

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHOL THIEK DENG,

Defendant-Appellant.

UNPUBLISHED

June 20, 2024

Nos. 363071; 368885

Kent Circuit Court

LC No. 20-004377-FC

Before: RICK, P.J., and JANSEN and LETICA, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of kidnapping, MCL 750.349; first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(c) (during the commission of a felony); and second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(c) (during the commission of a felony). He was resentenced¹ to concurrent terms of 15 to 40 years’ imprisonment for his kidnapping conviction, 14 to 25 years’ imprisonment for his CSC-I conviction, and 5 to 15 years’ imprisonment for his CSC-II conviction. Defendant appeals as of right, and we affirm.

I. FACTUAL AND PROCEDURAL HISTORY

In June 2020, the victim, a 16-year-old female immigrant from Togo, Africa, went to her father’s apartment to retrieve her phone.² When the victim left the apartment to return home to

¹ In Docket No. 363071, defendant appealed his convictions. Thereafter, he subsequently moved for a directed verdict of acquittal and for resentencing in the trial court. The trial court denied the motion for acquittal, but granted defendant’s motion for resentencing. Although defendant was initially sentenced to 19 to 40 years’ imprisonment for kidnapping, the trial court imposed 15 to 40 years’ imprisonment on resentencing. In Docket No. 368885, defendant appealed his amended judgment of sentence. We consolidated the appeals “to advance the efficient administration of the appellate process.” *People v Deng*, unpublished order of the Court of Appeals, entered December 12, 2023 (Docket Nos. 363071; 368885).

² The victim indicated that the phone was not charged so she could not call for help.

her mother's apartment, she noticed a honking black Jeep, but she ignored it. As the victim continued her 15-minute walk home, she passed an elementary school where the black Jeep was parked, and the driver honked at her. The victim approached the black Jeep because her sister's boyfriend drove a similar vehicle. Defendant, who was 38 years old, was the driver of the Jeep. The victim apologized, stating that she thought he was someone else. Defendant asked the victim her name, and she told him before walking away.

The victim was walking past a building when defendant once again drove his Jeep toward her. The victim was unfamiliar with defendant and did not know his name. Defendant offered to give the victim a ride. He noted that they shared the same ethnic heritage and were "a big family." Defendant offered to drive the victim home and stated that she need not be afraid. The victim got into the front passenger seat of defendant's car because he seemed "so nice." Additionally, it was a long walk home, she was tired, and it was getting dark. The victim testified that defendant seemed like a "kind person" who would not hurt her. During the drive home, the victim spoke about her country of origin. The victim directed defendant to drop her off in front of a veterinary (vet) clinic so her mother would not see her with a stranger.

But, defendant drove to the back of the vet clinic and parked near a trash can. There were no people outside, and the victim felt uncomfortable. Defendant kissed the victim, touched her breasts, and digitally penetrated her although she told him to stop. The victim opined that her passenger door was locked, and she could not unlock it because defendant was "all over" her. Defendant then opened the door for the victim and walked her to the backseat.³ Defendant got on top of the victim, and she was unable to move. He sexually assaulted her although she was crying and asked him to stop. After the assault ended, the victim was able to leave the car and walk away.

The victim went to a neighbor, DS, for help because she felt uncomfortable confiding in her parents. After DS learned of the victim's sexual assault, she called the victim's brother, KA. KA, DS, and the victim returned to the father's apartment complex where they saw defendant's Jeep was parked. KA and DS contacted apartment residents to learn the identity of the Jeep owner. Defendant came out of the apartment complex. When questioned about an assault committed upon the victim, defendant was aggressive toward DS and challenged KA to a fight. Because of defendant's hostility, the police were called.

After the police arrived, defendant gave a statement at the scene. Defendant claimed that he merely gave the victim a ride and denied that any sexual activity occurred. But, once he learned of the victim's claims of sexual assault, defendant admitted that he kissed the victim and touched her breasts and stomach. Defendant continued to deny any sexual penetration of the victim. The victim submitted to a forensic medical examination performed by a sexual assault nurse examiner (SANE). Defendant was determined to be a contributor to the DNA profile developed from the victim's vaginal swabs. The jury convicted defendant as charged.

³ At her medical examination, the victim indicated that she was dragged to the backseat. At trial, she denied that defendant dragged her. She testified that defendant placed her in the backseat, but also indicated that she opened the door. Ultimately, the victim explained that she could not remember certain details because it had been two years since the assault.

II. DOCKET NO. 363071

Defendant first argues that the prosecution provided insufficient evidence of the victim's restraint to establish that he kidnapped the victim. Because the kidnapping offense served as the felony committed to support the CSC-I and CSC-II charges, he further alleges there was insufficient evidence to support those convictions. We disagree.

This Court reviews a challenge to the sufficiency of the evidence by reviewing the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Jarrell*, 344 Mich App 464, 480; 1 NW3d 359 (2022). “[T]he standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict.” *People v Oros*, 502 Mich 229, 239; 917 NW2d 559 (2018) (quotation marks, citation, and alteration omitted). “Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.” *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000) (quotation marks and citation omitted). “Issues involving statutory interpretation are reviewed de novo.” *Jarrell*, 344 Mich App at 473.

MCL 750.349(1)(c) states that a person “commits the crime of kidnapping if he or she knowingly restrains another person with the intent to . . . [e]ngage in criminal sexual penetration or criminal sexual contact”⁴ For purposes of kidnapping, MCL 750.349(2) defines “restrain” as restricting

a person's movements or to confine the person so as to interfere with that person's liberty without that person's consent or without legal authority. The restraint does not have to exist for any particular length of time and may be related or incidental to the commission of other criminal acts.

Defendant contends that a kidnapping did not occur because there was no restraint “of any kind.” He relies on testimony elicited at trial that: (1) the victim willingly entered defendant's car; (2) defendant acted “not inconsistent” with the agreement to drive the victim near her mother's

⁴ Defendant alleged that acts of restraint that occurred during the sexual assaults could not be considered for purposes of kidnapping because the kidnapping would no longer be “related or incidental” to other criminal acts, but rather, “indistinguishable and indistinct” from the sexual assaults. Defendant acknowledges that he has no authority exactly on point and raises hypotheticals to support his position. The definition of restraint includes “to confine the person so as to interfere with that person's liberty without that person's consent or without legal authority.” MCL 750.349(2). Before the sexual assaults occurred, defendant ignored the victim's request to be dropped off in front of the vet clinic. Instead, defendant drove to a secluded location behind the vet clinic near a trash can where no other persons were present. This constituted an act of restraint that occurred before the sexual assaults because it confined the victim, interfering with her liberty to which she did not consent. It is distinguishable from the restraint that transpired during the sexual assaults.

home but not in plain view; and (3) the victim admitted that she got out of the car and then willingly reentered the backseat “without restraint.”

We reject defendant’s contention that the victim’s voluntary entry into his vehicle negates the knowingly restraint element of kidnapping. Consent is a complete defense to kidnapping only if it has not been obtained by fraud, duress, or threats. *People v LaPorte*, 103 Mich App 444, 448-449; 303 NW2d 222 (1981). Moreover, such consent must be present “throughout the commission of the entire transaction.” *Id.* at 449. Consequently, “[i]nitial consent does not necessarily exonerate the defendant from all subsequent acts.” *Id.*

In this case, the jury could reasonably conclude that any consent by the victim to enter defendant’s car was obtained by fraud. The victim entered defendant’s car under the mistaken belief that defendant would drive her home, leaving her near the vet clinic. However, defendant drove past the vet clinic to a secluded area in the back parking lot near a trash can. Contrary to his argument, this act was indeed inconsistent with his agreement to drive the victim to an area near her apartment but outside the view of her mother. The jury was entitled to conclude that defendant did not offer to drive the victim home because he was a nice person from their common native land, but used that information as a ruse to get the victim into his car. Once inside, defendant secreted the victim in the area behind the vet clinic, where no one was present, and there he sexually assaulted her. Defendant restrained the victim when he did not drop her off near her home, but continued to a secluded area to which she did not agree. And, the victim testified that being restrained during the sexual assault in the front seat prevented her from attempting to exit the locked Jeep as well as the sexual assault that transpired in the backseat. Viewing the evidence in the light most favorable to the prosecution and resolving credibility issues in favor of the jury’s verdict, there was sufficient evidence that defendant fraudulently offered to drive the victim home, but his intent was to secure the victim and sexually assault her.

Defendant further contends that the victim voluntarily exited the car and willingly reentered the backseat. Although the victim gave contradictory statements regarding the circumstances of her entry into the backseat, the evidence was sufficient to establish that it was caused by defendant’s continuing restraint. The SANE report indicated that the victim was dragged from the front seat to the backseat; however, at trial, the victim denied that she was dragged. Rather, the victim testified that that defendant opened the door for her and walked her to the backseat. Although the victim indicated that she may have opened the backseat door, she then indicated that she was unsure of the exact circumstances because it had been two years since the assault occurred. Irrespective of who opened what door, defendant’s presence at the victim’s side and act of walking her to the backseat, following the completion of an act of sexual assault committed in the front seat, was sufficient for the jury to find restraint as defined in MCL 750.349. Defendant’s challenge to the sufficiency of the evidence premised on restraint is without merit.⁵

⁵ On appeal, defendant also faults the victim for failing to flee the car when it slowed down to park, for failing to test the car’s door locks instead of assuming they were locked, and for simply entering the backseat after defendant “asked” her to do so. There is no requirement that a victim take evasive and potentially harmful action to avoid restraint in the plain language of MCL 750.349. See *Jarrell*, 344 Mich App at 473. Thus, the victim was not required to jump from

Viewing the evidence in the light most favorable to the prosecution, any consent obtained by defendant was obtained by fraud and that defendant's real intention had been to sexually assault the victim.⁶

III. DOCKET NO. 368885

Defendant next contends that the trial court improperly assigned 15 points under OV 10, addressing exploitation of a vulnerable victim. We disagree.

