

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDMEN WINSTON GRIFFIN,

Defendant-Appellant.

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UNPUBLISHED

November 21, 2006

No. 263510

Wayne Circuit Court

LC No. 04-011652-01

Before: Servitto, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(e) (sexual penetration perpetrated with a weapon), and assault with intent to commit CSC, MCL 750.520g(1). Defendant was sentenced to 27 to 70 years' imprisonment for the first-degree CSC conviction and 7 to 20 years' imprisonment for the assault conviction. We affirm.

I. Underlying Facts

Defendant's convictions arise from an incident of CSC committed against a 16-year-old complainant. The complainant testified that defendant approached her while she was awaiting the school bus. The complainant indicated that she recognized defendant because she had seen him in the neighborhood on prior occasions. She testified that defendant initially asked her questions, then told the complainant that her bus was approaching. When the complainant turned to look, defendant allegedly grabbed her around the shoulders and made a motion at his side verbally indicating the presence of a gun.

The complainant testified that defendant dragged her to the side of building and ordered her to unzip her coat and pants, again threatening to shoot if the complainant did not comply. The complainant unbuckled her pants, but began to fight defendant off when he pulled her pants down. Defendant allegedly pushed the complainant onto the ground and penetrated her vagina with his tongue and with his finger. The complainant testified that defendant unzipped his pants and attempted to remove his penis, but that he was unable to do so because she was struggling. The complainant eventually pushed defendant off and stood up. The complainant stated that she tricked defendant into turning around to have him pick up her book bag to allow herself time to run away. The complainant informed her family about the incident and they summoned the police and an ambulance.

## II. Ineffective Assistance of Counsel

Defendant asserts that he was denied the effective assistance of counsel by defense counsel's failure to retain an independent expert to review the DNA evidence. Defendant further asserts that defense counsel was ineffective in failing to investigate and present two allegedly exculpatory witnesses and in failing to provide defendant with a copy of the discovery packet.

Defendant failed to preserve his challenges to defense counsel's performance by filing a motion for a new trial or *Ginther*<sup>1</sup> hearing in the trial court. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).<sup>2</sup> Absent a *Ginther* hearing, "our review of the relevant facts is limited to mistakes apparent on the record." *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

Whether a defendant has been denied the effective assistance of counsel is a mixed question of law and fact. A judge must first find the facts and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *People v LeBlanc*, 465 Mich 575; 640 NW2d 246 (2002). [*Riley (After Remand)*, *supra* at 139.]

Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish ineffective assistance of counsel, defendant must prove that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the proceedings would have resulted differently. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

At the conclusion of the first day of trial, the officer in charge of the investigation admitted that, although a rape kit had been performed with swabs of the complainant's external genital area and a bite mark incurred on her left thigh during the rape, the samples had not been submitted for DNA analysis. The trial court sua sponte ordered the prosecution to submit the samples for DNA analysis given that identity was contested in this case and the DNA analysis could potentially "clear" defendant. The trial court then queried whether defense counsel wanted to retain an independent DNA expert to review the results. Before the trial continued, the court again asked defense counsel if he wanted to retain a DNA expert and indicated that it would grant defense counsel's motion for such an expert if one was filed. The trial court subsequently recognized that defense counsel was required to file a "motion for extraordinary fees" in order to retain a DNA expert and suggested that defense counsel do so before the chief judge.

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<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

<sup>2</sup> Defendant filed a motion to remand in this Court. Given that defendant failed to support his pro se claims in both the Standard 4 Brief and motion, this Court denied defendant's motion "for failure to persuade the Court of the need to remand at this time." *People v Griffin*, unpublished order of the Court of Appeals, entered March 27, 2006 (Docket No. 263510).

The prosecution was not ready to present testimony regarding the DNA analysis until April 28, 2005. At that time, defense counsel requested additional time to prepare for cross-examination. Defense counsel noted that defendant had “some concerns” with the methodology used to analyze the DNA in this case. Defense counsel also indicated that defendant wished to express his dissatisfaction with counsel’s performance and request a different lawyer. The trial court denied that request, noting that defendant seemed to be dissatisfied because the DNA analysis implicated him in the charged offenses.

