STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERAY GIBSON,

Defendant-Appellant.

UNPUBLISHED
June 25, 2020

No. 348041
Wayne Circuit Court
LC No. 18-006921-01-FC

Before: TUKEL, P.J., and SERVITTO and BECKERING, JJ.

PER CURIAM.

Defendant, Deray Gibson, appeals by right his jury-trial convictions of third-degree criminal sexual conduct (CSC-3), MCL 750.520d(1)(b) (force or coercion), assault by strangulation or suffocation, MCL 750.84(1)(b), and interfering with a witness in a criminal case punishable by more than 10 years' imprisonment, MCL 750.122(7)(b).[1] The trial court imposed sentences of 120 to 180 months' imprisonment for the CSC-3 conviction, 60 to 120 months' imprisonment for the assault conviction, and 36 to 120 months' imprisonment for the witness-tampering conviction, the latter to run consecutively to the CSC-3 sentence. We affirm defendant's convictions and sentences in all respects but for the consecutive sentencing, for which we remand to the trial court for articulation of its reasoning.

I. FACTS

The prosecution presented evidence that, shortly after midnight on August 4, 2018, defendant entered the home of the victim, his ex-girlfriend, through a window, and after choking and beating her, sexually penetrated her against her will. The victim's aunt testified that defendant moved the victim into her bedroom, after which she heard the victim screaming, saying "no," "stop

[1] The jury found defendant not guilty of home invasion with intent to commit a felony, MCL 750.110a(2), and found him guilty of CSC-3 as a lesser included offense of the charged one of first-degree criminal sexual conduct (CSC-1), MCL 750.520b(f) (force or coercion plus personal injury).

it," and crying. After the incident, the victim was in pain and treated at a hospital for cuts and bruises. The sexual assault nurse examined the victim, photographed numerous bruises, and observed linear red bruising and abrasions on the victim's neck that indicated strangulation. The prosecution also presented evidence that defendant sent two letters to the victim attempting to dissuade her from testifying against him.

Defendant testified in his own defense. He admitted that he choked the victim and caused her bruising during a "physical dispute," but maintained that such aggression took place before, and was not related to, what he characterized as a consensual act of sexual intercourse.

Appellate counsel challenges the trial court's scoring of four of the offense variables for purposes of the sentencing guidelines, and its decision to impose consecutive sentencing. Defendant, in his Standard 4 brief,[2] adds challenges to the effectiveness of his trial attorney and to the sufficiency of the evidence to support his CSC-3 conviction.

II. SCORING OF OFFENSE VARIABLES

Our Supreme Court has held that the sentencing guidelines are unconstitutional to the extent that they are mandatory, and, to remedy that defect, decreed that the guidelines are advisory only, in all applications. *People v Steanhouse*, 500 Mich 453, 461-462, 470; 902 NW2d 327 (2017); *People v Lockridge*, 498 Mich 358, 365, 399; 870 NW2d 502 (2015). However, sentencing courts must "continue to consult the applicable guidelines range and take it into account when imposing a sentence." *Id.* at 392. The guidelines thus remain "a highly relevant consideration." *Steanhouse*, 500 Mich at 474-475 (quotation marks and citations omitted). And trial courts must continue to comply with statutory directions when scoring the guidelines. *Lockridge*, 498 Mich at 392 n 28.

Appellate counsel challenges the trial court's scoring of Offense Variables (OV) 4, 7, 8, and 10. "Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "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*.

A. OV 4

OV 4 addresses "psychological injury to a victim." MCL 777.34(1). The trial court assessed 10 points, which MCL 777.34(1)(a) prescribes if "[s]erious psychological injury requiring professional treatment occurred to a victim." The statute further instructs sentencing courts to score 10 points where serious psychological injury "may require professional treatment," but that "[i]n making this determination, the fact that treatment has not been sought is not conclusive." MCL 777.34(2). However, some evidence of psychological injury must exist to justify a 10-point score. *People v Lockett*, 295 Mich App 165, 183; 814 NW2d 295 (2012). The fear a victim

[2] A "Standard 4" brief refers to a brief filed on behalf of an indigent criminal defendant pursuant to Michigan Supreme Court Administrative Order 2004-6, Standard 4.

experiences during the commission of a crime, without other evidence of psychological harm, "is insufficient to assess points for this variable." *People v White*, 501 Mich 160, 164-165, 165 n 3; 905 NW2d 228 (2017). Nor may a sentencing court simply assume, on the basis of the nature of the crime, that a victim suffered serious psychological harm; there must be evidence of psychological harm beyond what took place while the crime was in progress. *Id*. at 163-165; *Lockett*, 295 Mich App at 183.

