

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
April 16, 2013

v

KELVIN LEON HAWKINS, a/k/a LEON LEE
DENNIS, a/k/a LEON LEE DINNIS

No. 308742
Calhoun Circuit Court
LC No. 11-002789-FC

Defendant-Appellant.

Before: FITZGERALD, P.J., and O'CONNELL and SHAPIRO, JJ.

PER CURIAM.

A jury convicted defendant of first-degree criminal sexual conduct, MCL 750.520b(1)(e), second-degree criminal sexual conduct, MCL 750.520c(1)(e), and kidnapping, MCL 750.349. The trial court sentenced defendant as a fourth-offense felony offender, MCL 769.12, to concurrent prison terms of 50 to 75 years for the CSC I and kidnapping convictions and 19 to 75 years for the CSC II conviction. Defendant appeals as of right. We affirm.

I

On August 1, 2012, the victim, who had recently moved to Michigan from a homeless shelter in Montana, left the residence at which she had been residing and rode a bus to Detroit and checked into a homeless shelter. The following day she unsuccessfully attempted to secure assistance in purchasing a bus ticket back to Montana. She was sitting outside the shelter with her head in her hands when she heard defendant ask her from his van what was wrong. After the victim told defendant about her situation, defendant offered to provide her with a ride to his apartment in Battle Creek where he would purchase a bus ticket for her to return to Montana the following day. The victim stressed to defendant that she did not have any money and was unwilling to provide him with any sexual favors in return for the ride or the bus ticket. Defendant responded that he did not expect any sexual favors in return.

The victim entered defendant's van and told him that she needed to retrieve her suitcase from Pontiac. Defendant told her that it would be another week before he would be able to return to the Detroit area and he continued driving toward Battle Creek. Approximately 30 to 45 minutes into the drive, defendant informed the victim that he did not have enough gas to drive to Battle Creek. He pulled into a McDonald's restaurant and devised a plan to have AAA tow his vehicle to Battle Creek. A short time later, James Michaels from Budget Stadium Towing in

Ypsilanti arrived and loaded defendant's van onto a flatbed truck. The victim sat between Michaels and defendant on the ride to Battle Creek. Michaels testified that defendant and the victim did not appear to be a couple. Rather, it appeared to him that the two did not know each other at all.

Once in Battle Creek, Michaels unloaded defendant's van from the flatbed. The victim described the location as a business with a tall chain link fence around the perimeter with barbed wire on top. Numerous cars were cluttered around the property. Defendant used his key to unlock the gate to the fence around the property and drove the van inside of the fence. Defendant then got out of the van and locked the gate. He put the gate key into his pocket and then drove the van around the property a couple of times before parking.

The victim followed defendant into the building. She first entered the business area of the building, then followed defendant through a couple of doors and into his apartment in the back of the business. The victim asked defendant if she could use his cellular phone to call her friend in Pontiac. While the victim was conversing with her friend, defendant began to remove her pants. She continued to talk to her friend as defendant removed her pants and digitally penetrated her.

The victim concluded her conversation, turned around, and handed defendant the phone. She attempted to pull up her pants as she reiterated that she was not going to provide any sexual favors. Defendant would not allow the victim to pull up her pants and told her that she had to pay for using his phone. The victim explained that she did not have any money and that she would pay him back once she returned to Montana.

Defendant became aggressive and punched the victim twice in the side of her head. The victim begged defendant to stop and asked him to let her leave. Defendant reached under a computer desk and pulled out a black handgun that appeared to be a nine-millimeter pistol. The victim felt frozen with fear as she realized that the gate was locked and that she could not run away. Defendant pressed the gun to the victim's head and insisted that she was going to pay for using his phone. He told her that he was going to "blow her brains out and that she had better make peace with her God." The victim, feeling frightened and believing that defendant was going to shoot her, complied with defendant's demands.

Defendant ordered the victim to sit on the couch, lay back, and spread her legs. He took numerous photographs of her as he forced her to remove her clothing. Defendant removed his pants and got on top of the victim and vaginally penetrated her with his penis. The victim had trouble breathing with defendant on top of her and injured her wrist as she struggled to free herself. Defendant got off of the victim after having difficulty maintaining an erection. He then digitally penetrated her a second time before ordering her to masturbate him. Defendant then pulled up his pants and, once they were both dressed, asked the victim if she still would like him to purchase a bus ticket. The victim responded that she did not want a ticket and that she wanted to leave. Defendant agreed to release her, but continued to hold her against her will for nearly an hour after the sexual assault concluded.