Based on the record before us, we cannot find that defense counsel was ineffective for failing to present the testimony of an expert witness to rebut the DNA evidence presented by the prosecution. Contrary to defendant’s assertion on appeal, it appears that defense counsel did, in fact, submit the DNA evidence for an independent review. Generally, questions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *Rockey, supra* at 76. However, we note that the most likely reason for defense counsel’s failure to present rebuttal evidence or to call a rebuttal witness was that the independent analysis did not exonerate defendant.

Moreover, defense counsel engaged in extensive cross-examination of forensic scientist, Christopher Steary, challenging his experience in analyzing DNA evidence and his qualitative and quantitative analysis of the DNA evidence. Defense counsel elicited testimony that Steary was required to secure the review of his supervisor before reaching any conclusion and that he was required to cross-reference his results to those produced by a computer-generated program. Upon defense counsel’s questioning, Steary admitted that he could not definitively state that defendant had contributed the DNA found in the forensic samples.

Furthermore, defendant has wholly failed to support his pro se claims on appeal. Defendant identified two potential defense witnesses by name, but completely failed to describe their potential testimony or explain how these witnesses could have assisted the defense. While defendant claims that defense counsel failed to provide him with a copy of the discovery packet, defendant has not argued that he was prejudiced by this omission in any way. Absent any factual support for defendant’s pro se arguments, we deem those issues abandoned on appeal. *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004).

### III. Sufficiency of the Evidence

Defendant asserts that the prosecution presented insufficient evidence to support his convictions beyond a reasonable doubt. Specifically, defendant challenges the accuracy of the complainant’s eyewitness identification and the accuracy of his identification based on the DNA evidence.

A criminal defendant need not take any action in the trial court to preserve an appellate claim regarding the sufficiency of the evidence. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). When reviewing a claim that insufficient evidence was presented to support a defendant’s conviction, we “must view the evidence in [the] light most favorable to the prosecution” to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). “Circumstantial evidence and reasonable inferences arising from that

evidence can constitute satisfactory proof of the elements of a crime.” *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

The complainant testified on cross-examination that she spoke to a light-skinned African-American man at the bus stop. She testified that the man was between five-foot-seven and five-foot-nine inches tall, between 130 and 145 pounds, with bushy facial hair on his cheeks and a light moustache. Upon further questioning by the trial court, the complainant continued to assert that the man who approached her at the bus stop was light-skinned and admitted that defendant had a darker complexion than that described. However, the complainant indicated that she recognized defendant because she “never forgets a face” and asserted that she may have “mischaracterized” her assailant as light-skinned. The police officer that initially questioned the complainant regarding her attack, subsequently testified that the complainant made a comparison of her assailant, which the officer interpreted as describing a medium-skinned African-American man.

The Michigan Supreme Court has recognized that eyewitness identifications can be unreliable. See *People v Davis*, 241 Mich App 697, 701; 617 NW2d 381 (2000), quoting *United States v Wade*, 388 US 218, 228; 87 S Ct 1926; 18 L Ed 2d 1149 (1967), and *People v Anderson*, 389 Mich 155; 205 NW2d 461 (1973). However, the credibility of a complainant’s identification of a defendant “is a question for the trier of fact that we do not resolve anew.” *Davis, supra* at 700. The trial court heard the discrepancy between the complainant’s description of her assailant and the actual description of defendant. Yet, the court accepted the complainant’s identification of defendant to the police officer on the scene of the assault and her identification in court. We will not interfere with that determination.

Defendant also challenges his identification based on the DNA evidence. Specifically, defendant contends that the evidence regarding the statistical probability that defendant contributed the DNA found in the complainant’s genital area and on her bite mark was highly suspect because the methodology employed is no longer generally accepted in the scientific community. This Court has repeatedly disagreed with that contention.

