

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
November 8, 2011

v

JAMES HENRYLEONARD ROBINSON,  
  
Defendant-Appellant.

No. 297172  
Oakland Circuit Court  
LC No. 2009-226825-FC

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Before: METER, P.J., and CAVANAGH and SERVITTO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct (CSC), MCL 750.520b, and armed robbery, MCL 750.529. He was sentenced to concurrent prison terms of 15 to 30 years for each conviction. He appeals as of right. We affirm.

Defendant's convictions arose from his participation in an incident in January 2009 in which the victim was confronted by four men, at least one of whom was armed with a gun, while the victim was in her car at her apartment complex. The victim testified that the men took money from her purse, forcibly restrained her for several hours, and sexually assaulted her. The prosecution presented evidence that defendant and three additional perpetrators agreed to commit an armed robbery, randomly selected the victim, and subsequently acted in concert as they robbed the victim of approximately \$60 and forced her to perform fellatio on each of them. The defense theory at trial was that the victim was not credible, that the matter actually involved the victim's failed attempt to extract money from her ex-husband, and that the sexual activity was consensual.

**I. SUFFICIENCY OF THE EVIDENCE**

Defendant first argues that there was insufficient evidence to support his armed robbery conviction under an aiding and abetting theory, and insufficient evidence to support a first-degree CSC conviction under any of the alternative theories presented by the prosecution. We disagree.

In ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found 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). Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of a crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). “[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).

#### A. ARMED ROBBERY

The elements of armed robbery are an assault and a felonious taking of property from the victim’s presence or person, while the defendant is armed with a dangerous weapon or with an article used or fashioned in such a way as to lead a reasonable person to believe that it is a dangerous weapon. *People v Ford*, 262 Mich App 443, 458; 687 NW2d 119 (2004); MCL 750.529. A person who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense. MCL 767.39.

To support a finding that a defendant aided and abetted a crime, the prosecutor must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. [*People v Carines*, 460 Mich at 759, 757-758; 597 NW2d 130 (1999) (internal citations and quotation marks omitted).]

Alternatively, the prosecutor, to support the necessary state of mind, may show “that the charged offense was a natural and probable consequence of the commission of the intended offense.” *People v Robinson*, 475 Mich 1, 15; 715 NW2d 44 (2006). “‘Aiding and abetting’” describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime. . . .” *Carines*, 460 Mich at 757 (internal citations and quotation marks omitted); see also *People v Rockwell*, 188 Mich App 405, 411-412; 470 NW2d 673 (1991). “The quantum of aid or advice is immaterial as long as it had the effect of inducing the crime.” *People v Lawton*, 196 Mich App 341, 352; 492 NW2d 810 (1992). An aider or abettor’s state of mind may be inferred from all the facts and circumstances, including a close association between the defendant and the principal, and the defendant’s participation in the planning or execution of the crime. *Carines*, 460 Mich at 758.

Viewed in the light most favorable to the prosecution, the evidence was sufficient to enable a rational jury to find beyond a reasonable doubt, first, that co-felons James Johnson and Isaiah Dickerson committed the crime of armed robbery by attacking the victim with a gun and taking money from her purse. Second, there was sufficient evidence that defendant assisted others in the commission of the crime by (1) planning the robbery with the co-felons; (2) driving them in his truck in search of a person to rob; (3) providing Johnson with a gun to use during the robbery; (4) parking his truck nearby and waiting as his associates accosted the victim with the gun, grabbed her hair, forced her into the backseat of her car, looked in her purse, and stole her money; and (5) ultimately driving two of the co-perpetrators away at the conclusion of the criminal episode.

Third, the evidence was sufficient to show that defendant knew about the robbery and intended for the co-perpetrators to commit the robbery. The evidence showed that defendant planned to commit a robbery with his co-felons, drove his truck as they searched the area for a target, gave Johnson a gun to carry out the robbery, and acted in concert with other perpetrators when he parked his truck and waited as his colleagues carried out the robbery. Thereafter, defendant called the other perpetrators and joined them in the victim's car after he was advised that they were attempting to obtain more money from her. Defendant then actually took over driving the victim's vehicle. Considered together, this evidence was sufficient to support a finding that defendant knew about the robbery and intended for the co-perpetrators to commit an armed robbery. Accordingly, the evidence was sufficient to support defendant's conviction of armed robbery under an aiding and abetting theory.

