

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN IVEZAJ,

Defendant-Appellant.

UNPUBLISHED

May 10, 1996

No. 177229

LC No. 93-000326-FC

Before: Taylor, P.J., and Fitzgerald and P.D. Houk,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(f); MSA 28.788(2)(1)(f), and was sentenced to concurrent prison terms of five to twenty-five years for his respective convictions. Defendant appeals as of right. We affirm.

Defendant first contends that the trial court erred by failing to grant his motion for directed verdict because the prosecutor failed to prove beyond a reasonable doubt that he used force, coercion, or violence to accomplish sexual penetration. He claims that the evidence established only that the victim voluntarily engaged in the sexual acts.

When ruling on a motion for directed verdict, the trial court must consider the evidence presented by the prosecutor up to the time the motion was made in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Circumstantial evidence and reasonable inferences drawn from the evidence may be sufficient to prove the elements of the crime. *Id.* at 466.

Under MCL 750.520b(1)(f)(i); MSA 28.788(2)(1)(f)(i), a person is guilty of first-degree criminal sexual conduct if he engages in sexual penetration with another person and causes personal

* Circuit judge, sitting on the Court of Appeals by assignment.

injury to the victim and force or coercion is used to accomplish sexual penetration. Force or coercion includes, but is not limited to, the use of physical force or physical violence to overcome the victim.

Here, the complainant testified that defendant took her in the bedroom, pinned her down with his knees, and held her hands above her head. She testified that, through the use of such force, defendant engaged in two acts of penetration against her will. Viewed in a light most favorable to the prosecution, this evidence was sufficient to permit a rational trier of fact to conclude that defendant used physical force to achieve sexual penetration.

The evidence was also sufficient to permit a rational trier of fact to conclude that the complainant suffered personal injury in the form of mental anguish. MCL 750.520a(j); MSA 28.788(1)(j). Testimony was presented that the complainant became hysterical following the incident, and that she ingested nearly a full bottle of a highly toxic prescription medicine shortly after returning home. Following the incident, the complainant moved to West Virginia and immediately sought counseling. Viewed in a light most favorable to the prosecution, this evidence was sufficient to permit a rational trier of fact to conclude that the complainant suffered personal injury

Defendant also claims that he was denied the effective assistance of counsel by his counsel's failure to request the court to instruct the jury that "charges of sexual assault are easily made and difficult to defend against." Defendant's argument is based solely on *People v Jordan*, 23 Mich App 375, 384-385; 178 NW2d 659 (1970), wherein this Court stated:

[I]n some jurisdictions where the evidence is exceptionally close, some courts have held that failure by the trial court to instruct the jury that charges of sexual assault are easily made and difficult to defend against, after such a charge is requested, is reversible error." (Citations omitted.)

The above language was merely dicta and carries no precedential value. Nonetheless, *Jordan* did not opine that such an instruction is required, nor did it urge the use of such an instruction. Defendant has cited no Michigan authority that would require such an instruction, and our research has unveiled none. Consequently, we cannot conclude that counsel was ineffective for failing to request the instruction. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1995).

Next, defendant assigns error to the trial court's scoring of four offense variables. Appellate review of sentencing guidelines calculations is very limited. *People v Derbeck*, 202 Mich App 443, 449; 509 NW2d 534 (1993). A sentencing court has discretion in determining the number of points to be scored, provided there is evidence on the record that adequately supports a particular score. *Id.* A trial court's scoring of the sentencing guidelines will be upheld if there is evidence to support the score. *People v Ayers*, 213 Mich App 708, 723; 540 NW2d 791 (1995).

We have reviewed defendant's objections to the scoring of Offense Variables 5, 9 and 13 and find that there was evidence on the record that adequately supported the trial court's scoring of these Offense Variables. Further, defendant's argument that OV 12 was improperly scored because both of his penetrations resulted in convictions was squarely addressed and rejected in *People v Cotton*, 209 Mich App 82, 84-85; 530 NW2d 495 (1995), wherein this Court held:

The sentencing guidelines instructions regarding the scoring of this variable do not prohibit a trial court from scoring a second penetration that arises from the same criminal transaction simply because the second penetration results in a separate conviction. The instructions for OV 12 indicate that all penetrations that arise out of the same criminal transaction, except the one penetration forming the basis of the conviction, are to be scored. Any other interpretation, including the one urged by defendant, could result in shorter concurrent sentences for defendants with multiple convictions arising out of the same transaction than for defendants who are convicted of only one penetration and have OV 12 increased by the other penetrations.

The trial court properly scored twenty-five points for OV 12.

Affirmed.

/s/ Clifford W. Taylor

/s/ E. Thomas Fitzgerald

/s/ Peter D. Houk