Defendant drove the victim to the Te-Khi Truck Stop in Battle Creek in a different vehicle. The victim went into the truck stop and stated to the clerk that she had just been raped

and that she wanted the clerk to call 9-1-1. The clerk testified that the victim was sobbing and appeared to be scared. After the police arrived, the victim provided Officer Deb Novar with an initial statement and the two then drove around in an attempt to locate defendant's property. Defendant's property was determined to be a business known as Brown's Automotive. A search warrant was executed at the property at approximately 9:30 a.m. the day after the assault. Officers located a shotgun in the living room area of defendant's apartment. A second search warrant executed on defendant's van resulted in the discovery of a folding knife that resembled a pistol when placed into its holster and a black toy pistol.

Amanda Longanecker testified that on May 21, 2010, she was homeless and had a drinking problem. As she was walking to a gas station to purchase more alcohol, defendant pulled up in his van and asked if she needed a ride. Longanecker accepted defendant's offer to give her a ride and they drove to a party store where defendant purchased a fifth of whiskey and a 40-ounce beer. He gave Longanecker the key to unlock the gate. She unlocked the gate and defendant drove inside the fence. Longanecker then locked the gate as instructed and returned the key to defendant. Once inside the apartment, defendant gave her a beer. Shortly thereafter, defendant told Longanecker that she needed to pay for her beer by performing fellatio on him. When Longanecker told defendant that she could not pay for the liquor, defendant became aggressive and shouted, "I'm sick of you ho's," before slapping her across the face. As Longanecker reached for her cellular phone to call the police, defendant grabbed her right arm and twisted it behind her back, breaking her arm. Defendant pushed her down on the couch before reaching for a shotgun, cocking it, and putting it to her temple as he ordered her to remove her clothing. Longanecker complied because she thought defendant was going to kill her.

Defendant got on top of Longanecker and unsuccessfully attempted to penetrate her with his penis. Defendant then ordered Longanecker to perform fellatio on him. She complied until defendant retrieved his camera and forced her to pose naked while he took photographs of her. After the assault, defendant drove Longanecker to the location where he had picked her up.

Longanecker testified that she did not immediately report the assault because she saw him regularly around the neighborhood and she feared that he would kill her. A friend whom she told about the assault convinced her to contact the police the following day. Detective Keys investigated the allegations and was shown the location where the assault occurred. Longanecker denied being a prostitute.

During an interview with Detective Keys, defendant stated that he met the victim while visiting friends at a homeless shelter in Detroit. He stated that he brought the victim to Battle Creek after reaching an agreement that he would provide food and shelter in exchange for housekeeping services, medical care, and sexual favors. He admitted that he sucked the victim's breasts, digitally penetrated her, and took photos of her without her permission. He denied penile penetration and claimed that he masturbated as she posed for the pictures. He admitted that he owned a shotgun, but denied pointing a gun at the victim. When confronted with Longanecker's report of sexual assault from a year earlier, defendant claimed that Longanecker was a prostitute that he "used" frequently. Detective Keys asked defendant why two women who did not know each other would fabricate similar stories claiming that defendant had raped them under very similar circumstances. Defendant claimed that the encounters with both women were consensual.

Defendant testified that he met the victim when he was in Detroit for doctor appointments. He and the victim discussed his proposal that she would live with him in Battle Creek and that she would provide him with sexual favors, housekeeping, and care in exchange for food and shelter. Defendant agreed with much of the victim's testimony regarding the drive from Detroit to Battle Creek, but testified that he and the victim were "kicking it" and that she was hugging him.

After defendant's van was unloaded from the tow truck, he and the victim went inside his apartment and talked. The victim then removed her shirt and bra and became "romantic." She removed all of her clothing. Defendant played with the victim's breasts and then digitally penetrated her, but never penetrated her with his penis. He masturbated while the victim sat on the couch. He testified that he was not able to have sexual intercourse with the victim because he had not been able to achieve an erection since early 2010 due to his health problems and prescription medication. Defendant denied holding a gun to the victim's head, denied forcing her to perform sexual acts, and denied that she ever told him to stop. He also denied offering to purchase a bus ticket for the victim. The victim stayed at his apartment for approximately two hours before she called her friend in Pontiac. After talking to the friend, the victim told defendant that her child was sick and that she needed to return to Montana. Defendant intended to drop the victim off at the bus station so that she could make arrangements for someone to send her a ticket, but instead dropped her off at the truck stop.

