

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

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
July 3, 2014

v

CEDRIC DASHAN DAVIS,  
  
Defendant-Appellant.

No. 310542  
Kent Circuit Court  
LC No. 10-011872-FC

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

PER CURIAM.

Defendant Cedric Dashan Davis appeals by right his convictions for two counts of first-degree criminal sexual conduct (CSC) involving accomplices, MCL 750.520b(1)(d), and one count of furnishing alcohol to a minor, MCL 436.1701(1). The trial court sentenced defendant to concurrent terms of 10 to 25 years' imprisonment for his first-degree CSC convictions and to 30 days' time served for furnishing alcohol to a minor. We affirm.

Defendant's convictions arose from the sexual assault of a 15-year-old girl. The evidence supported that defendant, then aged 24, provided the victim with alcohol, which she consumed to the point that she was severely impaired and ultimately required hospitalization. While the victim was impaired and nonresponsive, defendant and at least three other individuals took turns sexually assaulting her. The victim could not recall the sexual assaults. However, at trial, numerous witnesses testified to the assaults and identified defendant as one of the perpetrators.

On appeal, defendant first contends that he was denied due process because the prosecution failed to present sufficient evidence to support his convictions. We review challenges to the sufficiency of the evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). We view the evidence "in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Circumstantial evidence and reasonable inferences arising therefrom can constitute sufficient evidence to establish the elements of a crime. *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993). "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

Credibility determinations are for the trier of fact and they will not be disturbed on appeal. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

In regard to defendant's conviction for supplying alcohol to a minor, the relevant statute provides that:

Alcoholic liquor shall not be sold or furnished to a minor. Except as otherwise provided . . . a person who knowingly sells or furnishes alcoholic liquor to a minor, or who fails to make diligent inquiry as to whether the person is a minor, is guilty of a misdemeanor. [MCL 436.1701(1).]

The term "furnish" has long been held to mean simply "letting a minor have liquor . . ." *People v Neumann*, 85 Mich 98, 102; 48 NW 290 (1891). In this case, witness testimony, specifically indicating that defendant purchased vodka on behalf of three 15-year-old girls and then gave it to them, was sufficient to support defendant's conviction for furnishing alcohol to a minor.

Defendant's two first-degree CSC convictions arose under MCL 750.520b(1)(d)(i), which requires the prosecutor to show that: (1) defendant engaged in "sexual penetration with another person," (2) while he was "aided or abetted by 1 or more persons," and (3) he knew or had reason to know that the victim was "mentally incapable, mentally incapacitated, or physically helpless." In regard to defendant's CSC convictions, the jury was also instructed on an aiding and abetting theory of liability under MCL 767.39. To support a conviction under an aiding and abetting theory, the prosecution must establish that:

(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement. [*People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004) (citation omitted).]

Under either an aiding and abetting theory or with defendant as the principle actor, the evidence was sufficient to support his convictions. The first element of the first-degree CSC offense, "sexual penetration," refers to "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." MCL 750.520a(r). According to witness testimony presented at trial, defendant, acting as a principle, penetrated the victim with his penis at least twice: once orally and at least once vaginally or anally. Although defendant contends the witnesses merely assumed vaginal penetration occurred, there were two witnesses who specified that they observed penetration. Alternatively, under an aiding and abetting theory, testimony showed that the victim was penetrated multiple times by at least three other assailants. Two of defendant's co-perpetrators testified and admitted penetrating the victim, and a third assailant, who died before trial, was described by eyewitnesses as having penetrated the victim. A finding of penetration was further supported by expert testimony which confirmed that the victim suffered recent physical injury consistent with having been vaginally penetrated. Viewing the facts in a light most favorable to the prosecution, there was clearly sufficient evidence of penetration to support both of defendant's CSC convictions.

The prosecutor also needed to establish that the sexual assailant was aided and abetted by 1 or more person. “The phrase ‘aids or abets’ is used to describe any type of assistance given to the perpetrator of a crime by words or deeds that are intended to encourage, support, or incite the commission of that crime.” *Moore*, 470 Mich at 63. In this case, the sexual assaults occurred in a group setting in which the assailants surrounded the victim while she was on the floor and took turns sexually assaulting her. Before the assaults began, defendant in particular whispered to the first assailant—an 11-year-old boy, after which the boy moved behind the victim and sexually assaulted her. Given that defendant’s whispered words immediately preceded the assault, it would be reasonable to infer that defendant said something to incite the boy’s actions and, ultimately, the assaults that followed. It would also be reasonable to infer, for purposes of an aiding and abetting theory of liability, that defendant intended the commission of the crime when he gave this encouragement. *Id.* at 67-68.

