norman*, 148 Mich App 273, 275; 384 NW2d 147 (1986). However, "the trial court may determine the accuracy of the

[disputed] information." *Uphaus*, 278 Mich App at 182 (quotation marks and citation omitted). Because the trial court concluded that these acts did in fact occur, based on a preponderance of the evidence, and used them in defendant's sentencing, the trial court's decision not to remove the statements was not an abuse of discretion. However, we believe that defendant is entitled to an explicit statement in this section of the report that he was acquitted of the CSC-III charges. Accordingly, the trial court shall add a statement somewhere under "Agent's Description of the Offense" that clearly states that defendant was acquitted of the three CSC-III charges.

Therefore, we remand for the ministerial task of correcting these errors and forwarding the corrected presentence report to the Department of Corrections. *People v Russell*, 254 Mich App 11, 22; 656 NW2d 817 (2002), rev'd on other grounds 471 Mich 182 (2004); *People v Dilling*, 222 Mich App 44, 53-54; 564 NW2d 56 (1997).

Affirmed and remanded for correction of the presentence report. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Deborah A. Servitto
/s/ Douglas B. Shapiro