With regard to Loganecker's allegations, defendant testified that she was a prostitute and that she did not "finish the job" so he did not pay her. He believed that she lied about the encounter to "get back at him." He denied using a shotgun to force her to perform fallatio.

II

Defendant first argues that the trial court unfairly prejudiced his right to a fair trial by admitting other acts evidence under MRE 404(b). We review a trial court's decision to admit evidence for an abuse of discretion. *People v Smith*, 282 Mich App 191, 194; 772 NW2d 428 (2009). However, when the decision involves a preliminary question of law, such as whether a rule of evidence precludes admission, we review the question de novo. *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010).

MRE 404(b)(1) governs the admissibility of other acts evidence and provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. Such evidence may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identify, or absence of mistake or accident when the same is material. "Relevant other acts evidence does not violate MRE 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith." *People v Vandervliet*, 444 Mich 52, 65; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Evidence regarding other acts is admissible if it is offered for a proper purpose, is relevant to an issue at trial, and the probative value of the evidence is not substantially outweighed by the potential for unfair prejudice. *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000).

The prosecutor filed a notice of intent to use 404(b) evidence to which defendant raised no objection. The prosecutor sought to admit testimony from Longanecker regarding an incident where defendant picked her up in his van as she was walking to a gas station for liquor, took her to his property, locked the gate to the tall fence, and demanded sexual favors to pay him back for his assistance in securing alcohol for her. When she refused, defendant pointed a gun at her and threatened to shoot her if she did not comply. She was forced to perform fellatio on him and he tried to penetrate her vaginally. The prosecutor argued that the evidence was admissible under MRE 404(b) to demonstrate defendant's intent and scheme, plan or system, that the evidence was relevant in light of defendant's defense that the sexual activity was consensual, and that the evidence was more probative than prejudicial. Defendant argued that the evidence should not be admitted because it would prejudice the jury. In a detailed ruling, the trial court found that the evidence was admissible under MRE 404(b) because the remarkably similar incident was relevant to rebut the defense of consent, and that the evidence was more probative than prejudicial. The jury was instructed in regard to the proper use and consideration of the other acts evidence during trial.

On appeal, defendant argues that the trial court abused its discretion by admitting the evidence because the evidence did not show a common scheme, plan, or system. We disagree. Longanecker's testimony demonstrated that defendant acted with a common scheme, plan, or system. Other act evidence and the charged crime must be "sufficiently similar to support an inference that they are manifestation of a common plan, scheme, or system." *Sabin*, 463 Mich at 63. There must be "such a concurrence of common features that the various acts are naturally to be explained as caused by general plan of which they are the individual manifestations." *Id.* at 64-65, quoting 2 Wigmore Evidence (Chadbourn rev), § 304, p 249 (emphasis omitted).

Here, the evidence showed that defendant located the victim at a homeless shelter and struck up a conversation with her from his van before offering to help her. Defendant drove her to his place in Battle Creek. He locked a tall chain fence. Defendant then demanded that the victim perform sexual favors to pay him back for his assistance. When the victim refused, defendant pointed a firearm. The victim complied under fear. She was penetrated vaginally by defendant's penis and finger. Longanecker testified that she has a drinking problem and that as she was walking to a gas station to purchase alcohol defendant struck up a conversation with her from his van and offered to buy her alcohol. Defendant took Longanecker to his place in Battle Creek. He locked the chain fence. Defendant demanded sexual favors to pay him back for his assistance in securing alcohol for her. When she refused, defendant pointed a firearm at her. Longanecker complied out of fear and was forced to perform fallatio. Defendant also attempted to penetrate her vaginally. The victim's and Longanecker's testimony demonstrated defendant's general plan to lure vulnerable women back to his place and use threats of violence to force them to engage in sexual activity. There was a concurrence of common features such that the acts were naturally explained as a general plan. *Sabin*, 463 Mich at 64-65.

This other acts evidence also was relevant to the allegations at issue. MRE 401 defines relevant evidence as "having 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." Defendant displayed a pattern of picking up vulnerable women and taking them back to his property and demanding sexual activity in exchange for his purported acts of kindness. This was relevant to a material fact at issue in the instant case because it

negated defendant's claim that he engaged in consensual sexual activity with the women and did not threaten them with weapons.

