

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

FOR PUBLICATION
May 17, 2012
9:00 a.m.

v

HAWK HENRY BRANTLEY,

Defendant-Appellant.

No. 298488
Oakland Circuit Court
LC No. 2008-220825-FC

Before: WHITBECK, P.J., and JANSEN and K. F. KELLY, JJ.

JANSEN, J.

Defendant appeals by right his jury-trial convictions of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(e) (armed with a weapon), and larceny from a person, MCL 750.357. He was sentenced to serve concurrent prison terms of 12 to 40 years for the CSC I conviction and 4 to 10 years for the larceny-from-a-person conviction. He was also ordered to submit to lifetime electronic monitoring following his release from prison. We affirm defendant's convictions, but vacate his sentences in part and remand for resentencing consistent with this opinion.

I

Defendant first argues that the prosecution failed to present sufficient evidence to prove beyond a reasonable doubt that he committed the crimes. We disagree.

Claims of insufficient evidence in a criminal case are reviewed de novo and in a light most favorable to the prosecution. *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010). We must determine whether a rational trier of fact could have found that all essential elements of the offenses were proved beyond a reasonable doubt. *People v Railer*, 288 Mich App 213, 217; 792 NW2d 776 (2010). Circumstantial evidence and reasonable inferences arising therefrom may be used to prove the elements of a crime. *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010). “[T]his Court must not interfere with the jury’s role as the sole judge of the facts.” *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005). It is the role of the jury to “determine questions of fact and assess the credibility of witnesses.” *People v Cameron*, 291 Mich App 599, 616; 806 NW2d 371 (2011).

Defendant was convicted under MCL 750.520b(1)(e), which provides that “[a] person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration

with another person” and if he or she “is armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon.” “Sexual penetration” is defined, in relevant part, as “any . . . intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body” MCL 750.520a(r); see also *People v Szalma*, 487 Mich 708, 712 n 5; 790 NW2d 662 (2010). “[T]he complainant’s testimony can, by itself, be sufficient to support a conviction of CSC.” *Id.* at 724; see also MCL 750.520h.

Defendant was also convicted under MCL 750.357, which provides in pertinent part that “[a]ny person who shall commit the offense of larceny by stealing from the person of another shall be guilty of a felony” As this Court observed in *People v Perkins*, 262 Mich App 267, 271-272; 686 NW2d 237 (2004), the elements of larceny from a person are:

(1) the taking of someone else’s property without consent, (2) movement of the property, (3) with the intent to steal or permanently deprive the owner of the property, and (4) the property was taken from the person or from the person’s immediate area of control or immediate presence.

We first conclude that the prosecutor presented sufficient evidence to prove beyond a reasonable doubt that defendant committed CSC I under MCL 750.520b(1)(e). The victim testified that defendant put his forearm on her throat with enough pressure that she could not breathe, that defendant produced a black folding knife and put the edge of the knife on her throat, that defendant pulled her pants down around her knees, and that defendant flipped her over onto her stomach and inserted his penis in her vagina from behind. The victim had a scratch on her neck that was consistent with her allegation that defendant had held a knife to her neck. In addition, the victim identified defendant as her attacker and defendant could not be excluded as a possible source of the semen that was collected. Lastly, defendant was arrested with a black folding knife in his possession. Taken as a whole, this evidence was sufficient to allow a rational trier of fact to conclude beyond a reasonable doubt that defendant engaged in criminal sexual penetration with the victim while he was armed with a weapon. See MCL 750.520b(1)(e).

We also conclude that the prosecutor presented sufficient evidence to prove beyond a reasonable doubt that defendant committed the offense of larceny from a person. The victim testified that defendant took her cell phone, money, and purse without her permission while they were in his car. Furthermore, the victim’s cousin testified that defendant had the victim’s cell phone after the assault, that defendant told the victim’s cousin not to call the cell phone again, and that defendant then used the cell phone to call the victim’s cousin back. Finally, the evidence indicated that the victim was missing her cell phone after the assault. This evidence was sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that defendant committed all essential elements of the offense of larceny from a person. See *Perkins*, 262 Mich App at 271-272.

II

Defendant also argues that the jury’s verdicts were against the great weight of the evidence. Again, we disagree.

We review unpreserved claims that the verdict was against the great weight of the evidence for plain error affecting the defendant's substantial rights. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). "[A] new trial based upon the weight of the evidence should be granted only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result." *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998) (internal citation omitted). In general, conflicting testimony or questions concerning the credibility of the witnesses are not sufficient grounds for granting a new trial. *Id.* at 643.

