

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL JOHN HICKS,

Defendant-Appellant.

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UNPUBLISHED

May 7, 1996

No. 171959

LC No. 93-1443-FC

Before: Doctoroff, C.J., and Hood and Gribbs, JJ.

PER CURIAM.

A jury convicted defendant of ten counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), one count of breaking and entering with intent to commit criminal sexual conduct, MCL 750.110; MSA 28.305, one count of unarmed robbery, MCL 750.530; MSA 28.798, and one count of kidnapping, MCL 750.349; MSA 28.581. The trial court sentenced defendant to ten terms of fifty to seventy-five years for the criminal sexual conduct charges, ten to fifteen years for breaking and entering with intent to commit criminal sexual conduct and unarmed robbery, and twenty to forty years for kidnapping, with all the sentences to be served concurrently. Defendant appeals as of right. We affirm.

The victim testified that, on April 27, 1993, she was awakened at 3:00 a.m. by someone banging on her front door. A few seconds later, she heard a loud crash and footsteps. The assailant jumped on the victim, covered her eyes and forced her to perform oral sex on him. The assailant then engaged in vaginal intercourse with the unwilling victim. He then placed a pillowcase over the victim's head and forced her to perform anal sex twice and to perform oral sex another time. The assailant demanded twenty dollars from the victim and vaginally penetrated her again. The assailant told the victim to stretch out her hands to feel his knife blade and threatened to slit her throat if she did not leave with him.

The assailant placed the victim in a headlock and, while she was naked except for the pillowcase over her head, forced her into his truck. In the truck, he again forced her to perform oral sex

and to engage in vaginal sex. The assailant threatened to kill the victim. The victim testified that, when the truck pulled into a driveway, she could see a silhouette of a building through the pillowcase. According to the victim, the assailant took her into his garage, and again forced her to engage in vaginal, oral, and anal sex. During the last instance of oral sex, the pillowcase fell off the victim's head. She faced her assailant for a few hours while he slept. After the assailant awoke, he forced the victim back into his truck and made her to perform oral sex on two more occasions. He then left her naked in the ditch.

The victim described her assailant to police. She also described the assailant's garage, his truck, and the route taken from her house to the garage. She told the police what clothing her assailant was wearing. A police officer testified that, by retracing the route described by the victim, he located defendant's residence. The police found that the truck outside matched the one described by the victim. Clothing from defendant's home matched that described by the victim. The police also located the pillowcase used to cover her head. A scientist with the Michigan State Crime Laboratory testified that the fibers found in the victim's hair matched those from the seat covers in defendant's truck. The victim identified defendant as the assailant. She testified that she had seen defendant at a party because he worked for her boyfriend's father.

First, defendant argues that the trial court improperly allowed a fingerprint expert to testify about a partial palm print on the back door of the victim's home. Defendant maintains that, because the expert testified that he could not match the palm print with defendant's palm, this evidence should have been excluded as irrelevant. Relevant evidence is evidence that has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. MRE 401. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403.

The expert testified that the partial palm print had insufficient ridge characteristics from which to make an identification but that there was a similarity in the pattern to defendant's palm. Because this evidence did not exclude defendant from a class of possible suspects, we find that this evidence was relevant. *People v Vettese*, 195 Mich App 235, 241; 489 NW2d 514 (1992).

Given the overwhelming evidence of defendant's guilt, we also find that the introduction of this evidence had very little prejudicial impact. The victim identified defendant as her assailant. The victim described defendant's truck and defendant's garage to police. Police found the defendant by following the route described by the victim. Samples of particles found in the victim's hair matched those from the seat covers in defendant's truck. Therefore, the probative value of the palm print testimony was not substantially outweighed by its prejudicial impact. *Id.* Even if the trial court had erroneously allowed the introduction of this evidence, the error would be harmless in light of the evidence against defendant. *People v Bahoda*, 448 Mich 261, 291; 531 NW2d 659 (1995).

Next, defendant contends that the trial court calculated the sentencing guidelines incorrectly. When defendant forced the victim to touch the knife and threatened to slit her throat, the trial court

properly awarded fifteen points under OV 1. Defendant's actions merited a score of fifty points under OV 2 because he treated the victim with excessive brutality. The trial court properly awarded defendant five points under OV 7 because defendant used his size and strength advantage over the victim and he kept her naked and covered her head with a pillowcase. Defendant properly received fifty points pursuant to OV 12. Despite defendant's argument, a trial court is not prohibited from applying a second penetration that arises from the same criminal transaction to defendant's score simply because it results in a separate conviction. *People v Cotton*, 209 Mich App 82, 84-85; 530 NW2d 495 (1995). Although we agree with defendant that the trial court improperly assessed fifteen points under OV 5 because defendant was convicted of kidnapping, this error is harmless. Even after subtracting fifteen points from defendant's offense variable score, he is still well within the highest offense severity level.

Defendant also claims that the trial court violated the principle of proportionality when it sentenced defendant in excess of the guidelines for the criminal sexual conduct convictions. The sentencing guidelines recommend a minimum sentence of ten to twenty-five years of imprisonment for defendant's criminal sexual conduct crimes. The trial court sentenced defendant to a minimum of fifty years of imprisonment.

Adherence to the guidelines is not required, and departures are appropriate where the guidelines do not adequately account for important factors legitimately considered at sentencing. *People v Milbourn*, 435 Mich 630, 657; 461 NW2d 1 (1990). The trial court stated that it exceeded the guideline recommendation because of the predatory nature of breaking into a stranger's home in the middle of the night, the ten acts of sexual penetration and other acts for which there was no charge, the fact that the offense variable score is almost triple the necessary score to justify a minimum sentence of twenty-five years, and the depraved manner in which the crimes were committed. The nature of this crime justified a sentence in excess of the guideline recommendation. We find that the trial court's sentence was proportionate to the offense and the offender.

Finally, in a separate pro se brief, defendant maintains that he was denied effective assistance of trial counsel. Because none of the alleged instances of ineffective assistance of counsel fell below an objective standard of reasonableness and there is no reasonable probability that, but for counsel's errors, the result of the proceedings would have been different, defendant's claims have no merit. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

Affirmed.

/s/ Martin M. Doctoroff

/s/ Harold Hood

/s/ Roman S. Gribbs