

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN LEE THOMAS,

Defendant-Appellant.

UNPUBLISHED

July 22, 2010

No. 290238

Genesee Circuit Court

LC No. 08-022267-FC

Before: SAAD, P.J., and HOEKSTRA and SERVITTO, JJ.

PER CURIAM.

A jury convicted defendant of eight counts of first-degree criminal sexual conduct, MCL 750.520b, three counts of carjacking, MCL 750.529a, armed robbery, MCL 750.529, assault with intent to do great bodily harm less than murder, MCL 750.84, three counts of kidnapping, MCL 750.349, and two counts of unarmed robbery, MCL 750.530. The trial court sentenced defendant as an habitual offender, third offense, MCL 769.11, to concurrent prison terms of 562 to 843 months each for the first-degree CSC, armed robbery, and kidnapping convictions, 100 to 240 months for the assault conviction, and 12 to 30 years for each unarmed robbery conviction, to be served consecutive to concurrent terms of 120 to 240 months for each carjacking conviction. For the reasons sent forth below, we affirm.

I. SUFFICIENCY OF THE EVIDENCE

The jury convicted defendant of a series of offenses he committed against three victims. Defendant contends that there was insufficient evidence to support his three carjacking convictions because the prosecution failed to show his intent to permanently deprive each victim of her motor vehicle.

To determine whether the prosecution offered sufficient evidence to support a conviction, this Court views the evidence in a light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). We will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Id.* Rather, "a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

The elements of carjacking are: (1) the defendant used force or violence against or assaulted the victim, (2) the defendant did so while he was in the course of committing a larceny of a motor vehicle, and (3) the victim was the operator, passenger, or person in lawful possession of the motor vehicle. MCL 750.529a(1); CJI2d 18.4a. In this context, larceny is “the taking and movement of someone else’s motor vehicle with the intent to take it away from that person permanently.” CJI2d 18.4a(3). The law does not require, in a literal sense, that a defendant intend to permanently deprive the owner of the property; lack of purpose to return property taken within a reasonable time is sufficient. See *People v Jones*, 98 Mich App 421, 425-426; 296 NW2d 268 (1980). “Because it is difficult to prove an actor’s state of mind, only minimal circumstantial evidence is required.” *People v McGhee*, 268 Mich App 600, 623; 709 NW2d 595 (2005).

Evidence showed that defendant forcefully took JE’s car while he attempted to abduct her from the Genesee Valley Mall parking lot. Though defendant argues that his only intent in taking JE’s car was to use it to sexually assault her, defendant drove off in the car even after JE escaped from the vehicle. Defendant counters that he did not keep JE’s car, but instead returned it to the parking lot at the Courtland Center Mall. However, if defendant attempted to return the property, this would not absolve him of the criminal consequences of his acts because a crime involving larceny is complete once a taking has been accomplished. In any event, the evidence supported an inference that defendant did not return the property to its owner. Defendant took the vehicle from the mall parking lot, and it was found in the parking lot of a different mall the following day. Further evidence showed that defendant kept the car keys and asked two different people if they were interested in buying a stolen car. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the jury to find that defendant intended to permanently deprive JE of her vehicle.

With regard to the vehicles driven by the other victims, SF and KL, defendant again argues that the evidence did not show his intent to permanently deprive each victim of her vehicle. However, evidence showed that defendant forcefully took the victims’ cars for a significant period of time, thereby depriving them of their rightful use and enjoyment during that time. Defendant drove the vehicles to a restaurant to purchase food, drove the cars to banks where he directed the victims to withdraw money, and drove the cars to a store to purchase cigarettes before driving to a remote location where he sexually assaulted the victims. Further, defendant instructed both victims that they were required to comply with his sexual requests in order to be released. When releasing KL, defendant referred to himself as keeping “up his end of the bargain.” If a defendant retains property with the intent to restore it only if the owner purchases it back or pays a reward or other compensation for the property’s return, this satisfies the larceny element of the statute. See *Jones*, 98 Mich App at 425-426. Again, the prosecution showed that defendant used force and violence to take the victims’ vehicles and that he did not intend to return the vehicles or release the victims until he accomplished his sexual assaults. This evidence enabled the jury to reasonably find that defendant did not intend to restore the victims’ vehicles if they did not follow his instructions and compensate him with sex. This conclusion is supported by the circumstances surrounding defendant’s second victim, JE, because defendant drove off in her vehicle and did not return it to her after his unsuccessful abduction attempt. Thus, the evidence was sufficient to establish defendant’s intent to permanently deprive SF and KL of their vehicles.

II. SENTENCING

Defendant maintains that he is entitled to resentencing on the kidnapping conviction involving JE because the trial court did not prepare a sentencing information report for each of his kidnapping convictions and on the ground that the proper guidelines range should have been lower.

We agree with the prosecutor that the trial court did not err when it failed to prepare a sentencing information report for each kidnapping pursuant to MCL 771.14(2)(i). The court conducted guidelines scoring for each of the highest crime classes, but was not required to separately score defendant's multiple, concurrent kidnapping convictions. Moreover, defendant waived his sentencing claims by specifically agreeing at the sentencing hearing that the applicable guidelines range for the kidnapping convictions was "up to 562 months." Defendant's presentence investigation report provided that "[t]he guidelines in this case for the life offenses are 225 to 562 or life." At sentencing, defendant challenged the scoring of offense variable 9 (multiple victims), and the trial court rescored that variable at zero points. The following exchange then occurred:

The court: Now, any other corrections or additions to the guidelines, [defense counsel]?

Defense counsel: None, your honor.

The court: Okay. Well we need to go back now and reduce the number . . . I don't know if it changes anything, but I want to be sure. Individually as to the crimes . . .

The prosecutor: Judge, on A grid offenses, the offense variable max out of 100 points plus, so.

Defense counsel: Right.

The prosecutor: Anything scored on the A grid if you have over 100 points, then it's scored without change.

The court: All right. And so we'll change all of these then. 171 on kidnapping?

Defense counsel: *That's correct.* [Emphasis added.]

During allocution, defense counsel stated the following with regard to the appropriate guidelines range:

The sentencing guidelines call for a sentence of up to 562 months with an enhancement of consecutive sentencing with up to the same for carjacking offenses. We'd ask the court to stay within the guidelines and with the consecutive sentencing on the carjacking counts is discretionary with the court. We would ask the court to sentence my client concurrently with these eighteen counts. Thank you, your Honor.

The trial court sentenced defendant within the guidelines range for each kidnapping conviction, without objection by defendant.

Though defendant requested a remand and now argues that his 562-month minimum sentence for the kidnapping conviction involving JE is an upward departure from the properly scored guidelines, because defendant specifically agreed at sentencing that the applicable guidelines range for the kidnapping convictions was “up to 562 months,” he has waived appellate review of this issue. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Defendant’s waiver extinguished any error. *Id.* at 216.

Affirmed.

/s/ Henry William Saad
/s/ Deborah A. Servitto