STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES Y. STURDIVANT,

Defendant-Appellant.

UNPUBLISHED
March 20, 1998

No. 199580
Oakland Circuit Court
LC No. 96-145767-FC

Before: Sawyer, P.J., and Wahls and Reilly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), one count of carjacking, MCL 750.529a; MSA 28.797(a), and three counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to life imprisonment for both first-degree criminal sexual conduct convictions, thirty-five to seventy-five years' imprisonment for the carjacking conviction, and two years' imprisonment on each of the felony-firearm convictions. Defendant appeals as of right. We affirm.

First, defendant argues that he was entitled to a jury instruction on accessory after the fact as it related to the charge of carjacking because it was a cognate lesser offense. We disagree.

Our Supreme Court has held that instructions on cognate lesser offenses are only appropriate where they: (1) bear a sufficient relationship to the principal charge in that they are in the same class or category, (2) protect the same societal interests as the principal charge, and (3) are supported by the evidence presented at trial. *People v Hendricks*, 446 Mich 435, 447; 521 NW2d 546 (1994).

We conclude that accessory after the fact is not in the same class or category as carjacking. Accessory after the fact is a distinct crime, whereby a person gives assistance to someone he knows has committed a crime in order to help protect that person from detection, arrest, trial, or punishment. *People v Lucas*, 402 Mich 302, 304; 262 NW2d 662 (1978); *People v Perry*, 218 Mich App 520, 534; 554 NW2d 362 (1996), lv pending. Moreover, the societal interests in making accessory after

the fact and carjacking a criminal offense are not the same. Carjacking is an extremely violent and increasingly common method of stealing a vehicle. The risk to human life is severe. In an effort to deter carjacking and punish carjackers, the Legislature recently defined carjacking as a new criminal offense punishable by a possible life sentence. MCL 750.529a; MSA 28.797(a). The societal interests in making accessory after the fact a criminal offense are completely different. In determining that accessory after the fact was not a cognate lesser offense of murder, another panel of this Court addressed this issue:

> The purpose in making an accessory after the fact a criminal offense is not primarily to deter the commission of the principal offense. Rather, the gravamen of accessory after the fact is that it is an interference with society's effort to bring a perpetrator to justice. By punishing those who are accessories after the fact, the law serves to deter others from hindering the justice process after the fact of the principal crime. Thus, the purpose of making accessory after the fact a crime is to assist society in apprehending those who have committed crimes and to assist in preserving evidence of crimes so that perpetrators of crimes can be brought to society's justice. [*Perry*, *supra* at 534.]

The panel in *Perry* held that such a purpose, while very important and worthwhile, did not approach the same deterrence and punishment purpose served by making murder a crime. *Id*. We believe that the same reasoning applies in distinguishing accessory after the fact from carjacking. Thus, we conclude that the trial court properly declined to give an accessory-after-the-fact instruction.

Next, defendant argues that there was insufficient evidence presented at trial to support his convictions. We disagree. When reviewing the sufficiency of the evidence, we must consider the evidence in the light most favorable to the prosecution in order to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, modified on other grounds 441 Mich 1201 (1992).

A person who by force or violence, or by threat of force or violence, or by putting in fear robs, steals, or takes a motor vehicle from another person, in the presence of that person, is guilty of carjacking. MCL 750.529a; MSA 28.797(a). Here, there was significant evidence presented at trial that defendant was involved in the carjacking. First, it was undisputed that defendant enabled codefendant to carjack the victim by driving him to the scene. Second, defendant admitted that he got into the victim's car knowing that the codefendant had just carjacked her. Third, defendant's written statement to police indicated that, just prior to the carjacking, he and codefendant needed a new car and they got off the highway to look for one. Finally, there was evidence that, immediately after defendant got into the victim's car, he asked codefendant "Did you get the money?" These facts would more than justify a rational trier of fact in finding that the carjacking was planned and that defendant actively participated in the crime.

Defendant next argues that there was no evidence that he was armed. This argument is without merit. The victim clearly testified that defendant was in possession of the gun at various points

throughout the entire ordeal. Although both defendant and the codefendant testified that defendant never had possession of the gun, questions of credibility are for the trier of fact. *People v Daniels*,172 Mich App 374, 378; 431 NW2d 846 (1988).

Defendant also argues that there was insufficient evidence to convict him of first-degree criminal sexual conduct. He contends that there was no evidence that he was armed with a weapon when he committed the sexual assault or that he committed the sexual assault under circumstances involving the commission of another felony. Either of these situations is sufficient to elevate third-degree criminal sexual conduct to first-degree. MCL 750.520b(c) and (e); MSA 28.788(2)(c) and (e). Viewed in a light most favorable to the prosecution, the evidence showed that defendant did possess a firearm during the commission of the sexual assaults. In addition, as noted above, the evidence showed that defendant did aid and abet the commission of the carjacking. Thus, there was sufficient evidence on two different theories to support defendant's first-degree criminal sexual conduct convictions.

Finally, defendant argues that his sentences violate the principle of proportionality and are an abuse of discretion. We disagree. Defendant was sentenced to life imprisonment on each of the first-degree criminal sexual conduct convictions. Under the sentencing guidelines, defendant's recommended minimum sentence on those convictions was fifteen to thirty years' imprisonment. There are no sentencing guidelines for carjacking. *People v Edgett*, 220 Mich App 686, 690; 560 NW2d 360 (1996).

It is clear that a sentence may exceed sentencing guidelines where there are aggravating factors not taken into account by the guidelines or a guideline score is generated that is in excess of the highest possible grid. *People v Merriweather*, 447 Mich 799, 807-808; 527 NW2d 460 (1994); *People v Watkins*, 209 Mich App 1, 6; 530 NW2d 111 (1995). Both factors are present in this case. The total number of points assessed for offense severity was more than twice the amount needed for placement in the highest category. There were also aggravating factors not provided for in the sentencing guidelines, including the fact that the victim was repeatedly raped in front of her two children and the resulting psychological trauma to the victim's three-year-old daughter. These factors are appropriate considerations at sentencing because they reflect the nature and severity of the crime, as well as the effect of the crime on the victim. *People v Hunter*, 176 Mich App 319, 321; 439 NW2d 334 (1989), *People v Girardin*, 165 Mich App 264, 266; 418 NW2d 453 (1987). A sentencing court may also consider a defendant's conduct during trial. *People v Ahumada*, 222 Mich App 612, 617; 564 NW2d 188 (1997), lv pending; *People v Syakovich*, 182 Mich App 85, 90-91; 452 NW2d 211 (1989). In this case, as defendant was being taken out of the courtroom after being found guilty, he looked at the victim and stated, "Just give me two years, I'll be back." The trial court properly considered this remark when imposing sentence.

The trial court took all these factors into consideration and determined that defendant was mean, vicious, expressed no remorse, and was a continuing danger to the victim and to society. Under these circumstances, the trial court did not abuse its discretion in exceeding the sentencing guidelines' recommended range. These were heinous crimes, and defendant's sentences are proportionate.

Affirmed.

/s/ David H. Sawyer
/s/ Myron H. Wahls
/s/ Maureen Pulte Reilly