STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 19, 2006
v	No. 262688 Macomb Circuit Court
TODD MICHAEL BAZZY, Defendant-Appellant.	LC No. 04-000337-FH

Before: Wilder, P.J., and Kelly and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e(1)(b) (sexual contact accomplished by the use of force or coercion). Defendant was originally sentenced as a fourth habitual offender, MCL 769.12, to 16 months' to 10 years' imprisonment, but was subsequently resentenced as a third habitual offender, MCL 769.11, to 16 months' to 4 years' imprisonment. We affirm defendant's conviction and sentence, but remand for correction of the judgment of sentence and presentence investigation report (PSIR).

This case arises out of an incident between defendant and a cashier at Home Depot. On June 26, 2003, the victim was working as a cashier at a Home Depot store in Shelby Township in the garden center of the store. Around 10:30 a.m., defendant entered the garden center from the parking lot. When defendant entered, the victim greeted him and asked if he needed any help. After the victim greeted defendant, defendant asked victim for her phone number. When the victim ignored this question, defendant made a sexually provocative statement about the victim. Feeling uncomfortable because she was alone in the garden center, she called the head cashier, who sent another employee into the garden center. Later, defendant returned to the victim's cash register in the garden center to purchase two boxes of nails. As she turned to walk toward the register, defendant drew close to victim's ear and told her that he wanted to take her home with him, and made more sexually provocative statements about her. Defendant then grabbed the victim's buttocks. She was certain that defendant's hand, rather than his hip touched her buttocks because she could feel his palm and five fingers. In response, the victim turned around, said "excuse me," and walked behind her register. While the victim was completing defendant's purchase, defendant continued to tell her that he wanted to take her home and again engaged in sexually provocative language aimed at the victim. The victim eventually asked defendant to

leave, set his bag on the counter and walked away to find someone to assist defendant. The next day, June 27, 2003, she saw defendant walk in the front area of the store.

On July 30, 2003, detective Terrance Hogan interviewed defendant. After waiving his rights, defendant told Hogan that he had asked a female cashier out on a date, but that she "spurned him, and wronged him" by rudely rejecting his advances. Defendant admitted to the police that he had made some of the sexually provocative statements that the victim contends he made. Defendant initially denied touching the victim, but later admitted that his hip may have accidentally touched her buttocks. Hogan noted that at no point during the interview did he advise defendant of the body part that the victim alleged defendant had touched. Defendant also claimed that the victim was trying to set him up because she did not like how he had talked to her and told Hogan that he "could not wait to get that (expletive) up on the stand."

On appeal, defendant argues that the evidence was insufficient to support his conviction. Due process requires the evidence to show guilt beyond a reasonable doubt to sustain a conviction. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). In determining the sufficiency of the evidence, this Court reviews the evidence de novo in the light most favorable to the prosecution. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005); *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). This Court does not consider whether any evidence existed that could support a conviction, but rather, must determine whether a rational trier of fact could find that the evidence proved the essential elements of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992), citing *People v Hampton*, 407 Mich 354, 366; 285 NW2d 284 (1979).

"A defendant can be found guilty of criminal sexual conduct in the fourth degree if he engages in sexual contact with another person and force or coercion is used to accomplish a sexual contact." *People v Lasky*, 157 Mich App 265, 271; 403 NW2d 117 (1987); see also MCL 750.520e(1)(b). Sexual contact is defined as "the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification . . . ." MCL 750.520a(o); *People v Russell*, 266 Mich App 307, 311; 703 NW2d 107 (2005). Intimate parts include the buttocks. MCL 750.520a(c). The element of force or coercion may be satisfied "when the actor overcomes the victim through the actual application of physical force or violence," MCL 750.520e(1)(b)(i), or "when the actor achieves the sexual contact through concealment or by the element of surprise," MCL 750.520e(1)(b)(v).

Here, the victim explained that she could feel defendant's palm and five fingers touch her buttocks when he returned to the garden area at Home Depot to purchase some nails. Further, defendant waited to touch the victim until she had her back turned to him and was walking toward the cash register. Given that "[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime," *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999), it is reasonable to infer that defendant intentionally touched the victim's intimate parts and that his action surprised her. Moreover, in light of defendant's repeated explicit sexual references to the victim, it is reasonable to infer that defendant touched the victim for the purpose of sexual arousal or gratification.

Although defendant argues that the security videotape does not show the touching and that the victim admitted that she did not like defendant, the Michigan criminal sexual conduct statute provides that "the testimony of a victim need not be corroborated in prosecutions under sections [750.]520b to 520g." MCL 750.520h; see also *People v Lemmon*, 456 Mich 625, 632 n 6; 576 NW2d 129 (1998). Further, it is the role of the jury, rather than this Court, to assess witness credibility. *Wolfe*, *supra* at 514-515. Therefore, sufficient evidence exists to support defendant's CSC IV conviction.