Lastly, this evidence did not produce any unfair prejudice. "Evidence is generally admissible if it is relevant and its probative value is not substantially outweighed by the danger of unfair prejudice." *People v Railer*, 288 Mich App 213, 219; 792 NW2d 776 (2010). "All evidence offered by the parties is prejudicial to some extent, but the fear of prejudice does not generally render the evidence inadmissible. It is only when the probative value is *substantially outweighed* by the danger of unfair prejudice that evidence is excluded." *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod on other grounds *People v Mills*, 450 Mich 1212 (1995) (citations omitted) (emphasis in original). Furthermore, "[e]vidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998).

The testimony from Longanecker was more than marginally probative, as it demonstrated defendant's common plan and scheme and negated his claim that he engaged in consensual sexual activity with the victim. There also is no evidence that the jury gave Longanecker's testimony undue or preemptive weight, especially in light of the trial court's limiting instructions. It cannot be said that the other acts evidence "stir[red] the jurors to 'such passion ... as to [be swept] beyond rational consideration of [the defendant's] guilt or innocence of the crime on trial.'" *People v Starr*, 457 Mich 490, 503; 577 NW2d 673 (1998), quoting McCormick, *Evidence* (2d ed), § 190, p 454. Accordingly, the relevance of Longanecker's testimony was not substantially outweighed by the danger of unfair prejudice and was admissible under MRE 404(b).

III

Defendant argues that the prosecution presented insufficient evidence to support his conviction for kidnapping, specifically that he restrained her or prevented her from leaving his property. When examining a challenge to the sufficiency of the evidence, we review the evidence de novo in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the prosecutor proved the elements of the charged offense beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). Circumstantial evidence, and the reasonable inferences drawn from that evidence, can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). "[B]ecause it can be difficult to prove a defendant's state of mind," the jury's resolution of such issues can be supported by even "minimal circumstantial evidence" and may be inferred from the evidence. *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008). It is the sole province of the jury to weigh the evidence and adjudge witness credibility and we may not second guess those considerations. *Wolfe*, 440 Mich at 514–515. Accordingly, we must "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).

As pertinent to this case, the kidnapping statute provides that "A person commits the crime of kidnapping if he or she knowingly restrains another person with the intent to "[e]ngage in criminal sexual penetration or criminal sexual contact with that person." MCL 750.349(1)(c). The statute further defines "restrain" as meaning "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." MCL 750.349(2). "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." *Id.*

Defendant contends that the evidence established that he locked the gate to the tall chain link fence surrounding his property to keep others from entering the property, not to lock the victim inside the property.¹ He contends that when the victim asked to leave the property, he immediately drove her to the truck stop.

At trial, there was evidence that defendant locked the gate to a tall, chain link fence surrounding his property after bringing the victim onto the property. When the victim refused to engage in sexual activity, defendant pulled out a gun and held it to her head. He denied her request to leave. Defendant thereby restricted her by her fear of being killed if she did not comply with his sexual demands, and further restricted her by her knowledge that she could not leave the property due to the locked gate. The intentional restraint of the victim without her consent, followed by the sexual assault of the victim, sufficiently established that defendant knowingly restrained the victim with the intent to engage in sexual penetration, thereby establishing the commission of a kidnapping.

IV

Defendant challenges the trial court's scoring of offense variables (OVs) 2, 3, 4, 7, 8, 10, and 11.² Defendant's challenges with respect to all but OV 11 are not preserved because defendant did not object to the particular scores. "This Court reviews a trial court's scoring decision under the sentencing guidelines to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009). The interpretation and application of the sentencing guidelines involves a question of law that we review de novo. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004). We review the trial court's scoring of the guidelines' offense variables for clear error. *People v Lockett*, 295 Mich App 165, 182; 814 NW2d 295 (2012). A scoring decision is not clearly erroneous if there is any evidence on the record to support it. *Steele*, 283 Mich App at 490. "An appellate court must affirm minimum sentences that are within the recommended guidelines range, except when there is an error in scoring the sentencing guidelines or inaccurate information was relied on in determining the sentence." *Id.*; MCL 769.34(10).