## B. FIRST-DEGREE CSC

Defendant was charged with first-degree CSC under several alternative theories under MCL 750.520b(1). Contrary to defendant's argument, there was sufficient evidence to support a conviction under each of the charged theories. As an initial matter, we note that the jury was not required to be unanimous on any of the alternate theories. See *People v Asevedo*, 217 Mich App 393, 397; 551 NW2d 478 (1996). Further, although defendant suggests alternative ways of viewing the evidence with respect to each theory, it was for the trier of fact to evaluate the evidence and, for purposes of resolving defendant's sufficiency challenge, this Court is required to view the evidence in the light most favorable to the prosecution. *Wolfe*, 440 Mich at 515.

To prove first-degree CSC under MCL 750.520b(1)(c), the prosecution was required to show that defendant engaged in sexual penetration with another person under circumstances involving the commission of any other felony. In this case, the "other felony" was kidnapping. Contrary to defendant's argument, his acquittal on the kidnapping charge did not prohibit him from being convicted of first-degree CSC under circumstances involving a kidnapping. Any inconsistency in the verdicts does not affect the validity of the verdicts because it is well established that juries may return inconsistent verdicts. *People v Lewis*, 415 Mich 443, 448; 453; 330 NW2d 16 (1982); *People v Vaughn*, 409 Mich 463, 465-466; 295 NW2d 354 (1980). The Michigan Supreme Court has explained that each count of a multi-count indictment is regarded as a separate indictment, *Vaughn*, 409 Mich at 465, and a jury "may reach *different* conclusions concerning an *identical* element of two different offenses." *People v Goss (After Remand)*, 446 Mich 587, 597; 521 NW2d 312 (1994) (emphases in original). Inconsistent verdicts require reversal only where there is evidence, beyond the inconsistent verdict itself, that the jury was confused, did not understand the instructions, or did not know what it was doing. *Lewis*, 415 Mich at 450 n 9; *People v McKinley*, 168 Mich App 496, 510; 425 NW2d 460 (1988). Conversely, when a jury chooses not to convict because it has chosen to be lenient, a defendant "has no cause for complaint." *Lewis*, 415 Mich at 453. In this case, defendant has not shown, or even argued, that juror confusion led to inconsistent verdicts.

An objective examination of the record reveals that the prosecution presented sufficient evidence to support the separate and distinct charge of first-degree CSC under this theory. As applicable to this case, a person is guilty of kidnapping if "he . . . knowingly restrains another person with the intent to . . . [h]old that person for ransom or reward [or] engage in criminal sexual penetration . . . with that person." MCL 750.349(1)(a) and (c). "Restrain" means

to restrict a person's movements or to confine the person so as to interfere with that person's liberty without that person's consent or without legal authority. The restraint does not have to exist for any particular length of time and may be related or incidental to the commission of other criminal acts. [MCL 750.349(2).]

The victim testified that she was forced into the backseat of her car at gunpoint and thereafter kept, for several hours, in her car and briefly in her home. The victim did not consent to being restricted by the defendants, and was further restricted by her fear of being killed. The group of men discussed obtaining a ransom for the victim's life and sent a text message to the victim's ex-husband in an attempt to extract money from him for that purpose. The victim explained that when the men were unable to obtain a sufficient amount of money, they took advantage of her sexually. This evidence, viewed in the light most favorable to the prosecution, was sufficient for a rational jury to find beyond a reasonable doubt that defendant sexually assaulted the victim during the commission of a kidnapping. The men's intentional restraint of the victim without her consent, followed by their attempt to gain a ransom and their sexual assault of the victim, sufficiently established that the men knowingly restrained the victim with the intent to hold her for ransom and engage in sexual penetration, thereby establishing the commission of a kidnapping.

Under MCL 750.520b(1)(d)(ii), the prosecution was required to show that defendant engaged in sexual penetration with the victim while he was "aided and abetted by 1 or more other persons" and "use[d] force or coercion to accomplish the sexual penetration." "Force or coercion" includes the following circumstances:

(ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats.

(iii) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute this threat[.] [MCL 750.520b(1)(f)(ii) and (iii).]

Sufficient evidence established that defendant was assisted by his three co-felons and used force or coercion to sexually assault the victim. All four men were inside the victim's car with her, Johnson held the gun provided by defendant, and Johnson asked that the victim perform oral sex on the four men, including defendant. The victim was threatened with death or harm to herself or her children if she did not comply, and only complied because of the fear caused by the men.