Stearly testified that he subjected the DNA samples provided with the rape evaluation kit to polymerase chain reaction (PCR) testing. PCR testing is faster than other methods of testing DNA and may be used to analyze smaller samples; however, this testing can only be used to “exclude” or “include” potential donors, rather than definitively identifying the individual contributor. *People v Leonard*, 224 Mich App 569, 586; 569 NW2d 663 (1997), writ gtd 256 F Supp 2d 723 (WD Mich, 2003). It is well established that PCR is a generally accepted in the scientific community as a proper method of analyzing DNA evidence. *People v Coy*, 243 Mich App 283, 291-292; 620 NW2d 888 (2000) (*Coy I*); *People v Lee*, 212 Mich App 228, 282-283; 537 NW2d 233 (1995).

Standing alone, however, the results of PCR analysis would be meaningless. Without a comparison to the remainder of the population, the inclusion or exclusion of the defendant could only result in a speculative identification. *Coy I, supra* at 294, 297, quoting *People v Adams*, 195 Mich App 267, 279; 489 NW2d 192 (1992), mod 441 Mich 916 (1993). Therefore, any evidence of a potential DNA match discovered by the PCR method *must* be accompanied by “interpretative evidence regarding the likelihood of the potential match,” i.e., a statistical comparison to the general population. *Coy I, supra* at 294. The method of statistical analysis

used in this case, the “product rule,” is also generally accepted in the scientific community. *People v Coy (After Remand)*, 258 Mich App 1, 10-11; 669 NW2d 831 (2003) (*Coy II*).

In relation to the swab taken from the complainant’s outer genital area, Steary testified that there was a one in 731,500 chance that another member of the African-American population contributed the DNA to the sample. The chance of finding another match in the Caucasian population was one in 604,200, the Southeastern Hispanic population was one in 409,200, and the Southwestern Hispanic was one in 411,200. In relation to the swab taken from the bite mark on the complainant’s inner thigh, the likelihood that another member of the African-American population contributed the DNA to the sample was one in 49.65 quadrillion. The chance of finding another match in the Caucasian population was one in 664.5 quadrillion, the Southeastern Hispanic was one in 368.3 quadrillion, and the Southwestern Hispanic was one in 285.5 quadrillion. The statistical probability that defendant contributed the DNA found in the samples taken from the complainant’s body is much greater than the probability accepted as sufficient evidence in *Coy II, supra* at 6. Accordingly, the DNA evidence provided by the prosecution was more than sufficient to support defendant’s conviction.

Defendant also argues that the prosecution lacked sufficient evidence to charge defendant with first-degree CSC in the first instance because the complainant testified that she never saw a gun. In order to convict a defendant of first-degree CSC perpetrated with the use of a weapon, the prosecution must show that the defendant was either armed or led the victim to believe that he was armed. MCL 750.520b(1)(e). In this case, the complainant testified that defendant repeatedly threatened her by indicating that he was carrying a gun. It is the sole province of the trier of fact to determine the credibility of the witnesses at trial. *People v Lemmon*, 456 Mich 625, 646-647; 576 NW2d 129 (1998). The trial court clearly accepted the truth of the complainant’s testimony in this regard and that evidence supports a finding that defendant at least led the complainant to believe that he possessed a gun.

#### IV. Judicial Misconduct

Defendant contends that the trial judge displayed partiality toward the prosecution throughout trial and continuously characterized defendant and his defense in a “negative light.” We review the manner in which a judge conducts a trial for an abuse of discretion. See *People v Cole*, 349 Mich 175, 200; 84 NW2d 711 (1957); *In re King*, 186 Mich App 458, 466; 465 NW2d 1 (1990). “A defendant in a criminal trial is entitled to expect a ‘neutral and detached magistrate.’” *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996), quoting *People v Moore*, 161 Mich App 615, 619; 411 NW2d 797 (1987). The trial court must remain impartial, *People v Siebert*, 450 Mich 500, 509; 537 NW2d 891 (1995), and should treat defense counsel with respect as an officer of the court, *People v Ross*, 181 Mich App 89, 91; 449 NW2d 107 (1989). A challenging party “must overcome a heavy presumption of judicial impartiality.” *Cain v Dep’t of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996).

