STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 29, 2016
v	No. 328642 Calhoun Circuit Court
JHAL DEVONN SMITH, also known as JHAL DEVON SMITH Defendant-Appellant.	LC No. 2014-003417-FC

Before: BOONSTRA, P.J., and SHAPIRO and GADOLA, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree criminal sexual conduct ("CSC"), MCL 750.520b(1)(c) (sexual penetration under circumstances involving another felony); of third-degree CSC, MCL 750.520d(1)(b) (sexual penetration with force or coercion);[1] of unlawful imprisonment, MCL 750.349b; of assault by strangulation, MCL 750.84(1)(b); and of domestic assault, MCL 750.81(2).[2] We affirm.

In her testimony, recounted as follows, the complainant described the events of the incident and those leading to it. She met defendant in June 2014; they began dating and then moved in together shortly thereafter. Defendant became increasingly violent as the relationship progressed, and so she broke up with him in September 2014 and made him move out of her house. On November 9, 2014, she arrived home from work at approximately 10:30 p.m. and found defendant inside the house, even though he was not supposed to be there. Defendant began to look through her cellular telephone, and he became angry when he found that it

[1] On this count, defendant was charged with first-degree CSC, MCL 750.520b(1)(c) (sexual penetration under circumstances involving another felony), on the theory that defendant committed sexual penetration under circumstances involving unlawful imprisonment, but the jury found defendant guilty of the lesser included offense of third-degree CSC, MCL 750.520d(1)(b) (sexual penetration with force or coercion).

[2] Defendant was charged with another count of first-degree CSC, MCL 750.520b(1)(f) (force or coercion causing personal injury). The jury found him not guilty of that charge.

contained contact information for other men. Complainant became afraid and tried to leave the house but defendant pulled her from the door. She tried to escape on three different occasions that night but defendant forcibly prevented her from doing so by grabbing her legs and one time by choking her. Defendant struck her in the face multiple times with a vodka bottle and told her that he would kill her. He also forced her to perform fellatio on him against her will and then forced her to the floor and had sex with her despite her telling him to stop both before and during the sexual conduct. Around 7:00 a.m. defendant began to apologize, but at around 8:00 a.m. or 8:30 a.m., he again forced her to have sex despite the fact that she told defendant that she did not want to and that she was in pain. In sum, according to complainant's testimony, over the course of approximately seven hours, defendant repeatedly threatened her life and physically and sexually assaulted her.

Defendant makes several arguments in support of his claim that there was insufficient evidence to support his conviction for first-degree CSC, unlawful imprisonment, and third-degree CSC. We review a challenge to the sufficiency of the evidence de novo. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). When assessing the sufficiency of the evidence, 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 Railer*, 288 Mich App 213, 216-217; 792 NW2d 776 (2010). We "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." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). We "resolve all conflicts in favor of the prosecution." *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). It is for the jury, not this Court, to assess the credibility of witnesses. *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012).

Defendant first argues that there was insufficient evidence to convict him of first-degree CSC for sexual penetration under circumstances "involving the commission of any other felony," MCL 750.520b(1)(c), because the jury was not presented with proofs that he had twice previously been convicted of domestic violence and that absent those proofs, the jury could not have considered the instant domestic violence charge as a felony. Defendant directs us to MCL 750.81(2) which provides that an individual who engages in domestic assault "is guilty of a misdemeanor" and MCL 750.81(5) which states that an individual who commits domestic assault "and who has 2 or more previous convictions for assaulting or assaulting and battering an individual . . . is guilty of a felony."[3]

Notably, however, defendant does not dispute the fact that he has been previously convicted of domestic violence on at least two occasions, nor that the charging information in this case included a "third offense notice" that referenced two of his prior domestic violence convictions, and that the instant domestic violence charge was, as a result, a felony. In addition, defendant did not object when the jury was twice instructed that the felony sufficient to elevate the criminal sexual conduct charge to first degree could be satisfied by a finding that the sexual

[3] The current MCL 750.81(5) was listed as MCL 750.81(4) until that statute was amended on July 25, 2016. 2016 PA 87.

conduct occurred in the context of domestic assault, i.e. without a specific requirement that they find it to be a third domestic assault charge. Because defendant does not contest that the evidence was sufficient for the jury to find him guilty in light of the instructions they received, we view defendant's sufficiency challenge as an argument that the trial court failed to properly instruct the jury on the elements of the offense.