To support its argument that the victim suffered serious psychological harm beyond the fear she experienced during the commission of the crimes, the prosecution proffers the notation in Victim's Impact Statement as set forth in the presentence investigative report (PSIR) that the victim should attend therapy in the future. But defendant points out that the entire Victim Impact Statement must be considered with that remark in context, which states in pertinent part: "She has not been in therapy, does *not* plan on attending therapy, but 'should in the future.' " (Emphasis added.) Nothing else in the record suggests that the victim suffered psychological injury as a result of the offense. Although "the fact that treatment has not been sought is not conclusive," MCL 777.34(2), in this case, the victim indicated only that she neither attended, nor planned to attend, therapy, but for the vague "should in the future," which falls short of describing an actual expectation that the criminal conduct at issue would eventually drive her to seek treatment of a sort she had so far eschewed. That the victim stated in effect that it might be a good idea if she sought therapy does not provide evidence of actual serious psychological harm.

Although the sexual assault nurse described the victim as being "flat," staring into space, having minimal facial expressions, and making minimal eye contact, those observations were made only a few hours after the offense, while the victim was still in obvious pain. Without other evidence of actual psychological harm, the nurse's observations of the victim immediately after the offense while enduring physical pain do not support the conclusion that the victim ended up with a serious psychological injury requiring professional treatment. Because courts may not assume serious psychological injury based on the nature of the offense, OV 4 should have been scored at zero.

B. OV 7

OV 7 concerns aggravated physical abuse of a victim. MCL 777.37. The trial court assessed 50 points, which MCL 777.37(1)(a) prescribes when "[a] victim was treated with sadism, torture, excessive brutality, or similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." Each of the listed categories offers a basis for scoring 50 points. *Hardy*, 494 Mich at 440-442. In this case, the trial court specified excessive brutality. "For purposes of OV 7, excessive brutality means savagery or cruelty beyond even the 'usual' brutality of a crime." *People v Rosa*, 322 Mich App 726, 743; 913 NW2d 392 (2018) (selected quotation marks and citation omitted). When scoring OV 7 sentencing courts may consider conduct that is inherent in the crime itself. *Hardy*, 494 Mich at 441-442.

In this case, the trial court held that defendant had engaged in excessive brutality on the ground that "the beating administered by the defendant was very severe," which conclusion the record well supported. Testimony and photographic evidence showed that defendant choked the victim to near unconsciousness, leaving strangulation marks on her neck, and repeatedly pummeled her, leaving the victim's upper body bruised all over. This evidence showed that

defendant's physical violence against the victim went well beyond that necessary to commit the offense.

Appellate counsel argues that the evidence did not show that defendant's conduct was "designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). This argument fails because the cited statutory language applies to the last, or catch-all, category in the statute of "similarly egregious conduct," not to the separate category of "excessive brutality." See *Hardy*, 494 Mich at 440-442; *People v Rodriquez*, 327 Mich App 573, 578-579; 935 NW2d 51 (2019). Accordingly, "if a defendant treated a victim with excessive brutality, 50 points should be scored under OV 7 even if the defendant did not intend to substantially increase the victim's fear and anxiety." *People v Walker*, __ Mich App __; __ NW2d __ (Docket No. 343844, issued November 14, 2019), slip op at 6.

C. OV 8

OV 8 addresses victim asportation or captivity. MCL 777.38(1). A sentencing court must assess 15 points where "[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). Asportation for purpose of OV 8 does not require movement of the victim beyond that incidental to the commission of the sentencing offense. *People v Barrera*, 500 Mich 14, 17; 892 NW2d 789 (2017). "A victim is asported to a place or situation involving greater danger when moved away from the presence or observation of others." *People v Chelmicki*, 305 Mich App 58, 70-71; 850 NW2d 612 (2014). Further, asportation under OV 8 may occur even when the victim voluntarily accompanies the defendant to a place or situation of greater danger. *People v Dillard*, 303 Mich App 372, 379; 845 NW2d 518 (2013), abrogated in part on other grounds by *People v Barrera*, 500 Mich at 16-17. Consequently, movement of the victim from a living room to a bedroom in order to commit a sexual assault was sufficient to score OV 8 at 15 points. *Id.* at 21-22.

