STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 24, 2004
v	No. 247656 Oakland Circuit Court
AARON RAY STEPHENS, Defendant-Appellant.	LC No. 2002-186598-FH

Before: Griffin, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction of third-degree criminal sexual conduct in violation of MCL 750.520d(1)(a). Defendant was sentenced to thirty months to fifteen years' imprisonment. We affirm defendant's conviction and sentence, but remand for the ministerial task of amending the judgment of sentence to reflect fourteen additional days of credit.

Defendant first asserts that his conviction must be reversed because the prosecution did not present sufficient evidence of the element of penetration. We disagree. A claim that evidence was insufficient to support a conviction raises an issue of law that is reviewed by this Court de novo. *People v Leuth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). When reviewing the sufficiency of the evidence, this Court must "view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002), quoting *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended on other grounds 441 Mich 1201 (1992). However, appellate courts must not interfere with the role of the jury, which is in a better position to determine the weight and credibility to be afforded the testimony of witnesses. *Wolfe*, *supra* at 514-515. Therefore, "[q]uestions of credibility are left to the trier of fact and will not be resolved anew by this Court." *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

Under MCL 750.520d(1)(a), a person is guilty of third-degree criminal sexual conduct (CSC III) if the person engaged in sexual penetration with another person and that person is between the ages of thirteen and sixteen. *In re Hawley*, 238 Mich App 509, 512; 606 NW2d 50 (1999). In the present case, defendant does not dispute that the victim was thirteen years of age at the time of the incident, but asserts that the prosecution did not present sufficient evidence that penetration occurred. MCL 750.520a(o) defines sexual penetration as "sexual intercourse,

cunnilingus, fellatio, anal intercourse, or any other 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."

Defendant asserts that because the nurse who examined the victim testified that the victim's hymen was still intact and that she could not confirm that an injury she discovered on the victim's hymen was the result of penetration by defendant, and because there was no evidence introduced at trial that semen stains found on the victim's underwear were subjected to DNA testing to show that the semen had come from defendant, there was no physical evidence to corroborate the victim's testimony that defendant had penetrated her. However, MCL 750.520h provides that "[t]he testimony of a victim need not be corroborated in prosecutions under sections 520b to 520g," and our Supreme Court has recognized that "[i]t is a well established rule that a jury may convict on the uncorroborated evidence of a CSC victim." *People v Lemmon*, 456 Mich 625, 643 n 22; 576 NW2d 129 (1998).

Defendant also contends that, without physical evidence to corroborate it, the victim's testimony alone is insufficient to support his conviction because she is not credible based on her inability to recall certain events that occurred on the night of the incident. However, as stated above, this Court will not review questions of credibility because they are within the province of the trier of fact. *Avant*, *supra* at 506. Moreover, although defendant correctly asserts that there was no physical evidence introduced to identify him as the source of the semen found on the victim's underwear, the victim's testimony was not completely uncorroborated because the officer in charge of the case testified that, during an interview, defendant admitted to having penetrated the victim.

Defendant next asserts that the trial court erred by reading CJI2d 4.4, which pertains to flight, to the jury because the evidence introduced at trial did not support it.[1] Again, we disagree. Generally, this Court reviews a defendant's claim of an erroneous jury instruction de novo. *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002). However, "[t]he determination whether a jury instruction is applicable to the facts of the case lies within the sound discretion of the trial court." *Id*.; see also *People v Ho*, 231 Mich App 178, 188-189; 585 NW2d 357 (1998).

[1] The prosecution asserts that defendant has waived this issue because the trial court presented the parties with the proposed instructions to review during a break in proceedings on the second day of trial and, after the break, defendant stated that he had no objections. A party must make a specific objection on the record in order to preserve the issue of whether a trial court erred in giving or failing to give a jury instruction. MCR 2.516(C); *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000). In order to be timely, the objection must be made before the jury retires to consider the verdict. MCR 2.516(C). The record reveals that, despite his earlier acquiescence to the instructions, defendant specifically objected to the court's proposal to read CJI2d 4.4 on the ground that it was not supported by the evidence after the parties' closing arguments and before the court instructed the jury. Therefore, this issue is preserved.

Jury instructions are reviewed for error in their entirety, must include all of the elements of the crime charged, and "must not exclude material issues, defenses, and theories if the evidence supports them." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). "To give a particular instruction to a jury, it is necessary that there be evidence to support the giving of that instruction." *People v Johnson*, 171 Mich App 801, 804; 430 NW2d 828 (1988). Therefore, trial courts are permitted to read CJI2d 4.4 to the jury in order to enable it to determine whether the defendant did flee and, if so, whether his flight was because of a consciousness of guilt, so long as there is evidence presented at trial to support the giving of the instruction. *Id*. However, in order for the trial court's decision to instruct the jury as to flight to be appropriate, the evidence at trial must indicate not only that the defendant left the scene of a crime or departed, but that the defendant did so because of the fear of apprehension. *People v Hall*, 174 Mich App 686, 691; 436 NW2d 446 (1989).

