

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAWN HUNLEY,

Defendant-Appellant.

UNPUBLISHED

December 4, 1998

No. 201874

Recorder's Court

LC No. 96-501879

Before: O'Connell, P.J., and Gribbs and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for kidnapping, MCL 750.349; MSA 28.581, and first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2). Defendant was sentenced to concurrent terms of ten to twenty-five years' imprisonment for each offense. We affirm.

I

Defendant contends that his kidnapping conviction must be reversed because the prosecution presented insufficient evidence of asportation to support the verdict. We disagree. When reviewing the sufficiency of evidence in a criminal case, we examine the evidence of record in the light most favorable to the prosecution and determine whether a rational trier of fact could conclude that each element of the crime was proved beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). Sufficient evidence to satisfy the asportation element for kidnapping requires that the confinement or movement of the victim not be merely incidental to a lesser underlying crime. *People v Adams*, 389 Mich 222, 237-238; 205 NW2d 415 (1973).

The facts of this case are similar to those of *People v Sawyer*, 222 Mich App 1; 564 NW2d 62 (1997), where the defendant picked up the victim from a location close to home, forced him into a vehicle at gunpoint, and drove for thirty minutes. The victim was then removed from the vehicle, assaulted, put back in the car, and driven for another thirty minutes before being released. *Id.* at 6. This Court held that these facts satisfied the asportation requirement for kidnapping. *Id.* In the case at bar, the victim testified that she was at home in Highland Park when defendant burst in during the early morning hours, wielding a table leg and demanding money. According to the victim, when she did not

give any money to defendant, he and an unidentified friend took her outside, placed her in the trunk of a car, drove to a wooded area, then sexually assaulted her. The victim continued that she was then beaten with a stick, placed back in the trunk, and driven to a place in Livonia where she was finally released. The course of conduct to which the victim attested involved forcible movement of the victim far beyond what could be considered merely incidental to the sexual assault. We conclude that this evidence well supports a finding that defendant's conduct satisfied the asportation element of kidnapping.

II

Defendant next argues that his convictions should be reversed because the trial court failed to preserve his right to a unanimous verdict. Although the court provided a general instruction on the need for a unanimous verdict, the court did not specifically instruct the jury that in order to convict defendant of first-degree criminal sexual conduct it had to agree unanimously that at least one particular act of penetration had occurred of the three alleged. Defendant did not object to the jury instructions given at trial, thereby failing to preserve this issue for appellate review. MCL 769.26; MSA 28.1096; *People v Paquette*, 214 Mich App 336, 339; 543 NW2d 342 (1995). Accordingly, appellate review is waived absent manifest injustice. *Id.* We find no manifest injustice here. We further conclude that defendant would not be entitled to relief even if he had objected to the instructions given at trial.

Defendant cites *People v Yarger*, 193 Mich App 532; 485 NW2d 119 (1992), for the proposition that that it is error requiring reversal for a trial court to allow a jury to find a defendant guilty of first-degree criminal sexual conduct without requiring the jury to agree unanimously that any one of multiple alleged acts of penetration had occurred. However, bearing more directly on this case are the pronouncements of our Supreme Court in *People v Cooks*, 446 Mich 503; 521 NW2d 275 (1994):

[A] specific unanimity instruction is not required in *all* cases in which more than one act is presented as evidence of the actus reus of a single criminal offense. The critical inquiry is whether either party has presented evidence that *materially* distinguishes any of the alleged multiple acts from the others. In other words, where materially identical evidence is presented with respect to each act, and there is no juror confusion, a general unanimity instruction will suffice. [*Id.* at 512-513 (italics in original).]

The Court elaborated:

[I]f alternative acts allegedly committed by defendant are presented by the state as evidence of the actus reus element of the charged offense, a general instruction to the jury that its decision must be unanimous will be adequate unless 1) the alternative acts are materially distinct (where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives), or 2) there is reason to believe the jurors might be confused or disagree about the factual basis of defendant's guilt. [*Id.* at 524.]

The Court distinguished *Yarger* and related cases from the one at bar by noting that the others concerned “a separate defense or . . . materially distinct evidence of impeachment regarding any particular act,” *Cooks, supra* at 528, concluding that where the sole task for the jury is to determine the credibility of the victim concerning allegations of a single course of conduct, the factual basis for specific unanimity instruction required by *Yarger* and related cases does not exist. *Cooks, supra* at 528-529.

In the instant case, the victim testified that defendant forced her to perform oral sex on him, and that he then forcibly penetrated her vaginally and anally. The victim described a continuous course of conduct, united in time and place. Defendant offered no separate defense to any individual allegation of penetration, nor did he attempt to impeach the victim’s version of events regarding any specific sexual act. Instead, defendant asserted that the sexual acts were consensual, provided as payment of a monetary debt. Accordingly, the jury assessed the credibility of defendant and the victim where the proofs and defenses were identical as concerned all alleged acts of penetration. In light of *Cooks, supra*, we conclude that the evidence at trial would not have justified the specific instruction on unanimity that defendant argues should have been given. There was no instructional error at trial.

III

Finally, defendant argues that resentencing is required, because statements from the bench indicate that the trial court wished to impose a more lenient sentence than the minimum within the applicable guidelines, but refrained from doing so because of an erroneous impression that the court could not sentence defendant below the guidelines without substantial and compelling reasons for a downward departure. Although we agree that the trial court labored under an erroneous belief that it was obliged to impose at least the minimum sentence under the guidelines absent substantial and compelling reasons for departure,¹ we nonetheless conclude that this was harmless error and that resentencing is not in order.

The sentencing guidelines provided for a minimum sentence range of 120 to 300 months, which is what the trial court imposed. Because the sentence is within the guidelines, it is presumed proportionate. *People v Hogan*, 225 Mich App 431, 437; 571 NW2d 737 (1997). In support of his assertion that the court wished to impose a lesser sentence, defendant cites statements from the bench in which the court opined that defendant’s successful return to society would best be assisted by his spending a minimal amount of time in prison. Although this alone does seem to imply that the court may have imposed a more lenient sentence but for its misapprehension concerning the standards for doing so, our review of the full sentencing proceeding persuades us that the court entertained no such temptation.

The trial court described defendant’s criminal conduct as terrorizing and degrading, and noted that defendant did not appear to accept responsibility for his actions. Doubting defendant’s assertion that he had undergone a religious transformation, the court regarded defendant as posing a danger to society. Further, the court did not find defendant’s testimony credible, concluding that defendant had manufactured an elaborate lie to avoid conviction. Finally, the court stated that “[a]ll in all . . . I believe that it is appropriate that a sentence be given in line with the guidelines,” adding that the sentence imposed was harsh enough to show respect for both the victim and for society’s interest in punishment.

Because the court expressly stated that a sentence within the guidelines was appropriate, and expressly concerned itself with the severity of defendant's criminal conduct, defendant's danger to society, and the victim's and society's interest in having defendant punished, defendant's contention that the trial court would have sentenced defendant below the guidelines but for its erroneous understanding of the applicability of the "substantial and compelling" standard is without merit.

Affirmed.

/s/ Peter D. O'Connell

/s/ Roman S. Gibbs

/s/ Michael J. Talbot

¹ The court was perhaps projecting into this case the rule that applies to certain drug offenses. See MCL 333.7401(4); MSA 14.15(7401)(4); *People v Johnson (On Remand)*, 223 Mich App 170, 172; 566 NW2d 28 (1997).