

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT EUGENE COUSINS,

Defendant-Appellant.

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UNPUBLISHED

July 25, 2000

No. 218472

Huron Circuit Court

LC No. 97-003939-FH

Before: Hood, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Following a bench trial, defendant was found guilty, but mentally ill, of first-degree home invasion, MCL 750.110a(2)(b); MSA 28.305(a)(2)(b), assault with intent to commit criminal sexual conduct involving sexual penetration, MCL 750.520g; MSA 28.788(7), first-degree criminal sexual conduct, MCL 750.520b(1)(c); MSA 28.788(2)(1)(c), and second-degree criminal sexual conduct, MCL 750.520c(1)(c); MSA 28.788(3)(1)(c). Defendant was sentenced to ten to twenty years' imprisonment for the home invasion conviction, five to ten years' imprisonment for the assault conviction, fifteen to forty years' imprisonment for the first-degree CSC conviction, and ten to fifteen years' imprisonment for the second-degree CSC conviction. Defendant appeals by leave granted, and we affirm, but remand to the trial court to vacate defendant's conviction for assault with intent to commit criminal sexual conduct involving sexual penetration.

On April 24, 1997, the victim was at home at 10:30 a.m. when she observed a septic truck back into her driveway. Defendant got out of the vehicle and came to the door. Defendant stated that there were reports of gurgling noises in the septic lines. The victim indicated that she had not heard any noise in the lines. Defendant grabbed the door and forced his way into the victim's home. Defendant grabbed the victim and attempted to remove her pants. The two struggled, and defendant began to strike the victim harder and more frequently. He pulled at her hair and choked her. Defendant forced the victim to engage in sexual acts. He then asked for hot water and food. When defendant entered the bathroom, the victim fled from the home. The victim and her daughter were able to describe the vehicle driven by defendant. Defendant was seen driving from the victim's home at a high rate of speed. A neighbor attempted to slow defendant down and followed defendant's vehicle for a time. Defendant

ultimately parked his vehicle behind a structure and slept. He was apprehended by police when found in his truck sleeping.

At trial, defendant asserted that he was insane at the time of the offenses. Family members reported that he had been previously hospitalized for his erratic behavior and religious interests. Although defendant was prescribed medication, his family did not believe that he had been taking the medication as prescribed. Defendant's ex-wife testified that his behavior was a contributing factor to their divorce. Additionally, Dr. Kenneth Bertram testified on behalf of defendant. However, he could not conclusively opine that defendant was insane at the time of the offenses. A forensic evaluation by Dr. Judith Thompson was also submitted to the court. Dr. Thompson concluded that, despite mental illness, defendant did not meet the statutory criteria for legal insanity. The trial court found defendant guilty, but mentally ill, of all charges.

Defendant first argues that the trial court erred in concluding that defendant was criminally responsible when the evidence demonstrated that defendant was "psychotic and mentally ill" at the time of the offenses. We disagree. Questions of law and questions of the application of law to the facts receive de novo review. *People v Barrera*, 451 Mich 261, 269 n 7; 547 NW2d 280 (1996). However, a trial court's findings of fact are reviewed under the clearly erroneous standard. *Id.* Review of the forensic evaluations reveals that Dr. Bertram could not conclude that defendant was insane at the time that he committed the crimes. Furthermore, Dr. Thompson concluded that defendant did not meet the criteria for insanity. While the evidence indicated that defendant did suffer from mental illness, his conduct on the day of the offenses was purposeful. He lied to the victim regarding the condition of her septic tank, then forced his way into the victim's home where he sexually assaulted her. Defendant then left the scene at a high rate of speed, despite being chased by a neighbor, and found a hidden place to sleep. When apprehended defendant denied that any sexual act had occurred, but later told police that the victim "wanted" him. We cannot conclude that the trial court's factual findings were clearly erroneous. *Barrera, supra*. Defendant's contention, that the facts clearly demonstrated insanity, is without merit.

Defendant next argues that his convictions for assault with intent to commit sexual penetration and second-degree criminal sexual conduct violate double jeopardy. We agree. The Legislature may authorize penalties for what otherwise would be the same offense, and cumulative punishment for the same conduct does not necessarily violate the prohibition against double jeopardy. *People v Lugo*, 214 Mich App 699, 706; 542 NW2d 921 (1995). The key inquiry is whether the Legislature intended to impose cumulative punishment for similar crimes. We consider whether the statute prohibits conduct violative of a social norm distinct from the norm protected by the other, the amount of punishment authorized by each statute, whether the statutes are hierarchical or cumulative, and other facts demonstrating legislative intent. *Id.* The two statutes in question are hierarchical in structure and take into account aggravating factors in the commission of sexual assault. *People v Campbell*, 165 Mich App 1, 7; 418 NW2d 404 (1987). Therefore, we vacate the assault with intent to commit sexual penetration conviction. *Id.*

Defendant next argues that the trial court erred in scoring OV 7 at five points and that the trial court's bias influenced sentencing. We disagree. "Appellate courts are not to interpret the guidelines or

to score and rescore the variables for offenses and prior record to determine if they were correctly applied.” *People v Raby*, 456 Mich 487, 498; 572 NW2d 644 (1998). In any event, we note that the removal of the five points has no impact on the offense variable scoring. Defendant’s claim of bias cannot prevail because of his failure to preserve this issue for appellate review by moving for disqualification as required by MCR 2.003(C)(1). *People v Mixon*, 170 Mich App 508, 514; 429 NW2d 197 (1988), modified 433 Mich 852 (1989).

Affirmed and remanded to the trial court to vacate defendant’s conviction for assault with intent to commit criminal sexual conduct involving sexual penetration. We do not retain jurisdiction.

/s/ Harold Hood

/s/ David H. Sawyer

/s/ Mark J. Cavanagh