Defense counsel was asked both before and after closing arguments if he had any objection to the jury instructions, and both times he stated that he did not. Therefore, the claim of instructional error is unpreserved and does not require reversal unless the following "three requirements [are] met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The trial court did err by failing to instruct the jury that two prior domestic assault convictions were necessary to find that defendant was committing felony domestic assault at the time of the sexual conduct. The prosecution argues that it was not required to present evidence of the prior two convictions because MCL 750.81(5) is merely a sentencing enhancement, not an element of the offense of domestic assault to be proven at trial. We would agree if defendant was charged with felony-domestic assault. However, in this case, the trial court was not required to simply instruct the jury on the elements of domestic assault; it was required to instruct the jury on the elements necessary to find defendant guilty of first-degree CSC, and the statute defining that offense explicitly provides that the prosecutor is required to prove sexual penetration occurring "under circumstances involving the commission of any other *felony*." MCL 750.520b(1)(c) (emphasis added). Domestic assault is only a felony if the person charged has two prior convictions for domestic assault. Therefore, in order for the jury to be properly instructed on the elements of first-degree CSC on a theory of sexual penetration under circumstances involving another felony, the trial court would be required to instruct the jury on the elements necessary to find the accused guilty of a felony. It was, therefore, not enough to instruct the jury on the elements of a crime that would be a misdemeanor, absent prior convictions, without instructing the jury what made the crime a felony in this particular instance.[4]

Despite this error, we conclude that reversal is not mandated as the error was unpreserved, and we do not find it to be plain, clear, or obvious given the caselaw addressing statutes in which repeated offenses can elevate the crime from a misdemeanor to a felony, which the trial court and both trial attorneys appear to have concluded was controlling. In *People v Reichenbach*, 459 Mich 109, 111-112, 127 n 19; 587 NW2d 1 (1998), the Supreme Court stated that prior convictions of operating a motor vehicle while under the influence of intoxicating

[4] If defendant wished to avoid having evidence of two prior convictions presented to the jury, he could have stipulated to the prior two convictions relieving the prosecution of its duty to prove these convictions and relieving the trial court of its duty to instruct the jury on the necessity of finding these two convictions. However, because no such stipulation was entered in this case, we find that the lack of instruction regarding these two prior offenses was erroneous.

liquor (OUIL) were not "elements of the offense" of OUIL 3d offense, a felony, that the prosecutor had to prove. The Supreme Court stated that this was because the statute specifically stated the prior offenses were to be considered at sentencing. *Id.* Similarly, in *People v Eason*, 435 Mich 228, 232-234; 458 NW2d 17 (1990), the Supreme Court held that a prior offense under the Controlled Substance Act, MCL 333.7101 *et seq*., is not an element required to be proven in order to seek a sentencing enhancement under that act. While both of these cases are distinguishable from the present case in that they concerned direct challenges to a conviction of a crime for which punishment was enhanced because of prior convictions, whereas the present case concerned a challenge to a conviction for which defendant could only be guilty if the predicate offense was enhanced because of prior convictions, we conclude that the presence of these cases is sufficient to conclude that the error in this case was not clear, plain, or obvious.

Finally, we decline to conclude that the alleged error in this case affected defendant's substantial rights in light of the fact that he has never disputed, neither at the trial court nor in this appeal, that at the time of this offense he had already been convicted of domestic violence on at least two occasions. He does not claim a possible miscarriage of justice, and given the unique circumstances of this case, we do not find the error to have affected the fairness, integrity, or public reputation of the judicial proceedings.[5]

