STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 29, 2009
v	No. 286548 Berrien Circuit Court
STEVENSON BENNETT, Defendant-Appellant.	LC No. 2007-405531-FH

Before: Markey, P.J., and Bandstra and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for assault with intent to do great bodily harm less than murder, MCL 750.84, and resisting and obstructing a police officer, MCL 750.81d(1). Defendant was sentenced as an habitual offender, third offense, MCL 769.11, to 84 to 240 months' imprisonment for assault with intent to do great bodily harm less than murder and 18 to 48 months' imprisonment for resisting and obstructing a police officer with credit for 200 days, the two sentences to run concurrently. We affirm.

Defendant argues that his conviction for resisting and obstructing a police officer should be reversed because the evidence shows that the conduct for which he was charged occurred during an unconstitutional warrantless arrest. We review unpreserved issues involving statutory interpretation and constitutional law for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The offense of resisting and obstructing a police officer requires the prosecutor to prove beyond a reasonable doubt that (1) defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered a police officer performing his duties, and (2) defendant knew or had reason to know that the person the defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered was a police officer performing his duties at the time. MCL 750.81d(1); *People v Nichols*, 262 Mich App 408, 410; 686 NW2d 502 (2004). "Obstruct" includes the knowing failure to comply with a lawful command. MCL 750.81d(7)(a). Conduct constituting resisting and obstructing a police officer includes failing to obey a police officer's command to stop and flight or attempted flight from the scene. See *People v Wess*, 235 Mich App 241, 242; 597 NW2d 215 (1999); *People v Pohl*, 207 Mich App 332, 333; 523 NW2d 634 (1994). In addition, as articulated by the Court in *People v Ventura*, 262 Mich App 370, 377; 686 NW2d 748 (2004), MCL 750.81d(1) does not require that the arrest be lawful. We find nothing wrong with *Ventura's* understanding of this statute. Consequently, an individual may not resist an arrest made by a police officer who he

knows or has reason to know is performing his duties regardless whether the arrest was illegal under the circumstances. *Id*.

In this case, after defendant was told by Officer Brett Johnston and Sergeant Timothy Sutherland that he was under arrest, defendant resisted and obstructed the police officers by pulling away from Officer Johnston, trying to slam a door shut, and trying to run away from the officers. We note that there is no evidence in the record that defendant did not know that Officer Johnston and Sergeant Sutherland were police officers. Rather, the record supports the conclusion that it was perfectly clear to defendant that Officer Johnston and Sergeant Sutherland were police officers. They were in full uniform and arrived in two fully marked police cars. We further note that defendant never argues that he did not resist or obstruct the police officers. Based on the foregoing, we find that the elements of MCL 750.81d(1) were established.

Nonetheless, defendant argues that his conviction of resisting and obstructing a police officer should be reversed because "the police may not enter a suspect's house without a warrant to make a felony arrest." Even assuming this is an accurate statement of constitutional law, the fact-finder here would not have had to conclude that this is what occurred in this case. Instead, the record amply supports the conclusion that the police officers went to defendant's home with sufficient probable cause to arrest him on the basis of allegations of physical assault and unlawful imprisonment, that the officers attempted to physically arrest defendant at the doorway while they were outside of his home, that defendant broke away from them and that they only entered his home to complete the arrest. Defendant presents no case law suggesting that his constitutional rights were violated under the circumstances. Further, defendant apparently agrees with the prosecutor that, even if a constitutional violation had occurred, the only remedy would be the suppression of evidence resulting from the unconstitutional entry; defendant concedes that there is no such evidence. We find defendant's argument in this regard to be without merit.

Defendant next argues that the trial court erred in scoring offense variables (OV) 12, MCL 777.42, and 19, MCL 777.49, with regard to the assault with intent to do great bodily harm less than murder conviction. MCL 777.42(1)(b) provides that if two contemporaneous felonious criminal acts against a person were committed, OV 12 must be assessed at ten points. MCL 777.42(2)(a)(i) and (ii) provide that an act is contemporaneous if it occurred "within 24 hours of the sentencing offense" and "will not result in a separate conviction." A trial court's calculation of a sentencing guidelines range is reviewed to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). In scoring a particular offense variable, a trial court's determination need only be supported by a preponderance of the evidence. *People v Drohan*, 475 Mich 140, 142-143; 715 NW2d 778 (2006). In fact, "[s]coring decisions for which there is any evidence in support will be upheld." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

The statute for unlawful imprisonment, MCL 750.349b(1)(b), (c), provides that a person commits the crime of unlawful imprisonment if he knowingly restrains another person and the restrained person was secretly confined or the person was restrained in order to facilitate the commission of another felony. "Restrain" means to forcibly restrict or confine a person's

movements so as to interfere with that person's liberty without that person's consent. MCL 750.349b(3)(a). And, "the essence of 'secret confinement' . . . is deprivation of the assistance of others by virtue of the victim's inability to communicate his predicament." *People v Jaffray*, 445 Mich 287, 309; 519 NW2d 108 (1994). In this case, after the victim got out of defendant's vehicle and started running and yelling for help, defendant ran after her, caught her, and dragged her back into his house by her legs. Later, when the victim tried to call for help, defendant grabbed the telephone out of her hand to prevent her from seeking assistance. Subsequently, defendant told the victim that if she tried to leave the house, he would know because the house was equipped with an alarm system. These actions clearly show that defendant forcibly restricted and confined the victim's movements so as to interfere with her liberty to leave the house and call for help. MCL 750.349b(3)(a). Moreover, defendant's actions show an intention to keep his confinement of the victim a secret. *Jaffray*, 445 Mich at 309; MCL 750.349b(1)(b). In addition, because defendant dragged the victim back into the house before bashing her head against the wall and kicking her down the basement stairs, a reasonable fact-finder could conclude that the victim was restrained in order to facilitate defendant's assault of the victim. MCL 750.349b(1)(c). Also, because defendant dragged the victim back into the house, prevented her from calling for help, and notified her of his alarm system before he committed first and third-degree criminal sexual conduct (CSC), the elements of which are met as set forth below, a reasonable fact-finder could conclude that the victim was restrained to facilitate defendant's subsequent offenses of first and third-degree CSC. MCL 750.349b(1)(c).

