

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH WAYNE RIDEAUX,

Defendant-Appellant.

UNPUBLISHED

March 12, 2009

No. 281533

Oakland Circuit Court

LC No. 2006-211649-FH

Before: Jansen, P.J., and Borrello and Stephens, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of two counts of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(b), for which he was sentenced as a fourth habitual offender, MCL 769.12, to concurrent sentences of 10 to 30 years in prison.¹ We affirm.

Defendant argues that the prosecution presented insufficient evidence to allow a rational jury to find him guilty of CSC III beyond a reasonable doubt. We disagree. We review sufficiency-of-the-evidence claims in a light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). Appellate courts are not juries, and even when reviewing the sufficiency of the evidence, they must not interfere with the jury's role. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992).

Viewing the evidence presented in this case in a light most favorable to the prosecution, we conclude that the prosecution presented sufficient evidence for a rational jury to conclude beyond a reasonable doubt that defendant committed two counts of CSC III. MCL 750.520d provides in relevant part:

¹ At the time of sentencing, defendant was on supervised release for an unrelated federal charge. Therefore, the trial court ordered that the CSC III sentences be served consecutively to the prior federal sentence.

(1) A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exist:

* * *

(b) Force of coercion is used to accomplish the penetration. . . .

Sexual penetration includes sexual intercourse and fellatio. MCL 750.520a(r). In CSC cases, the victim's testimony need not be corroborated by other evidence in order to support a conviction. MCL 750.520h; *People v Lemmon*, 456 Mich 625, 632 n 6; 576 NW2d 129 (1998).

A rational jury could have found that defendant engaged in two acts of forcible sexual penetration with the victim. The victim testified to an act of fellatio and an act of vaginal intercourse. Additionally, she testified that force was used when defendant threatened her with bodily harm. The jury heard the direct testimony of the victim, which established all of the elements of the crimes and identified defendant as the perpetrator. While there was no corroborating testimony or physical evidence, this does not render defendant's convictions infirm. MCL 750.520h; *Lemmon*, 456 Mich at 632 n 6. Although the victim wavered on the issue whether a knife was used during the attack, she consistently stated that defendant pulled her by the arm, dragged her into the basement of a home, and threatened to "cut her head off" and "make her dead" or "wish she was dead" if she didn't comply with his demands. The jury determined that the victim's testimony was credible. The jury is "free to believe or disbelieve, in whole or in part, any of the evidence presented at trial." *People v Eisenberg*, 72 Mich App 106, 115; 249 NW2d 313 (1976). "This Court does not weigh the competing evidence; that is the jury's function." *People v Unger*, 278 Mich App 210, 228; 749 NW2d 272 (2008). We conclude that the evidence was sufficient to support defendant's CSC III convictions.

Defendant also argues that his sentences of 10 to 30 years in prison violate federal and state guarantees against cruel and unusual punishment, US Const, Am VIII, Const 1963, art 1, § 16, because they are disproportionate to the offenses and are based on unreliable evidence. Defendant's minimum sentence of 120 months, however, was well within the recommended minimum sentence range under the legislative guidelines. Michigan Sentencing Guidelines Manual (2008 edition), p 90. Accordingly, the sentences are presumptively proportionate to the offenses and do not constitute cruel and unusual punishment. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). Indeed, this Court must affirm a sentence that falls within the appropriate guidelines range absent an error in the scoring of the guidelines or the trial court's reliance on inaccurate information. MCL 769.34(10).

Defendant cursorily suggests that he was improperly sentenced as a fourth habitual offender because the trial court did not adequately verify the accuracy of the underlying felony convictions upon which the sentencing enhancement was based. A defendant may not challenge for the first time on appeal the validity of the underlying convictions used to support his habitual offender enhancement. MCL 769.34(10); *People v Jones*, 83 Mich App 559, 568; 269 NW2d 224 (1978); *People Mays*, 77 Mich App 389, 390-391; 258 NW2d 87 (1977); *People v Covington*, 70 Mich App 188, 195; 245 NW2d 558 (1976). At any rate, any error in this regard was plainly harmless because defendant's actual minimum sentence was no longer than it might

have been had he been sentenced as a first-time offender only. Because defendant was a fourth habitual offender, MCL 769.12, the guidelines provided for a minimum range of 87 to 290 months. MCL 777.63; MCL 777.21(3)(c); Michigan Sentencing Guidelines Manual (2008 edition), p 90. But defendant's actual minimum sentence of 120 months would still have fallen squarely within the guidelines range of 87 to 145 months even if defendant had been sentenced as a first-time offender only. MCL 777.63; Michigan Sentencing Guidelines Manual (2008 edition), p 90.

Lastly, defendant contends that the trial court erred by denying his motion for a downward departure from the guidelines. This issue has not been properly presented for review because it was not raised in defendant's statement of the questions presented. MCR 7.212(C)(5); *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999). Nevertheless, we find that the trial court did not err when it denied defendant's motion for a downward departure in this case. Defendant did not identify below, nor has he identified on appeal, any substantial and compelling reasons that would have justified a downward departure. *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003). Finally, as noted previously, the trial court could have imposed much harsher sentences in this case based on defendant's fourth habitual offender status, but did not do so. We perceive no error with respect to this issue.

Affirmed.

/s/ Kathleen Jansen
/s/ Stephen L. Borrello
/s/ Cynthia Diane Stephens