

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SAMMY DIXISON, III,

Defendant-Appellant.

UNPUBLISHED

February 10, 2011

No. 294787

Kalamazoo Circuit Court

LC No. 2008-000989-FC

Before: OWENS, P.J., and MARKEY and METER, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of first-degree criminal sexual conduct (CSC), MCL 750.520b. Defendant appeals as of right. We affirm.

Defendant first contends that the evidence was insufficient to support his conviction. We apply a de novo standard of review when reviewing a sufficiency of the evidence claim. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). We review the evidence in a light most favorable to the prosecution to determine whether a rational juror could conclude that the essential elements of the crime were proven beyond reasonable doubt. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Evidentiary conflicts must be resolved in favor of the prosecution. *Id.* Circumstantial evidence and reasonable inferences arising from such evidence can be satisfactory proof of the elements of a crime. *Id.*

On the theory of the case the prosecution advanced in this case, for the jury to convict defendant of first-degree CSC it had to find the following elements beyond a reasonable doubt: (1) defendant engaged in sexual penetration with the victim; (2) defendant caused personal injury to the victim; and (3) defendant knew or had reason to know that the victim was mentally incapable, mentally incapacitated, or physically helpless. MCL 750.520b(1)(g). Defendant does not challenge the sufficiency of the evidence as to the elements of sexual penetration and his knowledge of the victim's incapacity. Rather, defendant argues that there is insufficient evidence that he caused personal injury to the victim. We disagree.

MCL 750.520a(n) defines "personal injury" as including mental anguish or bodily injury. Plaintiff concedes, and the record supports, that there is insufficient evidence that the victim suffered mental anguish. The issue is whether there is sufficient evidence that defendant caused the victim bodily injury. In this case, the evidence indicated that the victim suffered a small tear in the posterior vaginal opening and swollen labia. Although defendant admits to having

intercourse with the victim, the evidence indicated that at least two other people had sexual intercourse with the victim shortly after defendant. Specifically, hotel cameras showed that Jawan Bowden, Derrick Burroughs, and an unidentified man were alone with the victim in a hotel room for between five and nine minutes at a time. DNA from more than one donor was on the victim's test sample and that one of the donors was Bowden. The jury also heard testimony that Bowden, Burroughs, and the unidentified man were the subjects of an ongoing CSC investigation involving the victim. Although the victim became too intoxicated to remember having intercourse with defendant or anyone else during the early morning of June 9, 2008, she remembers waking up in a hospital that same morning with a vaginal pain that she had not had the night before.

Plaintiff argues that this case is analogous to *People v Brown*, 197 Mich App 448, 452; 495 NW2d 812 (1992), where this Court found that there was sufficient evidence for a jury to find a defendant guilty of first-degree CSC even though the defendant was not the sole cause of the victim's injury. Plaintiff contends that in both *Brown* and this case, it was impossible to know who caused the victim's injuries. We agree. The evidence showed that the victim was not injured before the assault; consequently, a jury could conclude beyond a reasonable doubt that each of the perpetrators contributed to the victim's injury.

In light of our conclusion to remand for resentencing, we review defendant's challenges to the scoring of offense variables where the same issues are likely to arise at resentencing. We generally review a trial court's scoring of sentencing variables for clear error.

Defendant also challenges the trial court's scoring of offense variable (OV) 3, MCL 777.33, at ten points. *People v Witherspoon*, 257 Mich App 329, 335; 670 NW2d 434 (2003). Our review of unpreserved scoring challenges is limited to whether plain error affected defendant's substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). This Court will uphold the scoring of an offense variable if there is any evidence in the record to support the scoring. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006) (citation omitted). Although defendant did not object on this basis during sentencing, he asserts that a score of ten points was improper because the proofs were inadequate to show by a preponderance of the evidence that he caused bodily injury to the victim. Defendant also argues that there is no evidence showing that defendant aided or abetted another person; rather, defendant acted alone. OV 3 considers physical injury to a victim. A trial court will score OV 3 at ten points where the victim suffered bodily injury requiring medical treatment. MCL 777.33. Moreover, in cases where there are multiple offenders, all offenders are assessed the same number of points if one offender causes personal injury. MCL 777.33(2)(a).

In this case, there is no evidence tending to show that defendant, instead of one or more of the others, caused or even contributed to some of the victim's bodily injury. Further, we find that there is evidence to support a score of ten points on the basis of a multiple offender situation. The record supports the inference that Bowden knew that defendant was alone with the victim and having sexual intercourse with her. Specifically, Bowden invited defendant to the hotel, and defendant assumed he was going to the hotel to have sexual intercourse with a girl. Both defendant and Bowden encouraged the victim to drink intoxicants. Furthermore, without having been in room 202 to know that defendant was having sexual intercourse with the victim, Bowden said something to witness Christina Lacey that prompted Lacey to go to room 202 where she saw

defendant standing over the victim. Both were naked from the waist down. Defendant eventually left the hotel, leaving Bowden alone with the mentally incapacitated victim in room 202. The record also shows that after defendant left, Bowden and other individuals were alone with the victim and had sexual intercourse with her. The evidence supports the conclusion that defendant and Bowden (and possibly others) acted in collusion for each to have sexual intercourse with the victim while she was mentally incapacitated. The trial court did not err in scoring OV 3 at ten points.

Defendant also challenges the trial court's scoring of OV 10 at 15 points. OV 10 concerns the exploitation of a vulnerable victim. MCL 777.40. A trial court will score 15 points if predatory conduct is involved. *Id.* Predatory conduct is "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). A defendant engages in predatory conduct where the following occurs: (1) the defendant engages in conduct before committing the offense; (2) the conduct was directed at one or more victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation; and (3) victimization was the defendant's primary purpose for engaging in the preoffense conduct. *People v Cannon*, 481 Mich 152, 161-162; 749 NW2d 257 (2008).

In this case, there is evidence supporting each of these elements, and, thus, the trial court's finding of predatory conduct. First, defendant engaged in preoffense conduct. While the victim was taking repetitive shots of vodka during a drinking game, defendant encouraged the victim to drink more by calling her "superwoman." When the victim was intoxicated and could not walk, defendant carried her from room 307 to room 202—a room away from other people where defendant could be alone with her. Second, this conduct was directed at the victim. Moreover, the testimony from Michael McKinley, Alicia Thompson, and Lacey, that it was obvious that the victim was drunk, supports the conclusion that the victim suffered from a readily apparent susceptibility to injury. And third, defendant's admission that he went to the hotel intending to have intercourse with a woman coupled with the other preoffense conduct and his sexual acts with the victim support the conclusion that victimization was defendant's primary purpose for engaging in the preoffense conduct.

Therefore, the trial court's decision to score OV 10 at 15 points was not clearly erroneous because the evidence supports a finding of predatory conduct.

We affirm.

/s/ Donald S. Owens

/s/ Jane E. Markey

/s/ Patrick M. Meter