The statute for first-degree CSC, MCL 750.520b(1)(c), (f), provides that a person is guilty of first-degree CSC if he engages in sexual penetration with another person and the sexual penetration occurs under circumstances involving the commission of any other felony or the actor causes personal injury to the victim and coercion or force is used to accomplish the sexual penetration. In this case, the testimony indicated that defendant sexually penetrated the victim. MCL 750.520b(1). Defendant was also convicted of assault with intent to do great bodily harm. And, as set forth above, a reasonable fact-finder could find that defendant unlawfully imprisoned the victim. Thus, a reasonable fact-finder could find that the sexual act occurred under circumstances that involved the assault or the unlawful imprisonment of the victim. MCL 750.520b(1)(c).

We also conclude that a reasonable fact-finder could find that the defendant caused personal injury to the victim and force or coercion was used to accomplish the sexual penetration. MCL 750.520b(1)(f). "'Personal injury' means bodily injury, disfigurement, mental anguish, chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ." MCL 750.520a(m). Mental anguish involves sustaining extreme or excruciating pain, distress, or suffering of mind. *People v Himmelein*, 177 Mich App 365, 376; 442 NW2d 667 (1989). In this case, the record supports a finding of mental anguish. The victim testified that every time she looked in the mirror after the incident, she "bust[ed] out" crying and that she could not stand to look at herself any more. She further testified that after the assault she was black and blue and that she could hardly see out of her eyes because her eyes were "all busted up, bruised up." She felt pain everywhere, especially in her back, arms, and legs. She was unable to sleep and could only sleep on her stomach with a pillow. She further testified that she still has pain in her head, arms and her leg. She also indicated that she was very ashamed of what happened and that when she spoke with Officer Johnston she was very jittery, in pain, and

nervous. In fact, the victim testified that she was so ashamed about the sexual assault that the shame was worse than the physical violence that she experienced. Based on the foregoing, we find that the personal injury element is satisfied based on the fact that the victim suffered mental anguish, which involved sustaining extreme or excruciating pain, distress, or suffering of mind. *Himmelein*, 177 Mich App at 376.

With regard to the force or coercion element, the testimony shows that after the victim told defendant that she did not want to have sex, he ignored her and they had sex anyway. The victim further testified that "[a]fter all he done to me, who am I to say no?" Based on the fact that defendant previously viciously beat the victim for merely attempting to leave his home, a reasonable fact-finder could conclude that the victim felt forced or coerced to engage in sexual intercourse with defendant in order to prevent another vicious beating. MCL 750.520b(1)(f); see also *People v Brown*, 197 Mich App 448, 450-451; 495 NW2d 812 (1992).

The statute for third-degree CSC, MCL 750.520d(1)(b), provides that a person is guilty of third-degree CSC if the person engages in sexual penetration with another person and force or coercion is used to accomplish the sexual penetration. As already stated, defendant sexually penetrated the victim and force or coercion was used to accomplish the sexual penetration. MCL 750.520d(1)(b).

Finally, the unlawful imprisonment and first and third-degree CSC occurred within 24 hours of the assault with intent to do great bodily harm less than murder and the offenses did not result in a separate convictions. MCL 777.42(2)(a)(i), (ii). Based on the foregoing, the trial court did not abuse its discretion when it scored ten points for OV 12 because the record supports the conclusion, based upon a preponderance of the evidence, that defendant unlawfully imprisoned the victim and committed first and third-degree CSC. *Hornsby*, 251 Mich App at 468; *Drohan*, 475 Mich at 142-143.

With regard to the scoring of OV 19, MCL 777.49(b) provides that 15 points must be scored when "[t]he offender used force or the threat of force against another person or the property of another person to interfere with, attempt to interfere with, or that results in the interference with the administration of justice or the rendering of emergency services." Interference with the administration of justice is not limited to the acts that obstruct justice. *People v Barbee*, 470 Mich 283, 286-287; 681 NW2d 348 (2004). Any acts or conduct that interfere with a police officer's duties and their investigation of a crime, even before charges are filed, may constitute conduct sufficient to support the scoring of fifteen points for OV 19. *Id*. at 288. And, those actions may include deterring a witness from testifying or reporting a crime so long as defendant's conduct occurred before the conduct involved with the sentencing offense was completed. *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009); *People v Endres*, 269 Mich App 414, 420-422; 711 NW2d 398 (2006). In this case, when the victim tried to run away from defendant's house yelling for help, defendant dragged her back into his house by her legs. Also, when the victim tried to call for help, defendant grabbed the telephone out of her hand to prevent her from seeking assistance. Based on the foregoing, there is support in the record that defendant "used force or the threat of force against another person or the property of another person to interfere with, attempt to interfere with, or that results in the interference with the administration of justice or the rendering of emergency services" and that this conduct occurred

in conjunction with the sentencing offense. MCL 777.49(b); *McGraw*, 484 Mich at 120. Consequently, the trial court did not abuse its discretion by scoring 15 points for OV 19. *McLaughlin*, 258 Mich App at 671.

We affirm.

/s/ Jane E. Markey
/s/ Richard A. Bandstra
/s/ Christopher M. Murray