

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
May 21, 2013

v

CHARLESTON BLUE WASHINGTON,  
Defendant-Appellant.

No. 304611  
Wayne Circuit Court  
LC No. 10-003701-FH

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Before: STEPHENS, P.J., and SAWYER and METER, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of third-degree criminal sexual conduct (CSC), MCL 750.520d(1)(a), unlawful imprisonment, MCL 750.349b(1), and felonious assault, MCL 750.82. He was sentenced as a third habitual offender, MCL 769.11, to serve 12 to 30 years for third-degree criminal sexual conduct, 12 to 30 years for unlawful imprisonment, and four to eight years for felonious assault. After defendant filed this appeal, he moved for resentencing in the trial court, and the court issued an amended judgment of sentence, changing his sentence for unlawful imprisonment to 8 to 15 years. For the reasons that follow, we conclude that defendant's argument with regard to the sufficiency of the evidence is meritless. Additionally, although defendant is correct that the trial court erred by assigning ten points for Offense Variable (OV) 3 and OV 10, because the error would not have altered his minimum guidelines range, we conclude that the error does not require resentencing. Accordingly, we affirm defendant's convictions and sentences.

I. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that the prosecution introduced insufficient evidence of unlawful imprisonment. Defendant does not challenge the sufficiency of the evidence regarding his felonious assault or CSC convictions.

A sufficiency of the evidence challenge is reviewed to determine whether any reasonable trier of fact could find each element of the crime established beyond a reasonable doubt, if the evidence is viewed in the light most favorable to the prosecution. *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002) (citation omitted).

Unlawful imprisonment, MCL 750.349b(1), requires proof that the defendant knowingly restrained another person in any of the following situations: (1) the person was restrained by a

weapon or instrument; (2) the person was secretly confined; or (3) the person was restrained to facilitate commission of a felony or flight after a felony. Restrain means to “forcibly restrict a person’s movements or to forcibly confine the person so as to interfere with that person’s liberty without that person’s consent or without lawful authority.” MCL 750.349b(3)(a). The restriction does not have to be for a specific length of time and can be incidental to the commission of another felony. MCL 750.349b(3)(a).

Defendant argues that forcible confinement requires proof of asportation. Defendant relies on case law defining kidnapping, specifically *People v Wesley*, 421 Mich 375, 383; 365 NW2d 692 (1984), and *People v Adams*, 389 Mich 222; 205 NW2d 415 (1973). However, the language of MCL 750.349b does not require movement and no case law supports defendant’s assertion that this requirement is extended to unlawful imprisonment, which, at common law, was distinguished from kidnapping by the lack of asportation, see *Adams*, 389 Mich at 230-231. The prosecution offered sufficient evidence that defendant forcibly confined the victim. She testified that she was unable to leave because defendant stopped her attempt, added additional items in front of the door, would not let her out of his sight, and used physical violence to intimidate her. It is the role of the trier of fact, in this case the trial judge, to judge witness credibility. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004) (citation omitted).

Defendant also argues that the instruments used to allegedly assault the victim were not used to restrain her, and she was not secretly confined because others knew of her location and her relationship with defendant. Restraint by weapon includes the use of a weapon to induce fear and discourage attempts to leave. Even if a weapon was not used to restrain the victim, there was sufficient evidence of secret confinement. Secret confinement is defined as keeping either the confinement or the location a secret. MCL 750.349b(3)(b)(i) and (ii). The totality of the circumstances must be considered to determine whether the defendant deprived the victim of the assistance of others. *People v Jaffray*, 445 Mich 287, 307; 519 NW2d 108 (1994). A victim can be deprived of the ability to communicate her confinement by fear of reprisal. *People v Railer*, 288 Mich App 213, 218; 792 NW2d 776 (2010). There was no evidence that anyone willing to assist the victim was aware that she wished to leave because of defendant’s violent conduct and was being confined against her will. She testified that defendant kept control of her cell phone until he fell asleep; she then sent texts for assistance and erased them to avoid reprisal.

There was sufficient evidence to find defendant guilty of every element of unlawful imprisonment, MCL 750.349b, by either secret confinement or restraint by weapon or instrument.