During the numerous sexual assaults that followed, those surrounding the victim spoke words to encourage the crimes. There was also testimony that the assailants passed around condoms to use on the victim. One witness also testified that, during the assaults, the victim was physically held in place by those present to prevent her from falling over while others sexually assaulted her. There was also testimony that when the victim’s friends attempted to turn the lights back on or to seek help outside the home in order to stop the assaults, they were thwarted in their efforts by individuals gathered at the house. These actions to prevent interference supported the commission of the crimes. Based on the evidence presented, the jury could reasonably conclude that the sexual assaults committed by defendant were accomplished with the aid of 1 or more persons and that he, in turn, aided the commission of the other sexual assaults.

Lastly, for purposes of defendant’s CSC convictions, the prosecution needed to show the actor knew or had reason to know that the victim was “mentally incapable, mentally incapacitated, or physically helpless.” The prosecution’s theory was that the victim was “physically helpless,” meaning she was “unconscious, asleep, or for any other reason [was] physically unable to communicate unwillingness to an act.” MCL 750.520a(m). Whether the actor should have known the individual was physically helpless is evaluated on a reasonable person standard. *People v Baker*, 157 Mich App 613, 615; 403 NW2d 479 (1986). In this case, it was no secret that the victim was drinking heavily; eyewitnesses, including defendant, testified that she was “guzzling vodka like water.” One of the victim’s friends testified that before the assaults began the victim got down on the floor and “was losing, like, consciousness.” The victim rested her cheek on the floor and then lay motionless, failing to respond to her friends’ voices. Consistent with this description, the victim has no memory of events after standing up and falling back down to the floor; she testified that she did not have sex with anyone while conscious. While conflicting testimony from other witnesses suggested the victim appeared somewhat conscious, at least during the initial sexual activities, several witnesses stated that the victim was not talking or moving while the assaults occurred and it was clear that the victim passed out entirely at some point: her eyes were closed, she was not moving and she was nonresponsive. One witness specified that “after she passed out, they kept on having sex with her.” When the lights were eventually turned on, one witness described the victim as looking “dead,” another said she was passed out with “eyes rollin’ in the back of her head.” Police and EMTs testified the victim could not follow commands or track movement, and she even failed to respond to painful stimuli. At the hospital, she was unconscious, she had a blood alcohol level of .256, and she had to be intubated to prevent her from aspirating on her own saliva or vomit.

From this testimony, it would be reasonable to conclude that the victim was severely intoxicated to the point that she was physically unable to communicate her unwillingness to participate in the sexual acts that took place that evening. Overall, the prosecution presented sufficient evidence to allow a jury to find defendant guilty of two counts of first-degree CSC and furnishing alcohol to a minor.

In challenging the sufficiency of the evidence on appeal, defendant highlights inconsistencies between the eyewitness testimonies, rehashes impeachment evidence, claims witness bias, laments the lack of forensic evidence, and generally asks this Court to reevaluate the credibility of the witnesses. However, as explained, there was more than enough testimony from eyewitnesses to support defendant's convictions. Whether this testimony was credible was a question for a jury. *Wolfe*, 440 Mich at 515 (“Juries, not appellate courts, see and hear witnesses and are in a much better position to decide the weight and credibility to be given to their testimony.”); see also *People v Lemmon*, 456 Mich 625, 646; 576 NW2d 129 (1998). Likewise, if there were conflicts in the evidence presented, those conflicts were for the jury to resolve; and in doing so, the jury was “free to believe or disbelieve, in whole or in part, any of the evidence presented.” *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999); *People v Artman*, 218 Mich App 236, 239; 553 NW2d 673 (1996). We will not reassess the jury's credibility determinations on appeal. *Wolfe*, 440 Mich at 515. Having determined that the prosecution presented sufficient evidence to support defendant's convictions, we also reject defendant's claim that the trial court erred in denying his motion for a directed verdict. See *People v Toodle*, 155 Mich App 539, 551; 400 NW2d 670 (1986).

Next, defendant raises two evidentiary challenges, both of which he preserved with timely objections in the trial court. MRE 103(a)(1). We review preserved challenges to the admission of evidence for an abuse of discretion. *People v Orr*, 275 Mich App 587, 588; 739 NW2d 385 (2007). A court abuses its discretion by choosing an outcome that falls outside the range of reasonable and principled outcomes. *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). However, when an evidentiary question involves a preliminary question of law, such as whether a rule of evidence or statute precludes admission of the evidence, those questions of law are reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). A court necessarily abuses its discretion when it admits evidence that is inadmissible as a matter of law. *Id.*

Defendant first argues that the trial court abused its discretion in admitting a photograph depicting the victim in the hospital following the assaults. We disagree. It is a fundamental rule of evidence that “[a]ll relevant evidence is admissible,” except as otherwise provided by constitutional rules, other rules of evidence, or rules adopted by the Supreme Court. MRE 402. Relevant evidence refers to “evidence 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.” MRE 401. In this case, given the prosecution's theory of the case under MCL 750.520b(1)(d)(i), the victim's physical helplessness was an element of the offense and thus a fact of consequence on which the prosecution could offer all relevant evidence. See *People v Mills*, 450 Mich 61, 67, 69-70; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995); *People v Crawford*, 458 Mich 376, 388-389; 582 NW2d 785 (1998).

Relevant to this question of physical helplessness, the physician who treated the victim testified that she was “heavily intoxicated” with a blood alcohol level of .256, she was not responsive or speaking, and she required intubation to protect her from aspirating on her own saliva or vomit. Photographs may be admitted to corroborate witness testimony. *Mills*, 450 Mich at 76. The photograph at issue in this case did just that. The nurse who conducted the sexual assault exam verified that the picture depicted the victim as she appeared at the hospital in the early morning hours following the assaults. The photograph thus visually depicted what the doctor and others described—namely, the extreme extent of the victim’s intoxication on the evening in question, such that she was rendered unconscious. As evidence of the extent of the victim’s extreme intoxication on the night in question, the photograph constituted evidence having a tendency to make it more probable that the victim was physically helpless at the time of the sexual assaults. Moreover, the photograph supported the testimony of eyewitnesses who described the victim as intoxicated, nonresponsive, and unconscious during the sexual assaults. Because the photograph bore on the material question of the victim’s physical helplessness and the credibility of witnesses, it was relevant. MRE 401; *Mills*, 450 Mich at 72 (“If a witness is offering relevant testimony, whether that witness is truthfully and accurately testifying is itself relevant because it affects the probability of the existence of a consequential fact.”). On appeal, defendant contests the relevance of the photograph on the grounds that, at trial, no one disputed whether the victim became intoxicated or required hospitalization. However, evidence is not rendered irrelevant or inadmissible because it relates to an undisputed fact. *Mills*, 450 Mich at 71. Defendant also challenges the relevance of the photograph given that the victim received a sedative at the hospital and that the photograph did not depict the victim at the actual time of the assaults. However, these concerns impact the weight the photograph should be given; they do not render it entirely irrelevant.<sup>1</sup> Because the photograph bore on the material question of the victim’s physical helplessness and the credibility of witnesses, it was relevant and admissible, subject to MRE 403. *Mills*, 450 Mich at 71.

Under MRE 403, “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Relying on MRE 403, defendant argues that the photograph was unfairly prejudicial and thus inadmissible. When evaluating the prejudicial potential of photographs, the fact that photographs depict gruesome images or may tend to arouse the passion or prejudice of the jurors does not necessarily render them inadmissible. *Mills*, 450 Mich at 77. Instead, as with all evidence, the proper inquiry is whether the probative value of the photographs is substantially outweighed by unfair prejudice. *Id.* at 76.