¹ Defendant also asserts that the victim testified that defendant used force to accomplish the sexual assault, but did not testify that defendant use force to prevent her from leaving and, therefore, that he did not forcibly restrain her. This assertion is misplaced as forcible restraint is not an element of kidnapping but, rather, is an element of unlawful imprisonment. See MCL 750.349b.

² Although defendant's statement of questions presented also refers to OV 13, defendant has not presented any argument regarding OV 13.

OV 2 addresses the lethal potential of the weapon possessed or used. MCL 777.32. Five points are to be scored if “[t]he offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon.” MCL 777.32(1)(d). Defendant argues that the toy pistol found during a search of his vehicle is not a weapon for purposes of OV 2. However, the fact that a search of defendant’s premises and vehicle resulted in the discovery of a toy pistol does not equate to a finding that the toy pistol was the weapon used during the assault. The victim testified that defendant pressed a nine-millimeter pistol against her head and threatened to “blow her head off.” This testimony describing the weapon and defendant’s threatened use of the weapon supports the trial court’s scoring of OV 2.

OV 3 addresses physical injury to a victim. MCL 777.33. A trial court must assign ten points for OV 3 if “[b]odily injury requiring medical treatment occurred to a victim.” MCL 777.33(1)(d). MCL 777.33(3) defines “requiring medical treatment” as “the necessity for treatment and not the victim’s success in obtaining treatment.” Defendant’s contention that the victim was only prescribed ibuprofen for her complaints of soreness and pain and that she received no medical treatment that would support a score of ten points is misplaced. The victim was examined by a doctor at the emergency room and had x-rays taken of her head to determine whether she suffered a head injury as a result of the blows to the head. Additionally, she testified that she injured her wrist during her struggle with defendant as he attempted to penetrate her and that her previously scheduled wrist surgery had to be postponed because she contracted “scratch fever.” The victim testified that she was attempting to reschedule the surgery at the time of trial. The evidence supports the trial court’s scoring of OV 3.

OV 4 addresses psychological injury to a victim. MCL 777.34. OV 4 allows the trial court to assign a score of ten points if “[s]erious psychological injury requiring professional treatment occurred to a victim.” MCL 777.34(1)(a). MCL 777.34(2) clarifies that a score of ten points is appropriate if the psychological injury *may* require professional treatment and “the fact that treatment has not been sought is not conclusive.” The facts elicited at trial showed that defendant’s assault and threats caused the victim fear and anxiety during the incident and that she was visibly shaken and upset afterward when she arrived at the truck stop and when she talked to police. These facts were sufficient for the trial court to find that the victim suffered a serious psychological injury that may require professional treatment. *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004). Accordingly, the trial court correctly scored OV 4 at 10 points.

OV 7 addresses aggravated physical abuse. MCL 777.37. OV 7 permits a score of 50 points 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). Relying on this Court’s holding in *People v Glenn*, 295 Mich App 529; 814 NW2d 686 (2012), defendant argues that this case is no more brutal than other first-degree criminal sexual conduct cases and involved only circumstances inherent in the crime. In *Glenn*, this Court determined that the two victims were not subject to excessive brutality when the defendant struck each victim one time with a sawed-off air soft shotgun while he committed an armed robbery. *Id.* at 531. The defendant did not injure either of the victims, and neither of them required medical treatment. *Id.*

This Court held that the defendant should have been scored zero points for OV 7 under those circumstances because, though his conduct was reprehensible, he did not engage in conduct designed to substantially increase the victims' fear and anxiety. *Glenn*, 295 Mich App at 533-534. We reasoned in part that the elements of armed robbery are only met if a defendant uses force against a person or assaults and places the person in fear. *Id.* at 535-536. We concluded that the conduct did not substantially increase the victims' fear beyond what occurs in most armed robberies. *Id.* at 536.

We find that the trial court did not clearly err when it scored 50 points for OV 7 under the facts of this case because they are not substantially similar. After digitally penetrating the victim, defendant struck the victim in the head twice before pulling a pistol and placing it to her temple while threatening to "blow her brains out" if she did not comply with his demands. He also told her to "make peace with her God" while threatening to kill her. Defendant suffered injuries as a result of the blows to the head. Defendant's acts of hitting the victim and holding a gun to her head while threatening to kill her were designed to substantially increase her fear and anxiety during the offense. Accordingly, we conclude that the trial court did not err in scoring 50 points for OV 7.