Defendant also contends that the Probation Department failed to correct several mistakes in the PSIR. We agree that defendant is entitled to a correction of the PSIR with respect to all but two of his challenges. "We review the sentencing court's response to a claim of inaccuracies in defendant's PSIR for an abuse of discretion." *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003). A "[d]efendant has the right to the use of accurate information at sentencing, and a court must respond to allegations of inaccuracies." *People v McAllister*, 241 Mich App 466, 473; 616 NW2d 203 (2000). In responding to an allegation, a court may "determine the accuracy of the information, accept the defendant's version, or simply disregard the challenged information." *Spanke*, *supra* at 648. If a court chooses the last option, it "must clearly indicate that it did not consider the alleged inaccuracy in determining the sentence." *Id*. at 649. A court must correct or delete any information from the PSIR it finds inaccurate or irrelevant before sending it to the Michigan Department of Corrections ("MDOC."). *Id*.

At sentencing, defendant claimed that: (1) the "Prior Record" incorrectly listed the number of misdemeanors as 16 rather than 14; (2) the "Evaluation and Plan" under the "New Conviction Update Report" listed 12 assaultive crimes rather than 8 and should have specified that defendant had assaulted only two women; (3) the "New Conviction Update Report" should not have listed his seventh conviction because that offense was already accounted for by his eighth conviction;[1] and (4) the "New Conviction Update Report" provided information pertaining to a personal protection order ("PPO") that was unrelated to this case. Further, in a motion for resentencing, defendant noted that he was erroneously sentenced as a fourth habitual offender on the basis of an offense that had occurred after the instant offense. Later, in a second motion for resentencing, defendant claimed that the PSIR incorrectly listed his jail credit as 270 days.

The trial court subsequently ordered that the PSIR be changed to reflect all of defendant's challenges except those pertaining to defendant's seventh conviction and the PPO. The trial court also amended defendant's maximum sentence from ten to four years' imprisonment and ordered that the PSIR reflect that defendant's jail credit was changed from 270 to 313 days.

Regarding the seventh conviction, the trial court indicated that it did not share the same offense date as the eighth conviction. Therefore, the court properly determined that the PSIR should not be changed. In addition, the trial court explained that information regarding the PPO was properly included in the PSIR because it is unnecessary that the PPO be related to the specific case at hand for its inclusion in the PSIR to be proper. Given that the PSIR "is presumed

[1] Defendant's seventh and eighth convictions pertained to domestic violence offenses.

to be accurate and may be relied on by the trial court unless effectively challenged by the defendant," *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003), and defendant failed to "deny, explain, or refute any evidence or information pertaining to the [defendant's] prior conviction or convictions before defendant's sentence [was] imposed" as required by MCL 769.13(6), the trial court properly disregarded these challenges in amending the PSIR.

Notwithstanding these corrections, none of the changes ordered by the trial court appear in the corrected PSIR. Therefore, the following changes should be made:

> 1) Page one of the "Prior Record" and page one of "Evaluation and Plan" should report 14 prior misdemeanors;
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> 2) Page one of the "New Conviction Update Report" under "Evaluation and Plan" should report a history of eight assaultive crimes;
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> 3) Pages 2 and 12 of the "New Conviction Update Report" under "Evaluation and Plan," page one under "Current Conviction(s)," and page one of the "Basic Information Report" under "Current Offense(s)" should report 313 days' jail credit;
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> 4) Paragraph seven of page one of "Evaluation and Plan" should indicate, after referring to defendant as "highly assaultive with many of his assaults focusing on women or friends," that defendant claims only two crimes were perpetrated against women;
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> 5) Page one under "Current Conviction(s)" and page one of the "Basic Information Report" under "Current Offense(s)" should report a four-year maximum sentence.

We also note that the "New Conviction Update Report" lists conviction number 21 as an assault with the conviction date "pending." However, at the resentencing hearing, the trial court ordered the PSIR corrected to describe the charge as *nolo prosequi* because the prosecution had agreed to dismiss this charge without prejudice. Therefore, we order that the trial court amend the PSIR to reflect this change as well. *Spanke*, *supra* at 650.

Defendant next argues that the trial court erred in granting him only 313 days' jail credit. However, at the resentencing hearing, defense counsel agreed that the jail credit awarded was appropriate. Therefore, defendant has waived this issue and we need not address it. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Notwithstanding this, we note that the amended judgment of sentence incorrectly lists defendant's conviction date as March 31, 2005. Therefore, we remand so that the judgment of sentence may be corrected to indicate defendant's conviction date as February 25, 2005.

Defendant also filed a supplemental pro per brief raising two issues. First defendant contends that the prosecution offered the surveillance video to "get the complainant to say exactly what he wanted her to say." Defendant asserts that given this purpose, the video tape should not have been introduced into evidence. Because a decision of the trial court to admit evidence is reviewed for an abuse of discretion, *People v Washington*, 468 Mich 667, 670; 664

NW2d 203 (2003), and because defendant has failed to even demonstrate that the trial court erred in its admission of the video tape, we find the defendant's argument to be without merit.

Lastly, defendant argues in his pro per brief that he was denied effective assistance of counsel. Here, defendant makes a number of assertions why defense counsel was ineffective. However, none of defendant's assertions regarding this claim have merit. Accordingly, we reject defendant's assertions of ineffective assistance of counsel.

We affirm defendant's conviction and sentence, but remand this matter for correction of the judgment of sentence and PSIR.

/s/ Kurtis T. Wilder
/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello