STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOBAL MAURICIO DELEON,

Defendant-Appellant.

UNPUBLISHED
September 10, 2020

No. 351292
Wayne Circuit Court
LC No. 16-008567-01-FC

Before: MARKEY, P.J., and K. F. KELLY and TUKEL, JJ.

PER CURIAM.

Defendant appeals as of right the sentences imposed following a remand. In this case, defendant was convicted by a jury of three counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b, and one count of kidnapping, MCL 750.349; defendant was sentenced to 65 to 80 years' imprisonment for each CSC-I conviction, to be served concurrently with 50 to 80 years' imprisonment for the kidnapping conviction.

In *People v DeLeon*, unpublished per curiam opinion of the Court of Appeals, issued February 14, 2019 (Docket No. 337134), this Court affirmed defendant's convictions, but vacated his sentences and remanded to the trial court for resentencing before a different judge. On remand, defendant was sentenced to 22 to 40 years' imprisonment for his CSC-I convictions and his kidnapping conviction. On appeal, defendant argues that the trial judge erred by improperly scoring prior record variable (PRV) 5 and offense variables (OVs) 4, 7, 8, 10, and 11. This appeal is being decided without oral argument pursuant to MCR 7.214(E)(1). We affirm.

I. UNDERLYING FACTS

This case arises out of a kidnapping and rape that occurred in 2003 in Detroit, Michigan. In this appeal, defendant does not challenge his convictions. Rather, the only issue on appeal is the trial court's sentence on remand. This Court previously summarized the facts of this case in *DeLeon*, unpub op at 1-2:

> In 2003, defendant kidnapped and sexually assaulted the female victim. In August of that year, the victim was outside her Detroit home talking to a homeless

man whom she sometimes assisted. A van drove by twice before stopping near the victim. A man jumped out of the van, punched the homeless man, and then grabbed the victim by her hair, placed a knife to her neck, and with the help of a second man, pulled her into the van. Once inside the van, a towel was placed over the victim's head, but she was able to see that there were four men inside the van. The victim described being repeatedly sexually and physically assaulted over a period of several hours while inside the moving van. The victim heard the men speak in Spanish, which she understood, about whether they should kill her or just leave her somewhere. The van apparently ran out of gas and one of the men pushed the victim out of the van in a neighborhood where other people were nearby. Witnesses observed some of the male assailants chasing the partially clad victim as she ran away from the van, but the men gave up their chase when they saw the nearby witnesses. Other people assisted the victim and contacted the police. The abandoned van was discovered nearby. Various articles of the victim's clothing were found inside the van. The victim was taken to a hospital where evidence was collected for a sexual assault kit.

The investigation languished for several years until the sexual assault kit was eventually sent for forensic testing. When the kit was tested, the test results revealed a match with defendant's DNA profile. In 2016, the victim was shown a photographic array and, although she identified defendant's photograph as someone she recognized, she could not remember from where or the circumstances under which she recognized him.

During trial, the prosecutor introduced evidence that the van used during the crime was stolen in a carjacking offense that was committed shortly before the victim was abducted from the street. A police officer testified regarding the contents of the carjacking police report. The carjacking victim reported that Hispanic males, one of whom was armed with a knife, had carjacked his van in the same general area where the victim of this offense was abducted. The carjacking victim did not testify at trial.

As stated earlier, the jury convicted defendant of three counts of CSC-I and one count of kidnapping. Defendant appealed his convictions and sentencing. This Court affirmed defendant's convictions, but reversed the lower court's sentencing determinations and remanded for resentencing before a different judge. *DeLeon*, unpub op at 8. At resentencing, the new trial judge calculated a total PRV score of 25 points, including 5 points for PRV 5. The trial judge also assessed 10 points for OV 4, 50 points for OV 7, 15 points for OV 8, 15 points for OV 10, and 50 points for OV 11. Having calculated the guidelines, the trial judge then sentenced defendant to 22 to 40 years' imprisonment for each of his CSC-I convictions and for his single kidnapping conviction. This appeal followed.

II. ANALYSIS

A. STANDARD OF REVIEW

In general, "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). "A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *People v Antwine*, 293 Mich App 192, 194; 809 NW2d 439 (2011) (citation and quotation marks omitted). "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." *Hardy*, 494 Mich at 438. "Trial courts are afforded broad discretion in calculating sentencing guidelines, and appellate review of those calculations is very limited. Scoring decisions for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996) (citations omitted). Finally, "[t]he sentencing Court may consider facts not admitted by the defendant or found beyond a reasonable doubt by the jury. Offense variables are properly scored by reference only to the sentencing offense except when the language of a particular offense variable statute specifically provides otherwise." *People v Roberts*, ___ Mich App ___, ___; ___ NW2d ___ (Docket No. 339424) (2020); slip op at 4.

To the extent defendant raises a due process argument, we review constitutional issues de novo. *People v Al-Shara*, 311 Mich App 560, 566-567; 876 NW2d 826 (2015). "[D]ue process is satisfied as long as the sentence is based on accurate information and the defendant has a reasonable opportunity at sentencing to challenge that information". *People v Williams*, 215 Mich App 234, 236; 544 NW2d 480 (1996).

B. WAIVED ISSUES

The prosecution argues that defendant's PRV 5, OV 8, and OV 11 arguments are waived. We agree. At resentencing, when the trial judge asked defendant's attorney whether she agreed with the trial court's total PRV score of 25 points, defendant's attorney answered, "Yes, Your Honor." In expressing her agreement with the entirety of the trial court's PRV scoring determination, defendant's attorney affirmatively approved of the trial court's PRV 5 score because PRV 5 was one of the PRVs which comprised that total. Similarly, when asked whether she objected to the trial court's scoring of the other Offense Variables which comprised the total, OVs 8 and 11, defendant's attorney answered "No, Your Honor," each time she was asked. Consequently, defendant's attorney also expressed her satisfaction with the trial court's scoring of OVs 8 and 11.

Waiver occurs "[w]hen defense counsel clearly expresses satisfaction with a trial court's decision." *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011). "The distinction . . . between counsel stating, 'I approve of the instructions,' and counsel stating, 'I have no objections,' is unavailing." *Id*. at 504-505. Thus, given defense counsel's statements at resentencing, defendant's PRV 5, OV 8, and OV 11 arguments are waived. When waiver occurs, whether by affirmation or refutation, any error is extinguished, and the defendant is precluded from raising the issue on appeal. *People v Carter*, 462 Mich 206, 209; 612 NW2d 144 (2000). Consequently, even

if defendant is correct that PRV 5 and OVs 8 and 11 were misscored, those issues are not reviewable because "waiver extinguishes any error and precludes defendant from raising the issue on appeal." *Id*. As such, we will not address these issues further.

C. OV 4

The trial court correctly assessed 10 points for OV 4. OV 4 requires the scoring of ten points when "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). Actual professional treatment is not required for scoring OV 4, but courts may consider evidence that a victim sought counseling. *People v Davenport (After Remand)*, 286 Mich App 191, 200; 779 NW2d 257 (2009); MCL 777.34(2). "[T]rial court[s] may assess 10 points for OV 4 if the victim suffers, among other possible psychological effects, personality changes, anger, fright, or feelings of being hurt, unsafe, or violated." *People v Armstrong*, 305 Mich App 230, 247; 851 NW2d 856 (2014). In *Armstrong*, the complainant testified that she "felt confusion, emotional turmoil, anger, guilt, and the inability to trust others" after the defendant's criminal, sexual, digital penetration of her vagina. *Id*. In that case, this Court "conclude[d] that the trial court did not clearly err when it found that the complainant suffered a serious psychological injury requiring professional treatment" because "complainant's statements about the way the sexual assault affected her life showed that she suffered a psychological injury." *Id*. at 247-248.

In this case, defendant was not the only perpetrator of the crimes against the victim; as a result, at resentencing, the trial court could consider defendant's own actions only for purposes of scoring OV 4. Thus, it would not have been permissible for the trial court to consider the actions of defendant's accomplices. See *People v Gloster*, 499 Mich 199, 206-207; 880 NW2d 776 (2016):

> Because the Legislature has explicitly provided that all offenders in a multiple-offender situation should receive the same score for OVs 1, 2, and 3, but excluded that language from other OVs, we conclude that a defendant shall not have points assessed solely on the basis of his or her co-offenders' conduct unless the OV at issue specifically indicates to the contrary. To conclude otherwise would require this Court to read the multiple-offender language into the OV at issue . . . in violation of our principles of statutory interpretation. [Citations omitted.]

As explained in detail later, the trial court did not rely on any act committed by an accomplice; the trial court relied on findings which the jury made, beyond a reasonable doubt, and under which defendant's conduct was considered only as a principal. The trial court's jury instructions explained to the jury that in order to convict defendant of one or more counts of CSC-I it must find:

> that the defendant engaged in a sexual act that involved entry into [the victim's] [genital opening, anal opening, or mouth] by the defendant's penis. Any entry, no matter how slight, is enough. It does not matter whether the sexual act was completed or whether semen was ejaculated.

In her jury instructions, the trial judge did not address aiding and abetting until discussing the aggravating circumstances required for CSC-I. Relevant to aiding and abetting, the trial judge instructed the jury:

> Circumstance too [sic] that you can consider for either the penis in mouth, vagina or anal opening is that before or during the alleged sexual act the defendant was assisted or assisted by, or assisted another person who either did something or gave encouragement to assist the commission of the crime and the defendant used force or coercion to commit the sexual acts. Anyone who intentionally assists someone else in committing a crime is as guilty as the person who directly commits it and cannot [sic] be convicted of that crime as an aider or a better [sic].