In this case, the evidence indicated movement of the victim from a hallway where defendant choked her, to a bedroom, where defendant secluded the victim from the view of others in the home by closing the door and barricading it with a 30-gallon tote containing shoes. Defendant admitted that he asked the victim to accompany him to her bedroom for the purpose of having privacy, and that once the victim was in the bedroom, he closed the door and moved the large tote next to the door to secure it. Thereafter, according to the victim, defendant beat her and imposed sexual intercourse on her. This evidence fully supports that the "victim was asported to another place of greater danger or to a situation of greater danger." MCL 777.38(1)(a). See also *Barrera*, 500 Mich at 21-22.

However, the trial court did not cite as the basis for its scoring of OV 8 that the victim was moved to, or secluded in, a place of greater danger, but rather based its decision on the evidence that the victim's three-year-old child was present in the home. The prosecution agrees with defendant's argument that this was not a valid basis for scoring OV 8, but maintains that this Court should uphold the result based on the principle that an appellate court will affirm a trial court when it reaches the correct result even if the trial court's reasoning is faulty. See *Klooster v Charlevoix*, 488 Mich 289, 310; 795 NW2d 578 (2011). We agree. In considering a trial court's scoring of OV 4, our Supreme Court noted that "review of the trial court's scoring of OV 4 is not limited to

the reasoning provided by the trial court." *White*, 501 Mich at 164, citing *Klooster*, 488 Mich at 310. There is no reason that same proposition should not apply to other offense variables. In this case, because the evidence clearly preponderates in favor of the assessment of 15 points for OV 8, we affirm that scoring decision even though the trial court's stated reasoning was incorrect.

D. OV 10

OV 10 addresses exploitation of a vulnerable victim. MCL 777.40(1). The trial court assessed 15 points, which MCL 777.40(1)(a) prescribes if predatory conduct was involved. " 'Predatory conduct' means preoffense conduct directed at a victim . . . for the primary purpose of victimization." MCL 777.40(3)(a).

Points may be assessed under OV 10 only for conduct involving the exploitation of a vulnerable victim. *People v Cannon*, 481 Mich 152, 157-158; 749 NW2d 257 (2008). "Vulnerability" for this purpose "means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." MCL 777.40(3)(c). Vulnerability may arise from "the existence of a domestic relationship." *Cannon*, 481 Mich at 158. A domestic relationship for this purpose "must be a familial or cohabitating relationship." *People v Jamison*, 292 Mich App 440, 447; 807 NW2d 427 (2011).

To justify 15 points for "predatory conduct" under OV 10, "preoffense conduct" must involve "more than run-of-the-mill planning to effect a crime or subsequent escape without detection." *Cannon*, 481 Mich at 162. Predatory conduct for this purpose consists of "only those forms of 'preoffense conduct' that are commonly understood as being 'predatory' in nature, e.g., lying in wait and stalking, as opposed to purely opportunistic criminal conduct." *People v Huston*, 489 Mich 451, 462; 802 NW2d 261 (2011).

In this case, the prosecution presented no argument in either the trial court or this Court to support the proposition that the victim was vulnerable within the meaning of OV 10. While the evidence showed that a dating or cohabitating relationship had existed between the victim and defendant before the offense, the prosecution's theory of the case was that this relationship had ended before the assault took place. Other possibilities for victim vulnerability, including "physical disability, mental disability, youth or agedness, . . . or the offender . . . authority status," MCL 777.40(1)(b), or difference in size or strength, intoxication by drugs or alcohol, or being unconscious, MCL 777.40(1)(c), are not readily apparent from the record. See MCL 777.40(3)(c); *Cannon*, 481 Mich at 157-159.

We do not agree with the prosecution's characterization of defendant's seeking out an unlocked window of the victim's home as "stalking" that constituted preoffense predatory conduct. Checking for an unlocked window through which to enter the home was nothing more than "run-of-the-mill" activity to enable the criminal assault. See *Cannon*, 481 Mich at 162. Such "purely opportunistic" conduct was not akin to lying in wait or stalking. See *Huston*, 489 Mich at 462. To engage in stalking, as commonly understood and applied to the scoring of OV 10, is to stealthily pursue prey or quarry, i.e., a vulnerable victim. See *Merriam-Webster Collegiate Dictionary* (11th ed) (defining "stalk" as "to pursue quarry or prey stealthily"). Trying to find an unlocked window does not comport with this concept of stalking.