Contrary to defendant’s arguments, although the photograph may have potentially invoked sympathy for the victim, we are persuaded that the relevancy of the photograph was not substantially outweighed by the danger of unfair prejudice. As discussed, the photograph had

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<sup>1</sup> The treating physician in fact testified that the sedative would not have rendered the victim unconscious. The sedative also did not explain the victim’s need for medical intervention or intubation.

significant probative value, constituting evidence that made it more probable that the victim was physically helpless during the assaults and tending to corroborate the testimony of witnesses who described victim as unconscious and nonresponsive during the sexual assaults. In contrast to the probative value of the evidence, the potential for prejudice was minimal. The trial court admitted only one photograph and there was no indication that the photograph was given undue emphasis during the course of the trial or even that the image involved was perceived as particularly gruesome or sympathetic. Further, in an instruction regarding the use of the photograph, the trial court reminded the jury of facts—including the hospital setting and the sedation—which might impact the weight afforded the photograph. The trial court further mitigated any potential prejudicial effect by instructing the jury it could not allow “sympathy or prejudice [to] influence [their] decision.” Jurors are presumed to follow their instructions, and the proffered instructions would limit any potential for prejudice in this case. *People v Mahone*, 294 Mich App 208, 212; 816 NW2d 436 (2011). On the whole, the admission of the relevant photograph was not unfairly prejudicial, particularly when coupled with the proffered jury instructions, and the trial court did not abuse its discretion in admitting the photograph.

Defendant’s second evidentiary claim relates to the prosecution’s introduction of extrinsic evidence of a witness’s prior inconsistent statements. Under MRE 613(b):

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

Under MRE 613(b), a party attempting to impeach a witness or refresh a witness’s memory with prior inconsistent statements must lay a proper foundation by questioning the witness concerning the time and place of the statement and the person to whom it was allegedly made. *People v Frank C Rodriguez*, 251 Mich App 10, 34; 650 NW2d 96 (2002). “Once a foundation is laid and a witness denies or neither admits nor denies making the alleged statement, his testimony may be impeached by the proof of the statement.” *People v Claybon*, 124 Mich App 385, 399; 335 NW2d 493 (1983); *People v Carson*, 87 Mich App 163, 169; 274 NW2d 3 (1978); *People v Dozier*, 22 Mich App 528, 532; 177 NW2d 694 (1970).

In this case, during examination by the prosecution, a witness admitted making several statements inconsistent with his trial testimony, among them that he previously told police: (1) that during the assaults he had been asleep and (2) that he required “protection” from the police for his family. The witness admitted these inconsistencies between his prior statements and his trial testimony. Nevertheless, the prosecution introduced extrinsic evidence of these two statements, asking a police officer to recount previous remarks made by the witness. Because the witness admitted making these prior remarks, the prosecution could not introduce extrinsic evidence to establish these statements. *Claybon*, 124 Mich App at 399; see also *People v Graves*, 15 Mich App 244, 246; 166 NW2d 480 (1968) (“[U]nless the witness admits the prior inconsistent statements . . . he can be impeached by independent evidence.”).

Assuming an evidentiary error occurred, however, a preserved, nonconstitutional error is not a ground for reversal unless defendant establishes that “after an examination of the entire

cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative.” *Lukity*, 460 Mich at 496 (citation omitted). The error must be “prejudicial” and the “inquiry ‘focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence.’” *Id.* at 495 (citation omitted). Here, defendant has not carried this burden. The testimony offered by the police officer in regard to the witness’s prior inconsistent statements was very brief and cumulative of the witness’s own acknowledgement that he in fact made the prior inconsistent statements. Given that the witness freely acknowledged the changing nature of his story, the police officer’s cumulative testimony to this effect did not prejudice defendant. *People v Manuel Roman Rodriquez*, 216 Mich App 329, 332; 549 NW2d 359 (1996). Further, although defendant speculates on appeal that the jury viewed the statements as substantive, rather than as impeachment evidence, the statements were clearly prior statements inconsistent with the witness’s trial testimony and the trial court instructed the jury on the use of such statements. The court explained, that “the only purpose for which that earlier statement generally can be considered by you is in deciding whether the witness testified truthfully in court.” Overall, considering the evidence offered by the numerous individuals who witnessed and/or participated in the sexual assaults, the impeachment of one witness (who claimed at trial not to be present when the attacks were said to have occurred) did not prejudice defendant.<sup>2</sup> Thus, after an examination of the entire cause, it does not affirmatively appear more probable than not that any error was outcome determinative. *Lukity*, 460 Mich at 496. Further, we do not believe the evidentiary claims in this case have constitutional implications; contrary to his arguments, defendant was not deprived of due process or a fair trial. See *People v Whittaker*, 465 Mich 422, 426; 635 NW2d 687 (2001) (“[E]rroneous admission of evidence, is nonconstitutional.”).