Defendant also argues that there was insufficient evidence to support his convictions for unlawful imprisonment and third-degree CSC (sexual penetration with force or coercion). MCL 750.349b(1)(c) states that "[a] person commits the crime of unlawful imprisonment if he or she knowingly restrains another person" and "[t]he person was restrained to facilitate the commission of another felony . . . ." Defendant does not dispute that he knowingly restrained the victim on the night of November 9 and 10, 2014, and evidence shows that he did. See *Railer*, 288 Mich App at 218. Defendant argues that there was insufficient evidence to sustain his conviction for unlawful imprisonment because there was no evidence that he committed another felony. However, there is ample evidence to support defendant's conviction for third-degree CSC, a felony, and to support a finding that defendant restrained the victim to facilitate this crime. MCL 750.520d(1)(b) states that "[a] person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if . . . [f]orce or coercion is used to accomplish the sexual penetration." The victim testified that defendant forced her onto the floor, removed her pants and underwear against her will, and had sex with her despite her pleas for him to stop. Defendant's arguments on appeal regarding his conviction for third-degree CSC essentially challenge the credibility of the victim's testimony, but

[5] We note that the better procedure in a case such as this, where a defendant is charged with first-degree CSC under a theory that sexual penetration occurred under circumstances involving another felony and where the predicate felony is only a felony, as opposed to a misdemeanor, because of the defendant's prior convictions, would be to either have the prosecutor introduce evidence of the prior convictions accompanied by a liming instruction or to have the defendant stipulate that the convictions occurred so that the jury will not have to hear about them.

credibility is the province of the jury, not of this Court. *Eisen*, 296 Mich App at 331. In sum, the evidence was sufficient to support the jury's finding that defendant knowingly restrained the victim to facilitate the commission of the felony of third-degree CSC, and the evidence was sufficient to support his conviction of third-degree CSC.[6] See *Railer*, 288 Mich App at 217-218.

In addition, defendant argues that this Court should remand for resentencing because his offense variables ("OVs") were assessed points based on judicial fact-finding in contravention of our Supreme Court's holding in *People v Lockridge*, 498 Mich 358, 364-365, 389, 391-392; 870 NW2d 502 (2015). Defendant moved the trial court for resentencing based on *Lockridge*, thus preserving the issue for appeal. See *People v Terrell*, 312 Mich App 450, 464; 879 NW2d 294 (2015). This Court reviews preserved issues regarding unconstitutional judicial fact-finding for "harmless error beyond a reasonable doubt." *Id.* Our Supreme Court stated in *Lockridge* that:

> [A]ll defendants (1) who can demonstrate that their guidelines minimum sentence range was actually constrained by the violation of the Sixth Amendment and (2) whose sentences were not subject to an upward departure[] can establish a threshold showing of the potential for plain error sufficient to warrant a remand to the trial court for further inquiry. [*Lockridge*, 498 Mich at 395 (footnote omitted).]

However, error with regard to assessing OVs pursuant to judicial fact finding is harmless where the trial court decides that "the sentence would have been essentially the same as originally imposed." *Id.* at 396 (citation and quotations omitted).

The record indicates that several of defendant's OVs were scored based on judicial fact-finding and, therefore, in contravention of the Supreme Court's holding in *Lockridge*. It is also clear that defendant's guidelines range "was actually constrained" by this violation. *Id.* at 395. However, defendant moved the trial court for resentencing on the ground that his OVs were assessed points according to judicial fact-finding. The trial court acknowledged that the legislative guidelines were advisory rather than mandatory, but the trial court stated that it would not change defendant's sentences even in light of the advisory—rather than mandatory—nature of the guidelines. The trial court stated that defendant's sentence was appropriate when considering the facts of the case. The trial court explicitly stated that "I believe that the sentence given imposed [sic] by this Court at the original sentencing is appropriate. I would not change

[6] In addition to the victim's testimony, evidence was presented at trial that defendant's semen was found on the shirt that the victim was wearing on the night of the incidents. Defendant also called the victim from jail on November 10 and 11. These conversations were recorded, and some of them were played for the jury. In these conversations, defendant begged the victim not to testify against him, and he stated that he would certainly be sentenced to prison if she testified.

it." Because the trial court already decided that it would impose the same sentences under advisory guidelines as the sentences which it originally imposed, the error was harmless. See *id.* at 396-397, and see *Terrell*, 312 Mich App at 464.

Affirmed.

/s/ Mark T. Boonstra
/s/ Douglas B. Shapiro
/s/ Michael F. Gadola