## II. SENTENCING GUIDELINES

Next, defendant challenges his sentence for his CSC conviction only. Initially, Defendant argues that he should have been scored separately for this offense because it was a separate transaction, and the offense variables should only have been scored for conduct related to that offense. When defendant moved for resentencing, the prosecution and trial court agreed with these arguments. Therefore, we need not address them again on appeal.

Defendant also challenges the trial court's findings under specific offense variables. At resentencing, the trial court agreed that OV 1, OV 2, OV 4, OV 7 and OV 8 should be scored zero for the criminal sexual conduct conviction. The trial court never scored these variables for defendant's CSC conviction, only for his unlawful imprisonment conviction. Accordingly, defendant's arguments regarding these variables are irrelevant to his challenge of his CSC conviction, and we need not address them. However, defendant also challenges the trial court's scoring of OV 3 and OV 10. For each of these variables, the trial court assigned ten points for defendant's CSC conviction.

"This Court reviews de novo the application of the sentencing guidelines but reviews a trial court's scoring of a sentencing variable for an abuse of discretion." *People v Harveson*, 291 Mich App 171, 179; 804 NW2d 757 (2010) (citations omitted). "A trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence." *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008) (citations omitted).

#### A. OV 3

OV 3 addresses physical injury to a victim. MCL 777.33(1). A trial court must assess ten points for OV 3 if "[b]odily injury requiring medical treatment occurred to a victim." MCL 777.33(1)(d). The trial court assigned ten points for OV 3 because the victim had chlamydia. Although the victim testified that she had unprotected sex with defendant and was subsequently diagnosed with the disease, she also testified that on March 23, 2010, defendant asked her why she cheated on him and gave him chlamydia. In the absence of some proof of causation regarding the disease's transmission from defendant to the victim, we cannot conclude by a preponderance of the evidence that defendant caused "bodily injury requiring medical treatment . . ." The trial court erred by assigning ten points for OV 3.

#### B. OV 10

OV 10 addresses exploitation of a vulnerable victim. MCL 777.40. A trial court must assess ten points for OV 10 if "[t]he 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). Vulnerability is defined as "the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." MCL 777.40(3)(c). Exploit means to "manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(b).

Defendant argues that the scoring was inappropriate because there was no evidence of grooming and the victim lied about her age. The court did not score 15 points for predatory conduct, which would have required preoffense conduct, such as grooming. *People v Cannon*, 481 Mich 152, 159; 749 NW2d 257 (2008). The court based its finding of exploitation on the age disparity between the 15-year-old victim and defendant, who was 27 at the time of the offense. The victim testified that she met defendant when he sold her drugs on the corner; their first sexual encounter was the next day in his car in the garage of a squatter house. She admits that she told him after that encounter that she was only 15, but that they had several more encounters before and after her sixteenth birthday. There is evidence that defendant may have sold drugs to the victim and no dispute that he sold drugs. However, the record does not contain

any indication that any sale of drugs was a grooming activity. The victim and defendant continued their interactions even after the victim's family was made aware of the relationship. The continuing interaction was done with the apparent knowledge and acquiescence of the victim's mother. This acquiescence was obtained by subterfuge with the defendant claiming to be 18 years of age. There is no evidence upon which the trial court could find that this subterfuge involved exploitation of an age or size differential. Moreover, in this instance there was no authority relationship between the victim and the defendant. Thus, the trial court erred in scoring OV 10 for the CSC conviction.

### C. SCORING ERRORS DO NOT REQUIRE RESENTENCING

“Where a scoring error does not alter the appropriate guidelines range, resentencing is not required.” *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006) (citation omitted). On resentencing, defendant's OV total for his CSC conviction, a class B offense, was 95 points. The removal of ten points for the erroneous OV 3 score combined with the removal of ten points for the erroneous OV 10 score results in a total OV score of 75 points. Any OV score 75 points or greater is within Level VI for class B offenses. MCL 777.63. Accordingly, even though the trial court erred when it assessed 10 points for OV 3, resentencing is not required because defendant's guidelines range would not change.

Affirmed.

/s/ Cynthia Diane Stephens  
/s/ David H. Sawyer  
/s/ Patrick M. Meter