Because it was not readily apparent that the victim in this case was vulnerable, and the evidence did not bring to light any preoffense predatory conduct on defendant's part, the trial court erred by scoring OV 10 at 15 points.

E. REMEDY

Our Supreme Court's holding that sentencing guidelines are advisory only, *Lockridge*, 498 Mich at 365, has not altered MCL 769.34(10), which requires this Court to affirm a sentence that falls within the recommended sentencing guidelines range absent an error in scoring the sentencing guidelines or reliance on inaccurate information. See *People v Schrauben*, 314 Mich App 181, 196 n 1; 886 NW2d 173 (2016). Where the trial court sentences a defendant on the basis of a scoring error that alters the appropriate guidelines range, the defendant is entitled to resentencing in reference to appropriately scored guidelines. *People v Francisco*, 474 Mich 82, 88-91; 711 NW2d 44 (2006).

In this case, if OVs 7 and 8 remain as scored by the trial court, and OVs 4 and 10 are changed to zero, defendant's total OV score remains at level VI (75 points or more), and the recommended minimum sentence range for defendant's CSC-3 conviction remains as the trial court determined, 99 months to 160 months. Because correcting the scoring errors does not affect the applicable sentencing guidelines range, defendant is not entitled to resentencing. See *Francisco*, 474 Mich at 89 n 8.

III. CONSECUTIVE SENTENCING

A trial court's sentencing decision is reviewed for an abuse of discretion. *Steanhouse*, 500 Mich at 471. When permitted, but not mandated by statute, the trial court's decision to impose consecutive sentencing thus comes under that appellate standard. *People v Norfleet*, 317 Mich App 649, 664; 897 NW2d 195 (2016). However, statutory interpretation presents a question of law, subject to review de novo. *Barrera*, 500 Mich at 18.

Concurrent sentencing is the norm, and consecutive sentencing may be imposed only where it is specifically authorized by statute. *People v Ryan*, 295 Mich App 388, 401; 819 NW2d 55 (2012). The statutory provision authorizing consecutive sentencing for a conviction of witness tampering provides as follows: "The court may order a term of imprisonment imposed for violating this section to be served consecutively to a term of imprisonment imposed for the commission of any other crime including any other violation of law arising out of the same transaction as the violation of this section." MCL 750.122(11).[3]

Defendant argues that this authorization of consecutive sentencing is limited to offenses that arise out of the same transaction as the witness-tampering offense. We disagree. While the statute includes the phrase "any other violation of law arising out of the same transaction as the violation of this section," that phrase, as set forth in plain terms, is one of inclusion, not of

[3] "This section" refers to § 122 of Chapter XVII of Michigan's Penal Code, as added by 2000 PA 452, effective March 28, 2001, being MCL 750.122.

limitation. The phrase is preceded by the word "including," which is self-evidently inclusive. The root word "include" means "to take in or comprise as a part of a whole or group." *Merriam-Webster's Collegiate Dictionary* (11th ed).[4] It does not present a limitation or restriction, but in this instance clarifies that "any other crime" implies no exclusion of others set forth in that section.

In the context of MCL 750.122(11), the whole group to which a sentence for a conviction of witness tampering may be consecutive is "any other crime." The word "any" is commonly intended as "all-encompassing, meaning 'every' or 'all,' and can be 'used to indicate one selected without restriction' or 'to indicate a maximum or whole.' " *Ionia Ed Ass'n v Ionia Pub Sch*, 311 Mich App 479, 486, 875 NW2d 756 (2015), quoting *Merriam-Webster's Collegiate Dictionary* (11th ed). See also *People v Harris*, 495 Mich 120, 131-132; 845 NW2d 477 (2014) (" 'any' is commonly understood to encompass a wide range of things"), citing *Random House Webster's College Dictionary* (1997). Thus, the plain meaning of "any other crimes" in MCL 750.122(11) is "every other crime" or "all other crimes," expressly "including" those "arising out of the same transaction as the violation" of witness-tampering statute.

In light of the plain terms of MCL 750.122(11), the trial court had the discretion to order that the sentence for the witness-tampering conviction run consecutively to the sentence for the CSC-3 conviction.

