

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KALVIN LAMAR WASHINGTON,

Defendant-Appellant.

UNPUBLISHED

October 20, 2005

No. 256061

Oakland Circuit Court

LC No. 2003-190459-FH

Before: Owens, PJ, and Fitzgerald and Schuette, JJ

PER CURIAM.

Defendant was convicted by a jury of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(b). He was sentenced as an habitual offender third offense or higher to a prison term of twenty to thirty years. Defendant appeals as of right. We affirm.

Defendant first argues that there was insufficient evidence to support his conviction. We disagree.

Specifically, defendant contends the complainant's testimony was not believable. Defendant points out that the prosecution did not produce any eyewitness who could corroborate complainant's testimony despite the fact that the offense allegedly occurred near a busy intersection and that the prosecution did not produce any physical or medical evidence of the alleged offense. In determining whether the prosecution introduced sufficient evidence to support the verdict, we view the evidence de novo in the light most favorable to the prosecution to determine whether a rational tier of fact could find the essential elements of the crime proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Questions of credibility are left to the jury, and we will not interfere with the jury's role in determining the weight of the evidence or the credibility of the witnesses. *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002).

There is no requirement that the complainant's testimony be corroborated in order for a CSC conviction to stand. MCL 750.520h. In the present case, complainant testified that defendant drove her to a hotel parking lot where he used force and coercion to sexually penetrate her. While defendant attacks complainant's credibility, in assessing the sufficiency of the evidence, all conflicts must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452, 569 NW2d 641 (1997). Thus, there was sufficient evidence to support defendant's CSC III conviction.

Defendant next argues that the trial court abused its discretion when it assessed fifty points for offense variable seven (OV-7) (aggravated physical abuse) arguing the record did not support a finding that he treated complainant with excessive brutality. We disagree.

We review a sentencing court's scoring decision for an abuse of discretion. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). When scoring offense variables, "[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 Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), citing *People v Lerversee*, 243 Mich App 337, 349; 622 NW2d 325 (2000). Fifty points should be scored 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).

In this case, the complainant testified that during the first alleged episode of sexual assault defendant threatened her with physical force when she refused to remove her pants and underwear. Complainant recalled crying and being very scared during the episode. During the second alleged episode of sexual assault, complainant testified defendant repeated this threat. Complainant recalled defendant calling her a "bitch" and telling her that she was not going to make it home that night. On the way back home complainant testified that defendant threatened to kill her and her mother if she told anyone what had happened. Undoubtedly, threats to one's person or life or the life of another person related to the victim qualify as conduct designed to substantially increase the victim's fear and anxiety. It is evident from the complainant's testimony that defendant's conduct was contemporaneous with the alleged assaults and was designed to increase the fear and anxiety she was suffering from the assaults. Thus, the trial court did not abuse its discretion by scoring fifty points for OV-7.

Defendant also challenges the scoring of twenty-five points under OV-11 based on the occurrence of the alleged sexual penetration underlying the CSC III charge of which defendant was acquitted. But, in *People v Perez*, 255 Mich App 703, 712; 662 NW2d 446 (2003), vacated in part on other grounds, 469 Mich 415 (2003), we held that "the scoring of the guidelines need not be consistent with the jury verdict." A court may consider all evidence presented at trial when determining the guidelines. *People v Dewald*, ___ Mich App ___, ___; ___ NW2d ___ (2005), slip op at 7. Thus, contrary to defendant's argument, the trial court was free to find that the alleged penetration at issue occurred for purposes of scoring OV-11 although the jury acquitted defendant of the CSC III charged based on that alleged penetration. Accordingly, defendant has not shown any error in the scoring of OV-11.