Defendant contends that the trial judge prematurely reached a guilty verdict as evinced by her reference to the likely ensuing appeal. In the challenged comments, however, the trial judge merely indicated that she ordered the analysis of the DNA evidence because she felt bound to do so by previous case law of this Court and the Michigan Supreme Court.

Defendant further contends that the trial judge indicated that she would place little weight on evidence presented by the defense; however, defendant has provided no record citation for his contention and we could find no such comments on the record. Accordingly, this challenge is deemed abandoned on appeal. MCR 7.212(C)(7); *People v Smyers*, 398 Mich 635, 642; 248 NW2d 156 (1976).

Defendant also contends that the trial judge's bias is evinced by her denial of defendant's motion for substitute counsel. As asserted by defendant, the trial judge did state that defendant's dissatisfaction with counsel's performance appeared to arise from the discovery of incriminating DNA evidence against defendant. Even if this comment evinced bias, the trial judge properly denied defendant's motion for substitute counsel. Defendant did not express dissatisfaction with defense counsel's performance until late in these proceedings, after the majority of the prosecution witnesses had testified. The substitution of counsel at that point would have unreasonably disrupted the trial and, therefore, was properly denied. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001).

Defendant challenges the trial judge's characterization of defendant as a "predator" at sentencing.<sup>3</sup> However, "[w]here a judge forms opinions during the course of the trial process on the basis of facts introduced or events that occur during the proceedings, such opinions do not constitute bias or partiality unless there is a deep-seated favoritism or antagonism such that the exercise of fair judgment is impossible." *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). Based on the evidence presented at trial, the judge commented that defendant acted as a predator in committing the charged offenses. Although negative of defendant's conduct, this comment does not evince a deep-seated antagonism toward defendant.

Finally, defendant alleges that the trial judge showed her bias toward the prosecution by "facilitat[ing] the composure and confidence" of the complainant while testifying on the stand. Specifically, defendant contends that the trial judge questioned the complainant in a manner that made the witness appear more credible, "effectively putting the [c]ourt's stamp of approval on the witness['] testimony."

Pursuant to MRE 614(b), the trial court is empowered to "interrogate witnesses" at trial. "[A] trial court should conduct a trial 'with a view to eliciting the truth and to attaining justice between the parties.'" *People v Davis*, 216 Mich App 47, 49; 549 NW2d 1 (1996), quoting *United States v Dandy*, 998 F2d 1344, 1354 (CA 6, 1993). To meet this goal, there are

three situations in which a trial court has good reason to interject itself into the trial: (1) when the trial is lengthy and complex, (2) when attorneys are unprepared or obstreperous, or if the facts become confused and neither side is able to resolve the confusion, and (3) when a witness is difficult or is not credible

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<sup>3</sup> Defendant also contends that the trial judge referred to defendant as "blood of the daughter" at sentencing. We could not find this language in the record and are unsure what this purported comment means.

and the attorney fails to adequately probe the witness, or if a witness becomes confused. [*Davis, supra* at 49-50, citing *Dandy, supra* at 1354.]

This Court has provided other examples of when a trial court may interject and question the witnesses at trial:

[T]here might be situations in which attorneys for both sides avoid asking a witness a material question on the (traditional in some quarters) ground that counsel never ask a question without first knowing the answer. In these and other appropriate instances, the court may have good reason to question a witness in order to enhance the role of the criminal trial as a search for substantive truth. [*Davis, supra* at 50.]

Whatever the trial court's reason for questioning the witness, the court must pose its questions "in a neutral manner" and beware not to add to or distort the evidence. *Id.*, citing *Dandy, supra* at 1354-1355. "As long as the questions would be appropriate if asked by either party and, further, do not give the appearance of partiality, . . . a trial court is free to ask questions of witnesses that assist in the search for truth." *Davis, supra* at 52.