The evidence presented at trial did not preponderate heavily against the jury's CSC I verdict. The victim testified regarding the sexual assault. She relayed consistent versions of the assault to her sister, the emergency room doctor, and the forensic nurse who examined her. The victim also identified defendant as her attacker. She had a scratch on her neck that was consistent with her allegation that defendant had held a knife to her neck. When she spoke to her sister and the forensic nurse, she was shaken and upset. Although there was no acute injury to the victim's vagina, the forensic nurse testified that this was not unusual for a victim of sexual assault. Moreover, defendant could not be excluded as a possible source of the semen. Defendant was arrested with a black folding knife that matched the weapon used during the assault. Furthermore, the facts that the victim could not judge how far defendant parked his car from a school security guard and that the victim may have lied about a previous consensual encounter did not make her story so unreliable that a reasonable jury could not have believed it.

Similarly, the evidence presented at trial did not preponderate heavily against the jury's larceny-from-a-person verdict. The victim testified that defendant took her cell phone, money, and purse. This testimony was supported by evidence that the victim had to use a school security guard's cell phone to call her sister. Moreover, the victim's cousin testified that defendant had the victim's cell phone after the assault. The jury's verdicts were not against the great weight of the evidence.

III

Defendant next argues that the trial court erroneously assessed 10 points for offense variable (OV) 10, MCL 777.40, when sentencing him for the CSC I conviction. We agree and remand for resentencing with respect to the CSC I conviction.

We review a trial court's scoring decisions under the sentencing guidelines to determine whether the court properly exercised its discretion and whether the record adequately supports a particular score. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009). "An appellate court must affirm minimum sentences that are within the recommended guidelines range, except when there is an error in scoring the sentencing guidelines or inaccurate information was relied on in determining the sentence." *Id.*; see also MCL 769.34(10).

Pursuant to MCL 777.40(1)(b), a trial court may assess 10 points for OV 10 if "[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." In the context of OV 10, this Court has recently defined a "domestic relationship" as "a familial or cohabitating relationship." *People v Jamison*, 292 Mich App 440, 447; 807 NW2d 427 (2011). This Court

specifically rejected the proposition that a past dating relationship would fall within the definition of a “domestic relationship” under MCL 777.40(1)(b). *Jamison*, 292 Mich App at 447-448.

Given this Court’s decision in *Jamison*, we conclude that the trial court erroneously assessed 10 points for OV 10. Defendant and the victim had stopped dating at least two months prior to the assault. Although they remained friends, both were dating other people, they did not continue to have sex, and they did not live together. Indeed, the victim and defendant had limited contact. Although defendant took the victim to school and they occasionally talked on the phone, this did not constitute a domestic relationship for the purpose of scoring OV 10. The trial court incorrectly found that defendant and the victim were involved in a domestic relationship.

If the trial court had properly assessed zero points rather than 10 points for OV 10, defendant’s total offense variable score would have been 35 points instead of 45 points. This would have placed defendant in cell D-II, rather than cell D-III, on the sentencing grid for Class A felony offenses. MCL 777.62. The minimum sentencing guidelines range for offenders falling in cell D-II on the Class A felony grid is 81 to 135 months in prison. *Id.* However, the trial court imposed a minimum sentence of 144 months in prison in this case. This minimum sentence fell outside defendant’s correct guidelines range of 81 to 135 months. Because defendant’s minimum sentence was based on an erroneous interpretation of OV 10 and fell outside the appropriate guidelines range, we vacate the sentence imposed for defendant’s CSC I conviction and remand for resentencing. *People v Francisco*, 474 Mich 82, 91-92; 711 NW2d 44 (2006).

IV

Defendant also argues that the trial court erred by ordering him to submit to lifetime electronic monitoring following his release from prison. We disagree.

“Whether defendant is subject to the statutory requirement of lifetime electronic monitoring involves statutory construction, which is reviewed *de novo*.” *People v Kern*, 288 Mich App 513, 516; 794 NW2d 362 (2010).

With respect to an individual convicted of CSC I, MCL 750.520b(2)(d) provides in pertinent part that “[i]n addition to any other penalty imposed . . . the court shall sentence the defendant to lifetime electronic monitoring under section 520n.” In turn, MCL 750.520n(1) provides that “[a] person convicted under section 520b or 520c for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age shall be sentenced to lifetime electronic monitoring”

Defendant contends that, pursuant to MCL 750.520b(2)(d) and MCL 750.520n(1), a trial court must order a defendant who is convicted of CSC I to submit to lifetime electronic monitoring *only* if the defendant was 17 years old or older and the victim was less than 13 years old. Because the victim in this case was 21 years old when defendant sexually assaulted her, defendant asserts that he should not have been subjected to lifetime electronic monitoring. Defendant’s argument is compelling. Indeed, as the dissent points out, several panels of this