Defendant also argues the trial court violated his Sixth Amendment right to a trial by jury under *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), when it considered factors in scoring OV-7 and OV-11 that were not proven to the jury beyond a reasonable doubt. However, controlling Michigan precedent requires rejection of that argument. In *People v Claypool*, 470 Mich 715; 684 NW2d 278 (2004), a majority of the Justices of our Supreme Court opined that *Blakely* has no application to indeterminate sentencing in Michigan. See *id.* at 730-731 n 14 (Taylor, J., joined by Markman, J.), 741 (Cavanagh, J.), 744 (Weaver, J.), 744 n 1 (Young, J.). In *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004), lv gtd 472 Mich 881 (2005), this Court treated this determination in *Claypool* as binding on this Court. Thus, under controlling Michigan precedent, *Blakely* was inapplicable to defendant's indeterminate sentencing in this case.

Defendant also argues that his sentence constituted unconstitutional cruel and/or unusual punishment. We disagree. This Court has held that an argument that a sentence for a CSC III conviction violated constitutional prohibitions against cruel or unusual punishment was “without merit” because the sentence fell within the guidelines range. *Drohan, supra* at 91-92. In this case, defendant’s minimum sentence was within the guidelines range. Further, “a proportionate sentence does not constitute cruel or unusual punishment.” *Id.* at 92. And a sentence within the guidelines is presumptively proportionate. *People v Babcock*, 469 Mich 247, 263-264; 666 NW2d 231 (2003). Accordingly, defendant is not entitled to relief on this issue.

Defendant argues his due process rights were violated when the prosecution failed to serve him with a timely notice of intent to charge defendant as an habitual third offender. We disagree. Contrary to defendant’s argument, MCL 769.13(2) expressly allowed this notice to be served on defense counsel as the record reflects occurred in this case.

Defendant next argues that the prosecution abused its charging authority when it charged defendant in Oakland County with a count of CSC III and one count of fourth-degree criminal sexual conduct (CSC IV) when these alleged events took place outside of Oakland County.

Venue was proper in Oakland County under MCL 762.8, which provides:

Whenever a felony consists or is the culmination of 2 or more acts done in the perpetration thereof, said felony may be prosecuted in any county in which any 1 of said acts was committed.

The statutory elements of CSC III as charged in this case are (1) the defendant sexually penetrated the complainant and (2) the defendant used force or coercion to accomplish the sexual penetration. MCL 750.520d(1)(b). A county has jurisdiction over a CSC III case when acts of force or coercion occurred within its borders even though penetration occurred elsewhere. *People v Slifco*, 162 Mich App 758, 762; 413 NW2d 102 (1987). In the present case, complainant testified that following the first alleged episode of sexual assault, while the vehicle remained parked in the parking lot, defendant began asking her if her mother did not tell her that he was supposed to take her to the hotel and take her virginity. Complainant testified she was upset, scared, and confused, and could not understand why her mother would do such a thing to her.

Complainant testified she believed defendant’s story that it was her mother’s plan that he take her virginity, and she was upset and angry about it. Defendant’s persistent attempt to convince complainant that her mother and he concocted a plan to take her virginity coupled with the age of the complainant and the previous threat of physical force could reasonably be considered to have created a coercive atmosphere. While the location of the car wash where the second penetration occurred is unknown, it is clear that defendant’s acts of coercion began at the hotel parking lot in Oakland County. From there, defendant drove the complainant home where he allegedly fondled her. Therefore, because defendant’s coercive acts which culminated with the alleged commission of CSC III and CSC IV started in Oakland County, the trial court in Oakland County was the proper venue for the charged offenses. Thus, the prosecution did not act improperly by bringing this case in Oakland County.

Finally, defendant argues counsel for the second trial was ineffective because counsel did not object to the improperly charged offenses. We disagree. Because no *Ginther* hearing was held, this Court's review of the relevant facts is limited to mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). In any event, as previously discussed, the charges at issue were properly brought in Oakland County. Thus, counsel was not ineffective in failing to object. See *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005) (counsel need not argue a meritless position).

Affirmed.

/s/ Donald S. Owens
/s/ E. Thomas Fitzgerald
/s/ Bill Schuette