In the present case, Officer Christopher Bellang testified that he saw Tiffany Bunch, a friend of the victim, standing on the corner of Premont and Lynn Streets with two white men while he was waiting at defendant's apartment for a search warrant to arrive, and that he recognized one of the men as possibly being defendant. Bellang stated that, although he did not call to defendant or try to get his attention, he started driving toward the corner in a fully marked police car and, when he was approximately three hundred feet from the corner, Bunch, who was standing next to defendant, pointed to Bellang and defendant "took off running." Thereafter, Bellang stated that he caught up to defendant and told him that he wanted to talk to him, after which defendant turned around and did so. When asked whether defendant stopped running at this point, Bellang stated, "I ran up and grabbed his arm, yes," and that defendant did not attempt to resist him or break free at that point.

Defendant also testified that the victim's mother and stepmother came to his apartment looking for the victim. After he told them that he did not know the victim and that she was not in his apartment, they searched his apartment without finding the victim, and told him that they had called the police and that he could not leave until they arrived. However, defendant testified that he "was like watch me" and started walking down the street as one of them followed him in a car. Defendant testified that he eventually took off running and lost her. Defendant then went to his father's house for approximately an hour, but his father advised him to return to the apartment. Defendant testified that he met Bunch and his friend Toby on the corner of Premont and Lynn Streets while on his way back to his apartment, and when he asked Bunch what she was looking at, she pointed to the police at his apartment. Defendant then stated, "And I was like oh, turned around and walked the other way. And I heard a car engine rev up real loud and as I hit the corner I heard it hit the corner with me and I stopped and he said police officer said [sic] is your name Aaron Stephens. I said yes it is. He took me by the arm and put me in the back of the car."

Based on defendant's own testimony, as well as that of Officer Bellang and the victim's mother, we conclude that sufficient evidence was presented at trial to warrant the court giving the flight instruction to the jury for a determination whether defendant did, in fact, flee and whether his flight was based on a consciousness of guilt. See *Johnson, supra* at 804.

Defendant next asserts that the present case must be remanded for resentencing because the trial court inappropriately scored ten points for OV 10 (exploitation of a vulnerable victim) and one point for OV 12 (contemporaneous felonious criminal acts).[2] "This Court properly reviews a defendant's sentence for an abuse of discretion." *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Our review of the transcript of the sentencing hearing reveals that the trial court only scored five points for OV 10 and did not score OV 12. However, apparently because of a clerical error, it appears that the trial court stamped a sentencing information report prepared by the Department of Corrections and submitted it to the trial court as a recommendation, instead of completing a new one accurately indicating the scoring of OV 10 and OV 12. But, the sentencing information report also does not indicate that the trial court scored ten points for OV 4,[3] which defendant has not challenged in his appeal to this Court. Thus, defendant's correct offense variable total is fifteen points, which is four points higher than the eleven currently stated in the sentencing information report. Under MCL 777.63, OV level II applies to a score of ten to twenty-four points. Therefore, any error was harmless, and defendant's sentence must be affirmed. MCL 769.34(10); *People v Ratkov (After Remand)*, 201 Mich App 123, 127; 505 NW2d 886 (1993), remanded 447 Mich 984 (1994).

Defendant next asserts that the judgment of sentence must be amended to reflect fourteen additional days of credit for time served. We agree. The question of whether a defendant was inappropriately denied credit for time served in jail before sentencing as provided in MCL 769.11b is an issue of law that is reviewed de novo. *People v Givans*, 227 Mich App 113, 124; 575 NW2d 84 (1997). In the present case, the presentence investigation report recommended that defendant receive credit for 157 days for time served. However, at the sentencing hearing, defendant asserted that he should receive 171 days' credit instead of 157 because his sentencing hearing was delayed for two weeks. The prosecution did not object to defendant's assertion, and

---

[2] MCL 777.40 applies to the exploitation of a vulnerable victim. Under MCL 770.40(1)(b), a defendant is to be scored ten points for OV 10 if the trial court finds that "[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." MCL 770.40(1)(c) provides for a score of five points if the trial court finds that "[t]he offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious." MCL 777.40(3)(b) states that "[e]xploit means to manipulate a victim for selfish or unethical purposes." MCL 777.40(2) states, "[t]he mere existence of 1 or more factors described in subsection (1) does not automatically equate with victim vulnerability." See also *People v Harmon*, 248 Mich App 522; 640 NW2d 314 (2001). Under MCL 777.42(1)(f), a score of one point is appropriate for OV 12 where the trial court finds that the defendant committed "[o]ne contemporaneous felonious criminal act involving any other crime . . . ."

[3] Under MCL 777.34(1)(a) and (2), OV 4 is to be scored at ten points if the court finds that the victim suffered "serious psychological injury [that] may require professional treatment."

the trial court stated that defendant was entitled to 171 days' credit when imposing defendant's sentence. However, apparently because of a clerical error, the judgment of sentence states that defendant is entitled to only 157 days' credit. A trial court must grant a defendant credit against his sentence for any time that he has served in jail before sentencing as a result of his having been denied, or unable to furnish, bond. MCL 769.11b; *People v Lyles*, 76 Mich App 688, 690; 257 NW2d 220 (1977). Therefore, we remand this case to the trial court in order for the judgment of sentence to be amended. Because the prosecutor does not dispute the amount, the amended judgment of sentence should reflect fourteen additional days of credit, or 171 days. *Brinson v Genesee Circuit Judge*, 403 Mich 676, 687; 272 NW2d 513 (1978).

Defendant's conviction and sentence are affirmed and the case is remanded for the ministerial task of amending the judgment of sentence to specify fourteen days of additional credit. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood