

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

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARCO DESHAWN SMITH,

Defendant-Appellant.

---

UNPUBLISHED

April 20, 2006

No. 258929

Wayne Circuit Court

LC No. 03-008248-01

Before: Cooper, P.J., and Cavanagh and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for conspiracy to kidnap, MCL 750.349, conspiracy to entice a female under 16 years old for immoral purposes, MCL 750.13, conspiracy to transport a female for prostitution, MCL 750.459, conspiracy to prostitute/pander, MCL 750.455, conspiracy to accept earnings from a prostitute, MCL 750.457, conspiracy to commit extortion, MCL 750.213, and conspiracy to do a legal act in an illegal manner, MCL 750.157a. We affirm, but vacate the sentences for counts three, four, five, and six and remand for resentencing.

Defendant first argues that he was denied his constitutional rights to a properly instructed jury because (1) the jury was not instructed that the verdict must be unanimous as to each of the charged offenses, and (2) the instructions improperly shifted the burden of proof to defendant. After review for plain error affecting defendant's substantial rights, because defendant admittedly failed to object to the jury instructions, we disagree. See *People v Hill*, 257 Mich App 126, 151-152; 667 NW2d 78 (2003).

A defendant is entitled to an instruction that the jury must reach a unanimous verdict as to each of the charged offenses. *People v Cooks*, 446 Mich 503, 510-511; 521 NW2d 275 (1994). Here, defendant was charged with seven separate counts of conspiracy. The trial judge instructed the jury on the law of conspiracy, and the elements of each of the individual crimes involved in the seven separate counts, noting that "each count is a conspiracy to do the acts or offenses that I have just read to you." The court instructed the jury to "treat all the offenses separately in light of the facts presented because they are separate offenses." The court instructed the jury that it may find defendant guilty or not guilty of any or all of the counts "as you deem fit under the evidence." The court also instructed the jury, on two occasions, that the verdict in a criminal case must be unanimous, further explaining "it's necessary that each of you agree on a verdict" and "until you return with a unanimous verdict, do not reveal this to anyone

outside of the jury room.” In accordance with these instructions, the jury found defendant guilty of seven separate offenses, and such verdict was confirmed when each member of the jury was polled. The jury instructions, read as a whole, sufficiently protected defendant’s rights to a properly instructed jury. See *People v Huffman*, 266 Mich App 354, 371-372; 702 NW2d 621 (2005).

Next, defendant argues that the jury instruction allowing the jury to infer a lack of consideration with respect to receiving or taking earnings from a prostitute improperly shifted the burden of proof to defendant. Again, we disagree. The disputed instruction, CJI2d 20.36, is consistent with MCL 750.457 which provides, in pertinent part:

Any person who shall knowingly accept, receive, levy or appropriate any money or valuable thing without consideration from the proceeds of the earnings of any woman engaged in prostitution . . . shall be guilty of a felony . . . . And such acceptance, receipt, levy or appropriation of such money or valuable thing, shall, upon any proceeding or trial for violation of this section, be presumptive evidence of lack of consideration.

In *People v Jackson*, 280 Mich 6, 10-11; 273 NW 327 (1937), our Supreme Court held that MCL 750.457 did not unconstitutionally shift the burden of proof to the defendant. The instruction issued here by the trial court included, in pertinent part, that it was for the jury “to determine whether defendant knowingly received or took the earnings of a prostitute” and, if so, “you may infer that the defendant received and/or took the earnings of a prostitute without giving anything of value in return. You don’t have to make that inference, but you may.” The instruction was proper; therefore, defendant’s claim of error is without merit.

Defendant next argues, and the prosecution agrees, that the trial court erroneously imposed 15-year minimum sentences for 20-year maximum offenses with regard to counts three, four, five, and six. Pursuant to MCL 769.34(2)(b), and *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972), the trial court may not impose a minimum sentence in excess of two-thirds of the statutory maximum without articulating a substantial and compelling reason for departure. MCL 769.34(3). Therefore, the 15-year minimum sentences imposed for counts three, four, five, and six, in the absence of a substantial and compelling reason for departure, violate the two-thirds rule. Accordingly, these minimum sentences are vacated and the matter is remanded for resentencing to conform to the two-thirds rule of *Tanner, supra*.

Affirmed, but remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Jessica R. Cooper  
/s/ Mark J. Cavanagh  
/s/ E. Thomas Fitzgerald