To prove first-degree CSC under MCL 750.520b(1)(e), the prosecution was required to show that defendant engaged in sexual penetration with another person while armed with a weapon or an object fashioned as a weapon. The evidence indicated that defendant acted in concert with his co-perpetrators during the criminal episode. Defendant owned the gun, he gave it to Johnson who held it during the crimes, and Johnson returned the gun when defendant was leaving, after the victim performed oral sex on him. The victim testified that she was not sure if the men had more than one gun or were just passing around one gun between them. Given this

evidence, a trier of fact could reasonably conclude that defendant had dominion and control over the weapon, along with his co-perpetrators. Viewed in the light most favorable to the prosecution, the jury could reasonably conclude that defendant was armed with a weapon for purposes of § 520b(1)(e).

Lastly, under MCL 750.520b(1)(f), a person is guilty of CSC in the first degree if he engages in sexual penetration with another person and “causes personal injury to the victim and force or coercion is used to accomplish sexual penetration.” As previously indicated, there was sufficient evidence of force or coercion. Viewed in the light most favorable to the prosecution, the evidence was also sufficient to enable a rational trier of fact to find the “personal injury” element beyond a reasonable doubt. “Personal injury” includes “bodily injury” and “mental anguish.” MCL 750.520a(n). “Mental anguish” means “extreme or excruciating pain, distress, or suffering of the mind.” *People v Petrella*, 424 Mich 221, 227; 380 NW2d 11 (1985). Bodily injury and mental anguish are different aspects of the single element of personal injury and only one need be proven. *Asevedo*, 217 Mich App at 397.

The evidence indicated that the victim was forced to perform fellatio on four men whom she did not know and who had worked together to accost her, force her into her car at gunpoint, and restrain her for several hours. During the offenses, both the victim’s life and her children’s lives were threatened. Police officers and the victim’s roommate testified that, after the assault, the victim was distraught, panicked, scared, and nervous. The victim expressed that she was ashamed and embarrassed and felt sick whenever she thought about the acts. The victim sought professional counseling after the incident. This testimony was sufficient to enable a rational trier of fact to reasonably infer that the victim experienced extreme distress or suffering of the mind.

## II. SENTENCING

Defendant argues that he must be resentenced because the trial court improperly scored several offense variables (OVs). “A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score.” *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). A scoring decision “for which there is any evidence in support will be upheld.” *Id.* “The proper interpretation and application of the legislative sentencing guidelines are questions of law, which this Court reviews de novo.” *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

### A. OV 1 AND OV 2

The trial court assessed 15 points for OV 1 (aggravated use of a weapon), MCL 777.31(1)(c), and five points for OV 2 (lethal potential of weapon), MCL 777.32(1)(d). Defendant argues that the trial court should have assessed zero points for both of these variables because co-perpetrator Jernell Plunk testified that the weapon used was only a BB gun. MCL 777.31(1)(c) mandates a score of 15 points for OV 1 if a “firearm was pointed . . . toward a victim[.]” The instructions for OV 1 state that “[i]n multiple offender cases, if 1 offender is assessed points for the presence or use of a weapon, all offenders shall be assessed the same number of points.” MCL 777.31(2)(b). For OV 2, the trial court is to assess five points if the “offender possessed or used a pistol[.]” MCL 777.32(1)(d). Similar to OV 1, the instructions for

OV 2 provide that “[i]n multiple offender cases, if 1 offender is assessed points for possessing a weapon, all offenders shall be assessed the same number of points.” MCL 777.32(2).

At trial, the victim repeatedly testified that the group of men had a “gun,” that it was pointed at her as she was accosted and forced into the backseat of her car, and that she feared for her life because the defendants threatened to kill her or blow her leg off with the gun. The victim saw a black gun, felt the gun as it was pressed to the back of her head, and heard a clicking noise. She recalled the men describing the gun as a nine-millimeter weapon. In addition, there was evidence that defendant provided a gun to carry out the crimes. Although defendant claimed in his statements to the police that codefendant Johnson was the person who pulled out a weapon, he nonetheless described the weapon as a “black gun” with a slide on top, “kinda round on top,” but not a revolver. Defendant also stated that the victim was “taken at gunpoint.” The trial court could properly determine from the fact that both the victim and defendant described the weapon as a gun, without any qualification, that there was sufficient evidence to support a 15-point score for OV 1 and a five-point score OV 2. The evidence was sufficient to support the scoring of these variables.

#### B. OV 7

Fifty points are to be assessed for OV 7 if “[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense[.]” MCL 777.37(1)(a). “Sadism” means “conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender’s gratification.” MCL 777.37(3). “For OV 7, only the defendant’s actual participation should be scored.” *People v Hunt*, 290 Mich App 317, 326; \_\_\_ NW2d \_\_\_ (2010).