Lastly, defendant challenges the scoring of offense variables (OVs) 4, 10, and 11. Relying on *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and similar federal decisions, he contends first that any facts used in the scoring of these variables needed to be found by the jury beyond a reasonable doubt. Our Supreme Court rejected this argument in *People v Drohan*, 475 Mich 140, 162; 715 NW2d 778 (2006), and determined that the rule discussed in *Blakely* did not alter Michigan’s indeterminate sentencing system. While defendant challenges the decision, we are bound to follow decisions of the Michigan Supreme Court. *People v Hall*, 249 Mich App 262, 270; 642 NW2d 253 (2002). Thus, contrary to defendant’s argument, the facts supporting the trial court’s scoring decisions need only be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

In the alternative, defendant claims that, even under a preponderance of the evidence standard, the trial court erred in scoring the contested OVs. In reviewing a trial court’s scoring

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<sup>2</sup> In passing, defendant suggests the police officer’s testimony on this issue was “unduly prejudicial” in violation of MRE 403. For the reasons we have explained, the testimony did not prejudice defendant and certainly did not rise to the level of undue prejudice. See *Mills*, 450 Mich at 75-76. If the evidence was inadmissible, it was inadmissible in keeping with MRE 613(b), and defendant’s reliance on MRE 403 is misplaced.

decisions on appeal, the trial court's factual findings are reviewed for clear error. *Id.* "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id.*

In regard to OV 4, 10 points are appropriately scored when "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(a). Notably, however, 10 points should be scored "if the serious psychological injury may require professional treatment" and "[i]n making this determination, the fact that treatment has not been sought is not conclusive." MCL 777.34(2). Consistent with the plain language of the statute, this Court has recognized that there is no requirement that a victim actually receive psychological treatment. *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004). Depression, personality changes, and "statements about feeling angry, hurt, violated, and frightened support [a] score under our caselaw." *People v Gibbs*, 299 Mich App 473, 493; 830 NW2d 821 (2013); *People v Waclawski*, 286 Mich App 634, 681; 780 NW2d 321 (2009).

In this case, the victim's written impact statement, which the trial court read on the record, presented ample evidence to support the scoring of OV 4. The victim indicated that the crime caused her to be "very defensive with all males" and she does not "trust them at all." She spends considerable time wondering about the assaults and trying to bring forth memories of the events that occurred. As she described it, she thinks "nonstop" about what she does not know. She also described a general fearfulness and a need to look over her shoulder everywhere she goes. Based on her statement, the trial court did not clearly err in concluding the victim suffered serious psychological injury which may require professional treatment. MCL 777.34(2); *Gibbs*, 299 Mich App at 493.

Defendant acknowledges the content of the victim impact statement but nevertheless disputes the scoring of OV 4. First, defendant notes that the victim's statement was not attached to the PSIR. It was not inappropriate for the trial court to rely on the statement as sentencing courts are afforded broad discretion in the sources and types of information to be considered when imposing a sentence. *Waclawski*, 286 Mich App at 691-692. There is no requirement that a victim's statement appear in the PSIR and, regardless of its inclusion in the PSIR, a victim's written statement may be considered when scoring variables. See *People v McAllister*, 241 Mich App 466, 475-477; 616 NW2d 203 (2000), remanded in part on other grounds 465 Mich 884 (2001). Second, in contesting the scoring of OV 4, defendant speculates that the victim's psychological problems could be attributed to her own troubled past or the manner in which police informed her of the assaults. In other words, he contends that there is no evidence that he caused the psychological injury. As a factual matter, this argument ignores the opening clause of the victim's impact statement, specifically: "The effects this crime had on my life are . . . ." Given this language and the description of psychological injury which followed, it was eminently reasonable to attribute the victim's serious psychological injuries to the sexual assaults perpetrated by defendant and his accomplices. Lastly, in regard to OV 4, defendant also disputes the seriousness of the victim's psychological injury, noting there is no indication she received treatment or a diagnosis and claiming the facts do not demonstrate an "important, weighty, momentous, [or] grave" injury. In this regard, defendant goes on to challenge the propriety of our previous case law on the scoring of OV 4, including cases where we held fearfulness may support a scoring of OV 4. Defendant claims that this Court has departed from the plain