OV 8 addresses victim asportation or captivity. MCL 777.38. Fifteen points may be scored for OV 8 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). We conclude that the record adequately supports the determination that defendant asported the victim. Asportation only requires that the defendant move the victim, with or without force. *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003). A victim is asported to a situation of greater danger if the victim is asported to a place that a person is less likely to see the defendant commit the crime. *Steele*, 283 Mich App at 491. The victim testified that defendant picked her up in Detroit and drove her at night to his apartment in Battle Creek that is within property surrounded by a tall fence secured by a locked gate. The record supports a determination that defendant moved the victim to a location of greater danger. Additionally, the victim testified that defendant refused to let her leave the apartment for approximately an hour after the assaults concluded. Accordingly, we conclude that the trial court did not err in scoring 15 points for OV 8.

OV 10 addresses exploitation of a vulnerable victim. MCL 777.40. Fifteen points may be scored for OV 10 where "[p]redatory conduct was involved." MCL 777.40(1)(a). The statute defines predatory conduct as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). The Michigan Supreme Court has provided standards to help a trial court determine whether it should assess points for predatory conduct:

- (1) Did the offender engage in conduct before the commission of the offense?
- (2) Was this conduct directed at one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation?
- (3) Was victimization the offender's primary purpose for engaging in the preoffense conduct?

If the court can answer all these questions affirmatively, then it may properly assess 15 points for OV 10 because the offender engaged in predatory conduct under MCL 777.40.³

Further, the term “predatory” means that the conduct must be “‘predatory’ in nature, e.g., lying in wait and stalking, as opposed to purely opportunistic criminal conduct or ‘preoffense conduct involving nothing more than run-of-the-mill planning to effect a crime or subsequently escape without detection.’” *People v Huston*, 489 Mich 451, 462; 802 NW2d 261 (2011), quoting *Cannon*, 481 Mich at 162.

From the record evidence, we conclude that the trial court properly determined that defendant engaged in predatory conduct under the statute. The victim was sitting outside of a homeless shelter when defendant communicated with her from his van. The victim explained her situation to defendant, who then offered to assist her and took her to his apartment more than one hour away. Once at the apartment, defendant informed the victim that she could pay for his assistance by providing him with sexual favors. The victim’s circumstances were similar to those of Longanecker, who testified that she was an alcoholic walking alone along a road when defendant approached her in his van and offered to purchase alcohol for her. Defendant took Longanecker to his apartment and demanded sexual favors in return for purchasing alcohol for her. It is reasonable to conclude from this evidence that defendant’s conduct was predatory in nature as opposed to purely opportunistic criminal conduct. Consequently, there was evidence to support a score of 15 points for OV 10.

Lastly, OV 11 addresses criminal sexual penetrations. MCL 777.41. Fifty points may be scored for OV 11 when “[t]wo or more criminal sexual penetrations occurred.” MCL 777.41(1). Twenty-five points may be scored if “[o]ne criminal sexual penetration occurred.” All sexual penetrations of the victim arising out of the sentencing offense are to be scored. MCL 777.41(2)(a). The one penetration that forms the basis of a first-degree criminal sexual conduct offense cannot be scored. MCL 777.41(2)(c). Penetrations arise out of the sentencing offense if they occur at the same time and during the same source of conduct as the sentencing offense. *People v Mutchie*, 251 Mich App 273, 277-278; 650 NW2d 733 (2002).

Defendant contends that the victim testified to one incident of penile penetration and one incident of digital penetration. Defendant was acquitted of first-degree criminal sexual conduct involving penile penetration but was convicted of first-degree criminal sexual conduct involving digital penetration. He concedes that the fact that the jury acquitted defendant of first-degree criminal sexual conduct did not preclude the trial court’s scoring of 25 points for that penetration. Thus, defendant argues that OV 11 should have only been scored at 25 points. However, a review of the record reveals that the victim testified that defendant penetrated her digitally while she was on the phone, that he then instructed her to lay down and penetrated her vagina with his penis, and that he then digitally penetrated her a second time before forcing her to masturbate him. Accordingly, the evidence supported a finding that two criminal penetrations arose out of the sentencing offense in addition to the sentencing offense itself. *Steele*, 283 Mich

³ *People v Cannon*, 481 Mich 152, 161-162; 749 NW2d 257 (2008).

App at 490. The trial court properly scored 50 points under OV 11 based on its determination that two penetrations had occurred.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Peter D. O'Connell

/s/ Douglas B. Shapiro