However, a trial court must articulate with sufficient particularization the rationale for its decision to impose discretionary consecutive sentencing to permit appellate review. See *Norfleet*, 317 Mich App at 664-666. The trial court offered no such explanation in this case. The prosecution concedes that the trial court's failure to articulate on the record its reason or reasons for imposing consecutive sentencing calls for a remand for further explanation.

For these reasons, we hold that the trial court correctly recognized its discretion to impose consecutive sentencing, but remand this case to the trial court with instructions to explain on the record its reasoning for doing so.

IV. ASSISTANCE OF COUNSEL

The United States and Michigan Constitutions guarantee a criminal defendant the right to the assistance of counsel. US Const, Ams VI and XIV; Const 1963, art 1, § 20. The constitutional right to counsel is a right to the *effective* assistance of counsel. *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). In this case, because defendant's claim that his trial attorney's performance was constitutionally deficient was not raised before, or decided by, the trial court, our review is limited to counsel's performance as revealed by the existing record. *People v Unger*, 278 Mich App 210, 253; 749 NW2d 272 (2008).

A defendant pressing a claim of ineffective assistance of counsel must show that "(1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's

[4] "A court may consult dictionary definitions regarding the plain and ordinary meaning of un-defined terms." *People v Ackah-Essien*, 311 Mich App 13, 24-25; 874 NW2d 172 (2015).

deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). The defendant also bears the burden to prove the factual predicate of the claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). The defendant must further overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Defense counsel must consult with the defendant regarding such important decisions as "overarching defense strategy," but tactical decisions regarding the implementation of a defense strategy are generally within the control of counsel. See *Florida v Nixon*, 543 US 175, 187; 125 S Ct 551; 160 L Ed 2d 565 (2004). "Decisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy . . . ." *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). "We will not second-guess counsel on matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight." *Id.* A strategic decision of counsel may constitute ineffective assistance only when it deprives the defendant of a substantial defense, i.e., a defense that might have made a difference in the outcome of the trial. See *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009); *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

In this case, defendant, in his Standard 4 brief, argues that defense counsel failed to exploit opportunities to challenge the victim's credibility, or otherwise effectively to pursue and present the defense theory of consent. We disagree. The record reflects that defense counsel competently cross-examined the victim, elicited points of contradiction in her testimony, and also presented arguments to the jury regarding the victim's credibility and in support of the defense of consent. Defense counsel presented evidence and argument that suggested that jealousy over defendant's other girlfriend provided a motive for the victim to fabricate, and argued to the jury that the victim's actions before and after the offense comported with her having consented to a continuing sexual relationship. Moreover, the record contradicts defendant's assertion that the victim displayed no injuries to her thighs or legs, and thus belies defendant's assertion that defense counsel's performance was deficient for failure to highlight such a particular. In sum, defendant has neither supported the factual predicate of his claims, *Hoag*, 460 Mich at 6, nor overcome the strong presumption that counsel was acting within the wide range of discretion concerning strategy, *Strickland*, 466 US at 689; *Unger*, 278 Mich App at 253.

Other deficiencies that defendant asserts regarding counsel's performance are not apparent from the record. See *Unger*, 278 Mich App at 253. Defendant asserts that defense counsel erred by not presenting testimony of a long-time friend of the victim who was present in the victim's home on the night of the offense, but defendant presents no offer of proof regarding how that person's testimony would have supported his defense. See *Hoag*, 460 Mich at 6. Defendant has thus failed to overcome the strong presumption that not calling the victim's friend as a witness was legitimate trial strategy. See *Strickland*, 466 US at 689; *Unger*, 278 Mich App at 253.

Likewise, there is no record support for defendant's argument that counsel erred by not presenting evidence of certain text messages. Because the record offers no basis for concluding that any such text messages would have been favorable to the defense, defendant's argument based on those alleged messages does nothing to overcome the strong presumption that defense counsel's eschewing of any such opportunity comported with sound trial strategy.

For these reasons, defendant has failed to show "both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense." *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003). Quite the contrary. Defense counsel obtained an acquittal of the charge of first-degree home invasion, and mitigated the charge of CSC-1, and its potential life sentence, to conviction of CSC-3, and its maximum sentence of 15 years. Defendant's claim of ineffective assistance of counsel is without merit.