language of MCL 777.34 and crafted our own definition of “serious psychological injury” in violation of the separation of powers doctrine. He further contends that the rule of lenity requires us to adopt his understanding of OV 4. Contrary to defendant’s arguments, we have not ignored the plain language of MCL 777.34 or departed from the Legislature’s intent; rather, it is defendant who ignores entirely the plain language of MCL 777.34(2), which, as noted, provides that 10 points should be scored “if the serious psychological injury *may* require professional treatment” and further, that “the fact that treatment has not been sought is not conclusive.” MCL 777.34(2) (emphasis added). In short, our previous case law on the scoring of OV 4, see, e.g., *Apgar*, 264 Mich App at 329, accords entirely with the Legislature’s instruction that treatment is not necessary to support a scoring under OV 4. For similar reasons, there is no merit to defendant’s contention that the rule of lenity requires this Court to adhere to the interpretation he proposes. Under the rule of lenity, courts should mitigate punishment when the punishment in a criminal statute is “unclear.” *People v Denio*, 454 Mich 691, 699; 564 NW2d 13 (1997). However, as we have explained, MCL 777.34 is not unclear; defendant has simply chosen to ignore MCL 777.34(2). Following the plain language of MCL 777.34, we are persuaded the victim’s impact statement provided ample evidence to support the trial court’s conclusion that the victim suffered serious psychological injury which may require professional treatment and OV 4 was thus properly scored at 10 points.

Defendant next challenges the scoring of OV 10, the variable relating to exploitation of a vulnerable victim. There was ample evidence to support the conclusion that defendant exploited the victim while she was intoxicated or unconscious and, thus, the trial court properly scored OV 10 at five points. MCL 777.40(1)(c). The only argument defendant raises in challenge to the scoring of OV 10 is his contention that the jury was required to find these facts beyond a reasonable doubt. However, as noted, our Supreme Court has rejected this argument. See *Drohan*, 475 Mich at 162. OV 10 was properly scored.

Defendant’s last scoring challenge relates to the trial court’s assessment of 25 points under OV 11. Twenty-five points are scored where “[o]ne criminal sexual penetration occurred.” MCL 777.41(1)(b). Under the scoring rules for OV 11, the trial court was required to “[s]core all sexual penetrations of the victim by the offender arising out of the sentencing offense.” MCL 777.41(2)(a). However, the court could not “score points for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense.” MCL 777.41(2)(c). Consequently, based on defendant’s two convictions involving penetration, the trial court assessed 25 points for one criminal sexual penetration. On appeal, defendant claims that, because his two penetrations resulted in first-degree CSC convictions, neither penetration may be used in scoring OV 11. This Court has considered and rejected similar arguments. *People v McLaughlin*, 258 Mich App 635, 676-678; 672 NW2d 860 (2003). The one penetration which forms the basis of the first-degree CSC sentencing offense may not be scored under OV 11, but other penetrations, including those that resulted in separate convictions, should be scored. *Id.* Accordingly, the trial court did not err in scoring an act of penetration under OV 11 which resulted in a separate first-degree CSC conviction. Defendant also contends that the two penetrations involved did not “arise out” of each other as required by MCL 777.41(2)(a). This argument is also without merit. Both of defendant’s sexual penetrations occurred at the same place, under the same set of circumstances, and during the same course of conduct; in other words, they arose out of each other. *McLaughlin*, 258 Mich App at 674. OV 11 was properly scored at 25 points.

Lastly, we disagree with defendant's contention that he is entitled to resentencing. Because the trial court properly scored the OVs and sentenced defendant within the resulting recommended minimum sentence range under the legislative guidelines, defendant's sentence must be affirmed. MCL 769.34(10).

Affirmed.

/s/ David H. Sawyer

/s/ Jane E. Markey

/s/ Cynthia Diane Stephens