Defendant argues that the trial court erred by assessing 50 points for OV 7 because no sadism or brutality occurred above and beyond what was necessary to commit the sentencing offense of armed robbery. We disagree. Armed robbery is a continuing offense and is not terminated until the defendant reaches a “place of temporary safety.” *People v Davenport*, 122 Mich App 159, 165; 332 NW2d 443 (1982); see also *People v Gillis*, 474 Mich 105, 123; 712 NW2d 419 (2006). In this case, defendant and his co-felons were still in the process of an armed robbery when they forced the victim to commit fellatio on them. Although money and the victim’s purse had already been stolen, the perpetrators still had control over the victim and had not reached a place of temporary safety and escaped with the proceeds of the underlying crime. Moreover, the evidence made clear that the perpetrators had been in a continuing search for money or valuables, and the victim testified that one of the perpetrators made reference to her getting some of her money back if she performed oral sex. Thus, contrary to defendant’s contention on appeal, the offense-specific nature of the OVs discussed by the Supreme Court in *People v McGraw*, 484 Mich 120, 126-127; 771 NW2d 655 (2009), has no effect on our decision here. *McGraw* held that the OVs are “offense specific by default.” *Id.* at 126. The sentencing offense of armed robbery was not completed when defendant and his co-felons forced the victim to commit fellatio on them. This was certainly “for the offender’s gratification” and therefore meets the definition of sadism in MCL 777.37(3). We conclude that there is evidence in the record supporting the trial court’s decision to score 50 points for OV 7.

### C. OV 13

Defendant argues that he was improperly assessed 25 points for OV 13 for being part of an organized criminal group that committed three crimes. Defendant contends that he was not part of any gang or criminal organization and there was no third crime. We disagree.

A score of 25 points is appropriate for OV 13 when “[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person[.]” MCL 777.43. The instructions further provide that “[e]xcept for offenses related to membership in an organized criminal group or that are gang-related, do not score conduct scored in offense variable 11 or 12.”<sup>1</sup> MCL 777.43(2)(c). What comprises an “organized criminal group” is not specifically defined, but MCL 777.43(2)(b) instructs that “[t]he presence or absence of multiple offenders, the age of the offenders, or the degree of sophistication of the organized criminal group is not as important as the fact of the group’s existence, which may be reasonably inferred from the facts surrounding the sentencing offense.”

In this case, there was evidence that a group of four men met at co-perpetrator Dickerson’s house, agreed to commit an armed robbery, planned how the robbery would be carried out, separated, and reconvened some hours later to carry out their criminal plan. As a group, the men thereafter acted in concert as they robbed and sexually assaulted the victim. Thus, there was evidence that defendant committed this offense as a member in a criminal group.

Further, contrary to defendant’s argument, there were three crimes that could be considered. Defendant was convicted of two offenses against a person and acquitted of a third crime—kidnapping. The instructions for OV 13 provide that “all crimes within a 5-year period, including the sentencing offense, shall be counted *regardless* of whether the offense resulted in a conviction.” MCL 777.43(2)(a) (emphasis added). It is well established that a different burden of proof applies to the establishment of a minimum sentence and, therefore, the scoring of the guidelines need not be consistent with the verdict. Indeed, in *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008), the Michigan Supreme Court noted that “[a] trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence.” See also *People v Perez*, 255 Mich App 703, 713; 662 NW2d 446 (2003), *aff’d* in part and *vacated* in part on other grounds 469 Mich 415 (2003). Consequently, the prosecution’s apparent failure to prove the kidnapping charge beyond a reasonable doubt did not prevent the trial court from considering the evidence of a kidnapping when sentencing defendant. In light of the evidence, there was sufficient evidence for the trial court to find by a preponderance of the evidence that defendant committed the crime of kidnapping, which, along with his convictions of robbery and first-degree CSC, supported a 25-point score for OV 13.

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<sup>1</sup> Defendant was assessed one point under OV 12 for his commission of “[o]ne contemporaneous felonious criminal act involving any other crime . . . .” MCL 777.42(1)(f).

D. OV 11

Defendant also argues that resentencing is required because the trial court erred in scoring 25 points for OV 11. However, we need not reach this issue because defendant would remain at OV Level VI (100+ points) even if OV 11 were scored at zero points. See MCL 777.62 and *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006) (“[w]here a scoring error does not alter the appropriate guidelines range, resentencing is not required”).

Affirmed.

/s/ Patrick M. Meter  
/s/ Mark J. Cavanagh  
/s/ Deborah A. Servitto