In this case, the trial court briefly questioned the complainant to clarify her testimony. The court asked the complainant various questions to determine the complainant's understanding of skin tones. The court then asked questions to clarify the complainant's testimony about what defendant was wearing when she identified him. Finally, the court clarified that the complainant was going to the police department on the evening of October 22, 2004, with the understanding that the police had already arrested a suspect in her attack. These questions were properly asked to clarify the complainant's testimony because neither the prosecutor nor defense counsel had succeeded in doing so. *Davis, supra* at 49-50. Moreover, these questions were posed in a neutral manner and there is no indication of partiality on the record. *Id.* at 50, 52. Accordingly, defendant's challenge lacks merit.

## V. Scoring of Offense Variables

Defendant challenges the scores imposed for offense variables (OV) 4, 7, 8 and 10. Defendant preserved his challenges by objecting to these scores at the sentencing hearing. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 311; 685 NW2d 670 (2004). Specifically, defendant objected to the scoring of ten points for OV 4, arguing that there was no evidence of psychological injury to the complainant; to the scoring of 50 points for OV 7, arguing that there was no evidence that the complainant was treated with "sadism, torture, or excessive brutality;" to the scoring of 15 points for OV 8, arguing that the complainant was not moved to an area of greater danger; and to the scoring of ten points for OV 10, arguing that a size difference does not automatically mean that a defendant exploited a vulnerable victim. It is within the sound discretion of the sentencing court to determine the number of points to be assessed for a given sentencing variable "provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). We must uphold the sentencing court's decision where there is "any evidence" to support that score. *Id.*

### A. OV 4

OV 4 is scored ten points when the victim of a crime suffered “serious psychological injury requiring professional treatment . . . .” MCL 777.34(1)(a). “In making this determination, the fact that treatment has not been sought is not conclusive.” MCL 777.34(2). In assessing ten points, the court stated that it was “obvious” from the complainant’s demeanor during the proceedings that she was “going to need psychological assistance.” The lower court presided over the entire trial and had ample opportunity to examine the complainant’s verbal tones, body language, and emotional reactions, things that this Court could never review. See *Lemmon, supra* at 646 (noting that the trier of fact is in the best position to judge witness credibility as he or she had the opportunity to personally observe the testimony along with the witnesses’ verbal tones and speech patterns). Accordingly, we reject defendant’s challenge to the scoring of this variable.

#### B. OV 7

OV 7 (aggravated physical abuse) is scored 50 points when a defendant treats a victim “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). Under the statute, “‘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). The sentencing court found 50 points to be appropriate given that defendant “threw around” and bit the complainant, who “was a little girl.”

In *Hornsby, supra* at 469, this Court found that the defendant engaged in “conduct designed to substantially increase the fear and anxiety” of the victim of an armed robbery when he took the restaurant manager into the office alone and held and cocked a gun while threatening to kill the manager and the other employees. In this case, defendant made the complainant believe that he was carrying a gun and threatened to shoot her if she did not comply with his demands. Defendant then forced the 16-year-old girl to unbuckle her pants and physically attempted to force her to remove her clothing. Defendant pushed the complainant to the ground, bit her, and forcefully penetrated her vagina with his finger and tongue, causing injuries to the complainant’s labia minora. The evidence supporting this score is even stronger than that presented in *Hornsby* given that defendant actually caused physical injury to the complainant. Accordingly, we affirm the sentencing court’s score.

#### C. OV 8

OV 8 is scored 15 points when “A victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense.” MCL 777.38(1)(a). The evidence clearly supports the sentencing court’s score in this regard. Defendant grabbed the complainant and pulled toward a building to avoid detection by passing foot and automobile traffic, thereby increasing the risk of harm to the complainant.

#### D. OV 10

OV 10 (exploitation of a vulnerable victim) is scored ten points when “The offender exploited a victim’s physical disability, mental disability, youth or agedness, or a domestic

relationship, or the offender abused his or her authority status.” MCL 777.40(1)(b). However, a score of five points is appropriate when a defendant exploited a victim based on a “difference in size or strength.” MCL 777.40(1)(c). Contrary to defendant’s assertion on appeal, the sentencing court did not base this score solely on the size difference between defendant and the complainant. Rather, the court repeatedly noted that the complainant was only 16 years old or a “little girl.” The court’s determination was based on the complainant’s young age and relative innocence, as well as, the difference in size and strength. Because there is record evidence to support the court’s assessment of ten points in this regard, we affirm that score.