V. SUFFICIENCY OF THE EVIDENCE SUPPORTING THE CSC-3 CONVICTION

Defendant contends there was insufficient evidence to support his CSC-3 conviction. This Court reviews de novo a claim that the evidence is insufficient to sustain a conviction. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). The appellate court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that all of the elements of the offense were proved beyond a reasonable doubt. *Jackson v Virginia*, 443 US 307, 319; 99 S Ct 2781; 61 L Ed 2d 560 (1979); *Meissner*, 294 Mich App at 452. Circumstantial evidence and reasonable inferences arising from it may be sufficient. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). " '[T]he prosecution need not negate every reasonable theory consistent with the defendant's innocence, but need merely introduce evidence sufficient to convince a reasonable jury in the face of whatever contradictory evidence the defendant may provide.' " *People v Hardiman*, 466 Mich 417, 424; 646 NW2d 158 (2002), quoting *People v Konrad*, 449 Mich 263, 273 n 6; 536 NW2d 517 (1995).

A person is guilty of CSC-3 if the person engages in sexual penetration with another person and force or coercion is used to accomplish the sexual penetration. MCL 750.520d(1)(b). In this case, the victim testified that after defendant choked and beat her, he sexually penetrated her against her will. This testimony need not be corroborated to sustain defendant's conviction of CSC-3. MCL 750.520h. But it was. The victim's aunt testified that after defendant took the victim into a bedroom, she heard the victim screaming, crying, and saying "no," "stop it." That sexual activity took place is not in dispute, the only issue being whether the victim in fact consented to it. Defendant admitted that he caused the victim's bruising in a "physical dispute," although he insisted that this altercation was unrelated to the sexual activity that followed. "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." *Hardiman*, 466 Mich at 428. Viewed in the light most favorable to the prosecution, the evidence was sufficient to permit a rational trier of fact to find all of the elements of the offense were proved beyond a reasonable doubt. *Meissner*, 294 Mich App at 452.

Defendant, in his Standard 4 brief, grafts onto his sufficiency challenge a challenge to the propriety of allowing the jury to consider CSC-3 as an alternative to CSC-1 in the first instance. That issue is not properly before this Court, however, because it is not germane to the issue as set forth in the defendant's Statement of the Questions presented. See MCR 7.212(C)(5); *People v Albers*, 258 Mich App 578, 584; 672 NW2d 336 (2003). Moreover, even if this argument were properly presented to the Court, we would decline to reach it because it was affirmatively waived below, thus extinguishing appellate objections, when defense counsel both requested the alternative jury instruction on CSC-3, and approved generally of the instructions as given. See *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000); *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011); *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995)

("[A] party cannot request a certain action of the trial court and then argue on appeal that the action was error.").

In any event, there was no legal error in instructing the jury to treat CSC-3 as a necessary lesser included offense of CSC-1,[5] where both offenses required proof that sexual penetration was accomplished by force or coercion, with the CSC-1 charge adding the disputed element that personal injury resulted. Compare MCL 750.520b(1)(f) and MCL 750.520d(1)(b).

For these reasons, we reject defendant's challenge to the sufficiency of the evidence to support his conviction of CSC-3.

We affirm defendant's convictions, but remand the case to the trial court with instructions to explain on the record its reasoning for ordering that the sentence for the witness tampering conviction be served consecutively to the sentence for the CSC-3 conviction. We retain jurisdiction for the latter purpose.

/s/ Jonathan Tukel
/s/ Deborah A. Servitto
/s/ Jane M. Beckering

[5] See *People v Cornell*, 466 Mich 335, 357-359; 646 NW2d 127 (2002) (a requested instruction on a necessarily included lesser offense should be given where a rational view of the evidence would support it, but an instruction on a cognate lesser included offense is not permitted), citing MCL 768.32(1). See also *People v Nyx*, 479 Mich 112, 123-125; 734 NW2d 548 (2007); *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002).

Court of Appeals, State of Michigan

ORDER

People of MI v Deray Gibson

Docket No. 348041

LC No. 18-006921-01-FC

Jonathan Tukel
Presiding Judge

Deborah A. Servitto

Jane M. Beckering
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 35 days of the Clerk's certification of this order, and they shall be given priority on remand until they are concluded. As stated in the accompanying opinion, the trial court must state on the record its reasoning for ordering that the sentence for the witness tampering conviction be served consecutively to the sentence for the CSC-3 conviction. The proceedings on remand are limited to this issue.

Within seven days after entry, appellant shall file with this Court copies of all orders entered by the trial court on remand. The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings.

Jonathan Tukel

Presiding Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

June 25, 2020
Date

Jerome W. Zimmer Jr.
Chief Clerk