Court have agreed with that interpretation and held that lifetime electronic monitoring is required for a CSC I conviction *only* if the defendant was 17 years old or older and the victim was less than 13 years old. See *People v Floyd*, unpublished opinion per curiam of the Court of Appeals, issued September 20, 2011 (Docket No. 297393), lv den 491 Mich 886 (2012); *People v Quintana*, unpublished opinion per curiam of the Court of Appeals, issued May 19, 2011 (Docket No. 295324), lv den 490 Mich 894 (2011); *People v Hampton*, unpublished opinion per curiam of the Court of Appeals, issued December 20, 2011 (Docket No. 297224); *People v Bowman*, unpublished opinion per curiam of the Court of Appeals, issued November 9, 2010 (Docket No. 292415), lv den 489 Mich 898 (2011). However, those decisions are unpublished and nonbinding, and although we are fully cognizant of the rule of interpretation requiring adherence to the plain language of a statute, we refuse to look at the language in a vacuum and ignore other clearly relevant statutory rules of construction.

Taken alone, the language of MCL 750.520n(1) does seem to indicate that a trial court must order a defendant who is convicted of CSC I to submit to lifetime electronic monitoring *only* if the defendant was 17 years old or older and the victim was less than 13 years old. However, when examined in context and compared to MCL 750.520c, we conclude that the Legislature intended the modifying phrase “for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age” to apply to convictions of second-degree criminal sexual conduct (CSC II) under MCL 750.520c *only*, and *not* to convictions of CSC I under MCL 750.520b. Under the “last antecedent” rule, a modifying or restrictive word or clause contained in a statute is confined solely to the immediately preceding clause or last antecedent, unless something in the statute requires a different interpretation. *Duffy v Dep’t of Natural Resources*, 490 Mich 198, 220-221; 805 NW2d 399 (2011); see also *People v Henderson*, 282 Mich App 307, 328; 765 NW2d 619 (2009). Within the text of MCL 750.520n(1), the last antecedent preceding the modifying phrase “for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age” is “520c,” indicating that the Legislature intended the phrase to modify “520c” only.

This reading of MCL 750.520n(1) is further supported by the language of MCL 750.520b(2)(d) and MCL 750.520c(2)(b). Because MCL 750.520b(2)(d), MCL 750.520c(2)(b), and MCL 750.520n(1) address the same subject and share a common purpose, they are *in pari materia* and must be read together as a unified whole. *Kern*, 288 Mich App at 517. As explained previously, MCL 750.520b(2)(d) states, with respect to individuals convicted of CSC I, that “[i]n addition to any other penalty imposed . . . the court shall sentence the defendant to lifetime electronic monitoring under section 520n.” MCL 750.520b(2)(d) is notably silent regarding the age of the defendant or the age of the victim. In contrast, MCL 750.520c(2)(b) states, with respect to individuals convicted of CSC II, that “[i]n addition to the penalty specified in subdivision (a), the court shall sentence the defendant to lifetime electronic monitoring under section 520n *if the violation involved sexual contact committed by an individual 17 years of age or older against an individual less than 13 years of age.*” (Emphasis added.) Thus, while the CSC II statute specifically limits the requirement of lifetime electronic monitoring to defendants who are 17 years old or older and whose victims are younger than 13 years old, the CSC I statute contains no such age-based limitation. If the Legislature had intended the age-based limitation to apply to CSC I convictions, then, as MCL 750.520c(2)(b) demonstrates, it clearly was aware of how to draft the statute in a way to effectuate that intent. And the omission of a provision in one

part of a statute that is included in another part should be construed as intentional. *People v Monaco*, 474 Mich 48, 58; 710 NW2d 46 (2006). Accordingly, we read MCL 750.520n(1) as requiring the trial court to impose lifetime electronic monitoring in either of two different circumstances: (1) when any defendant is convicted of CSC I under MCL 750.520b, and (2) when a defendant who is 17 years old or older is convicted of CSC II under MCL 750.520c against a victim who is less than 13 years old. In other words, we hold that any defendant convicted of CSC I under MCL 750.520b, regardless of the age of the defendant or the age of the victim, must be ordered to submit to lifetime electronic monitoring. MCL 750.520b(2)(d); MCL 750.520n(1). In sum, the trial court did not err by imposing the requirement of lifetime electronic monitoring on the basis of defendant's CSC I conviction.¹

V

We affirm defendant's convictions. We also affirm the trial court's imposition of lifetime electronic monitoring on the basis of defendant's CSC I conviction.

We vacate defendant's sentence of 12 to 40 years in prison and remand for resentencing with respect to defendant's CSC I conviction. The trial court shall modify the sentencing information report to indicate defendant's correct minimum guidelines range and shall enter an amended judgment of sentence after resentencing.

Affirmed in part, vacated in part, and remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen

/s/ William C. Whitbeck

¹ In light of our conclusion in this regard, we reject defendant's argument that his attorney rendered ineffective assistance of counsel by failing to object to the trial court's imposition of lifetime electronic monitoring. It is well settled that counsel is not ineffective for failing to advocate a meritless position or make a futile objection. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003); *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).