The trial court also instructed the jury that it could find that defendant committed CSC-I if the sexual penetration occurred (1) during a kidnapping; (2) through force or coercion; or (3) with the aid of a weapon. Finally, at the conclusion of the CSC-I instructions, the trial judge instructed the jury that:

> If you all agree that the defendant committed the sexual act alleged, it is not necessary that you all agree on which of these aggravating circumstances accompanied the act as long as you all agree that the prosecutor has proved at least one of the circumstances beyond a reasonable doubt.

Similarly, when instructing the jury as to the kidnapping charge, the trial judge instructed the jury that it could find defendant guilty based on his own conduct only:

> For count four, kidnapping . . . [t]he defendant is charged with the crime of kidnapping. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt: First, that the defendant forcibly confined or imprisoned [the victim] against her will. Second, that the defendant did not have legal authority to confine [the victim]. Third, that while the defendant was confining [the victim] he forcibly moved or caused her to be moved from one place or another for the purpose of kidnapping.
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> * * *
>
> Fourth, that the defendant intended to kidnap [the victim].
>
> Fifth, that the defendant acted willfully and maliciously.

The jury did not return a special verdict form and, therefore, the record fails to establish which aggravating circumstance or circumstances the jury found when convicting defendant of CSC-I. But based on our reading of the jury instructions, the jury was not permitted to convict defendant of CSC-I solely because he aided and abetted his accomplices in their sexual penetrations of the victim. Rather, in order to convict defendant of CSC-I the jury was required to find that defendant penetrated the victim's mouth, anus, or vagina, a single time or in combination. Similarly, the jury also was instructed to determine defendant's guilt or innocence of kidnapping based only on his conduct, not the actions of his accomplices. Defendant has not raised a challenge to the sufficiency of the evidence for his CSC-I and kidnapping convictions, and "jurors are

presumed to follow their instructions." *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008).[1]

"[T]he trial court's power to impose a sentence is always derived from a jury's verdict." *People v Drohan*, 475 Mich 140, 162; 715 NW2d 778 (2006), overruled in part on other grounds by *People v Lockridge*, 498 Mich 358, 377-378; 870 NW2d 502 (2015). Indeed, a defendant's sentence can be based solely on the jury's findings and facts admitted by the defendant. See *Lockridge*, 498 Mich at 364, 373-374, 394-395, 399. Consequently, a trial court may use the facts necessarily found by the jury when making OV calculations, as those have been proven beyond a reasonable doubt. See *id*. As applicable here, therefore, the jury's verdict permitted the trial court to base its OV scores on the facts found by the jury that defendant committed three separate counts of CSC-I and that defendant kidnapped the victim. Accordingly, this Court is bound by the fact that there was proof beyond a reasonable doubt that defendant sexually penetrated the victim's mouth, anus, and vagina and that he kidnapped her.

At resentencing, the trial court found that "this [attack] seriously affected [the victim's] life. She sought help and she was terrified . . . [t]here was some indication that she had a loss of sleep." Furthermore, the trial court found that, "based on the facts of the case . . . being held at knife point and being raped" and the victim's testimony that she was terrified, the evidence preponderated towards scoring 10 points for OV 4. The evidence presented at trial supports the trial court's finding. The victim testified that she was "scared because I [do not] remember the faces of the guys who raped me." At resentencing, the victim's son gave an impact statement in which he stated that, as a result of the incident, the victim saw a therapist at least two times a month, had trouble sleeping and socializing, and rarely left her room because "[a]ny little thing will scare her."

The jury convicted defendant of three counts of CSC-I and one count of kidnapping. The serious psychological injury requiring professional treatment that these crimes caused the victim is evidenced by her constant state of fear and that "she can't go on with her everyday life." This experience clearly affected the victim, and, although not necessary for the trial court's OV 4 scoring determination, she sought professional psychological treatment to cope with it. Thus, the evidence supports the trial court's finding that the victim suffered serious psychological injury requiring professional treatment.

D. OV 7

The trial court did not err in assessing 50 points for OV 7. Offense variable 7 is codified in MCL 777.37 and "[a] trial court can properly assess 50 points under OV 7 if it finds that a

[1] Indeed, defendant is not permitted to do so because of the procedural posture of this case. Defendant's convictions already have been affirmed, and this Court only remanded for resentencing. See *DeLeon*, unpub op at 8. Consequently, defendant can only raise issues in this appeal related to his resentencing. See, e.g., *People v Canter*, 197 Mich App 550, 567-568; 496 NW2d 336 (1992) ("When a case is remanded by an appellate court, proceedings on remand are limited to the scope of the remand order.").

defendant's conduct falls under one of the four categories of conduct listed in subsection (1)(a)." *Hardy*, 494 Mich at 439-440. The four categories of conduct listed in subsection (1)(a) are "sadism, torture, excessive brutality, or similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). "[A]ll relevant evidence should be closely examined," in making a determination under OV 7, to determine whether the "conduct was intended to make the victim's fear or anxiety increase by a considerable amount." *Hardy*, 494 Mich at 443-444.