## VI. *Blakely* Violation

Finally, defendant asserts that the sentencing court improperly based its scores for several offense variables on facts not proven beyond a reasonable doubt at trial and, therefore, violated the United States Supreme Court’s ruling in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). In *Blakely*, the United States Supreme Court found that, in a sentencing scheme where the judge may depart from the *maximum* sentence permitted by law; the departure must be based on facts found by a jury and not a judge. *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). In *Claypool*, the Michigan Supreme Court found *Blakely* to be inapplicable to Michigan’s sentencing scheme as follows:

Michigan, in contrast, has an indeterminate sentencing system in which the defendant is given a sentence with a minimum and a maximum. The maximum is not determined by the trial judge but is set by law. MCL 769.8. The minimum is based on guidelines ranges as discussed in the present case and in [*People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003)]. The trial judge sets the minimum but can never exceed the maximum (other than in the case of a habitual offender, which we need not consider because *Blakely* specifically excludes the fact of a previous conviction from its holding). Accordingly, the Michigan system is unaffected by the holding in *Blakely* that was designed to protect the defendant from a higher sentence based on facts not found by the jury in violation of the Sixth Amendment. [*Claypool, supra* at 730 n 14.]

In *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006), the Michigan Supreme Court recently reaffirmed this ruling. Quoting *Blakely, supra* at 303-304, the *Drohan* Court noted that a “statutory maximum” sentence

“is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant* . . . . In other words, the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without any additional findings.*” [*Drohan, supra* at 153 (emphasis in *Blakely*).]

However, judicial fact-finding is not completely forbidden by the Sixth Amendment. *Drohan, supra* at 153. Rather, a judge inherently has some discretion in an indeterminate sentencing scheme to “‘implicitly rule on those facts he deems important to the exercise of his sentencing discretion.’” *Id.* at 154, quoting *Blakely, supra* at 308-309. Even in *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), in which the United States Supreme Court found the federal sentencing guidelines to be unconstitutional, the Court agreed that

judicial fact-finding is appropriate in certain circumstances.

If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range . . . . For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant. [*Drohan, supra* at 156, quoting *Booker, supra* at 750.]

Therefore, “a [sentencing] court *may* consider facts and circumstances not proven beyond a reasonable doubt in imposing a sentence within the statutory range.” *Drohan, supra* at 156 (emphasis in original), citing *Booker, supra* at 220; see also *Harris v United States*, 536 US 545; 122 S Ct 2406; 153 L Ed 2d 524 (2002).

Moreover, a sentencing judge in this state may even depart from the minimum sentencing guidelines range based on facts not found by the jury.

[I]n all but a few cases, . . . a sentence imposed in Michigan is an indeterminate sentence. The maximum sentence is not determined by the trial court, but rather is set by law . . . . Michigan’s sentencing guidelines, unlike the Washington guidelines at issue in *Blakely*, create a range within which the trial court must set the minimum sentence. However, a Michigan trial court may not impose a sentence greater than the statutory maximum. While a trial court may depart from the minimum guideline range on the basis of “substantial and compelling reason[s],” MCL 769.34(3); *Babcock, supra* at 256-258, such departures, with one exception, are limited by statute to a minimum sentence that does not exceed “2/3 of the statutory maximum sentence.” . . . MCL 769.34(2)(b). Thus, the [sentencing] court’s power to impose a sentence is always derived from the jury’s verdict, because the “maximum-minimum” sentence will always fall within the range authorized by the jury’s verdict. [*Drohan, supra* at 161-162 (footnotes omitted).]

Accordingly, we reject defendant’s challenge to the scoring of the offense variables on this ground.

Affirmed.

/s/ Deborah A. Servitto  
/s/ E. Thomas Fitzgerald  
/s/ Michael J. Talbot