Defendant argues that the trial court erred by assessing 50 points for OV 7 because it did not consider him the "leader" for purposes of OV 14 and the victim could not identify which, if any, of the criminal acts done to her were committed by defendant. At resentencing, the trial judge found that "there are kidnapings [sic] and there's kidnapings [sic] that also have the element of sadism." He then assessed 50 points for OV 7, finding that "[t]his is stopping somebody's movement, taking somebody from one place to another, questioning whether to kill that individual, beating that individual in a pretty severe way and committing sexual assault against that individual, not for twenty minutes, not for an hour, but for a prolonged period of time." While this is a close issue because the victim could not identify which actions defendant specifically took during her kidnapping and rape, the evidence supports the trial court's scoring of OV 7. The victim was kidnapped at knife point by two men who grabbed her hair and pulled her into a van. While in the van, a white towel was placed over her head, and her vagina, anus, and mouth were sexually penetrated. The victim's attackers also discussed killing her, in her presence. Furthermore, one of the victim's attackers ordered her not to look at him and she was beaten, bitten, and had a chunk of hair pulled from her head.

While defendant may not be responsible for beating the victim while she was in the van or for covering her head with a towel, he still sexually penetrated her three times while the victim was being beaten and unable to see, and she was held captive for hours. Such conduct went beyond what was required for defendant's CSC-I and kidnapping convictions and almost certainly increased the victim's fear by a considerable amount. Furthermore, the jury convicted defendant of three counts of CSC-I and one count of kidnapping. In doing so, the jury found that defendant personally committed the kidnapping and at least three criminal sexual penetrations to the victim's mouth, anus, and vagina, based on DNA evidence from the victim's vaginal swab. These actions were the product of an attack that went beyond the minimum required to sexually penetrate the victim and were likely intended to increase the victim's fear by a considerable amount. The evidence amply supports the trial court's assessment of 50 points pursuant to OV 7 for defendant's egregious conduct. See *Antwine*, 293 Mich App at 194.

E. OV 10

The trial court correctly assessed 15 points for OV 10. OV 10 is scored for "exploitation of a vulnerable victim." MCL777.40(1). For the purposes of OV 10, it is not necessary for a victim to have inherent vulnerabilities; "[i]nstead, a defendant's 'predatory conduct,' by that conduct alone (*eo ipso*), can create or enhance a victim's 'vulnerability.' " *People v Huston*, 489 Mich 451, 454; 802 NW2d 261 (2011). Vulnerability is the "readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." *Id.* at 466. Furthermore, "the defendant's preoffense conduct only has to be directed at 'a victim,' not any specific victim." *Id.* at 468. The trial court is to assess 15 points for OV 10 when "[p]redatory conduct was involved"

in the commission of the crime for which the defendant was convicted. MCL777.40(1)(a). Our Supreme Court defines "predatory conduct" as, "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 subsequent escape without detection.' " *Huston*, 489 Mich at 462, quoting *People v Cannon*, 481 Mich 152, 162; 749 NW2d 257 (2008).

Defendant argues that because the trial court did not score him as a "leader" under OV 14 and because the victim could not identify which, if any, acts were specifically committed by defendant, the evidence thus does not preponderate in favor of finding that his conduct was predatory. In the present case, the trial court assessed 15 points for OV 10 because defendant and his accomplices drove around in the van looking for a victim before abducting the victim. The evidence supports the trial judge's scoring of OV 10. Defendant and his accomplices drove around seeking out a lone female victim to kidnap. Defendant and his accomplices passed by the victim once before deciding that she was sufficiently vulnerable and turning around to drive by again. As found by the jury beyond a reasonable doubt, defendant then kidnapped the victim. Consequently, the jury found that defendant was not a passive observer in the van. While the jury's conviction of defendant for kidnapping the victim did not require a finding that he was the driver or that he grabbed the victim off the street, defendant apparently was in the van when this conduct occurred. The fact that defendant was present when the victim was kidnapped and then subsequently raped her multiple times and held her captive for hours provides circumstantial evidence that he helped his accomplices choose to abduct the victim. Thus, we are not left with a definite and firm conviction that the trial court erred by assessing 15 points for OV 10. See *Antwine*, 293 Mich App at 194.

III. CONCLUSION

For the reasons stated in this opinion, defendant's sentences are affirmed.

/s/ Jane E. Markey
/s/ Kirsten Frank Kelly
/s/ Jonathan Tukel