This Court reviews de novo whether the trial court properly interpreted and applied the relevant law to the facts. See *People v Clark*, 330 Mich App 392, 415; 948 NW2d 604 (2019). This Court reviews for clear error the trial court's factual findings in support of a particular score under an OV. *People v Dickinson*, 321 Mich App 1, 20-21; 909 NW2d 24 (2017). A finding is clearly erroneous when this Court is left with the definite and firm conviction that a trial court made a mistake. *Id.* at 21.

OV 10 addresses the "exploitation of a vulnerable victim," which provides that a trial court should assign a defendant 15 points when his exploitation involves predatory conduct. MCL 777.40(1)(a). The statute defines predatory conduct as "preoffense conduct directed at a victim, or a law enforcement officer posing as a potential victim, for the primary purpose of victimization." MCL 777.40(3)(a). Exploitation means "to manipulate a victim for selfish or unethical purposes," MCL 777.40(3)(b), and vulnerability refers to "the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." MCL 777.40(3)(c).

A defendant should be assigned 15 points when he or she engages in "preoffense conduct directed at a victim for the primary purpose of victimization . . ." *People v Cannon*, 481 Mich 152, 159; 749 NW2d 257 (2008). Victimization "inherently involves some level of exploitation."

a slowly moving vehicle or test the locks. But, we note that the victim testified that she believed defendant was a kind and nice person. She only became uncomfortable *after* he parked behind the vet clinic in an isolated area near a trash can. And, the victim testified that defendant's hands, being "all over" her, prevented her from testing the door locks. Finally, we note that there were discrepancies in the victim's testimony regarding how she entered the backseat and whether she opened the door. But, the victim attributed them to the nearly two-year period between the assaults and the trial. In closing argument, defense counsel highlighted the discrepancies in the victim's testimony that supported a finding that would negate the element of restraint. The jury's verdict reflects that it rejected defendant's argument.

⁶ Defendant briefly asserted that the prosecution failed to meet the requirement of asportation and that asportation cannot be merely incidental to the commission of an underlying offense, citing *People v Spanke*, 254 Mich App 642; 658 NW2d 504 (2003). In 2006, MCL 750.349(2) was amended to expressly provide, in relevant part, that: "The restraint does not have to exist for any particular length of time and may be related or incidental to the commission of other criminal acts." 159 PA 2006. In light of this statutory amendment, defendant's reliance on *Spanke* is without merit because the restraint may, in fact, be incidental to other committed criminal acts. This cursory challenge does not entitle defendant to appellate relief.

Id. Therefore, 15 points “may be assessed under OV 10 for exploitation of a vulnerable victim when the defendant has engaged in conduct that is considered *predatory* under the statute.” *Id.* (emphasis added). Predatory conduct

deserves to be treated as the *most serious* of all exploitations of vulnerability because that conduct itself created or enhanced the vulnerability in the first place, and it may have done so with regard to the community as a whole, not merely with regard to persons who were *already* vulnerable for one reason or another. [*People v Huston*, 489 Mich 451, 461; 802 NW2d 261 (2011).]

The term “predatory conduct” encompasses “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 or ‘preoffense conduct involving nothing more than run-of-the-mill planning to effect a crime or subsequent escape without detection.’ ” *Id.* at 462, quoting *Cannon*, 481 Mich at 162.

To determine whether a defendant engaged in predatory conduct, our Supreme Court provided the following test:

(1) Did the offender engage in conduct before the commission of the offense?

(2) Was this conduct directed at one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation?

(3) Was victimization the offender’s primary purpose for engaging in the preoffense conduct? [*Cannon*, 481 Mich at 162.]

If the trial court can answer all three questions affirmatively, then it may assign a defendant 15 points under OV 10 for engaging in predatory conduct. *Id.*

When examining a victim’s vulnerability, courts should consider the following:

(1) the victim’s physical disability, (2) the victim’s mental disability, (3) the victim’s youth or agedness, (4) the existence of a domestic relationship, (5) whether the offender abused his or her authority status, (6) whether the offender exploited a victim by his or her difference in size or strength or both, (7) whether the victim was intoxicated or under the influence of drugs, or (8) whether the victim was asleep or unconscious. [*Id.* at 158-159.]

However, the existence of one of these factors does not automatically render the victim vulnerable. *Id.* at 159.

In *People v Kosik*, 303 Mich App 146, 148; 841 NW2d 906 (2013), the defendant entered a shoe store where the victim worked. When the defendant was in the store, the victim’s coworker was preparing to leave for break by gathering her jacket and purse. The defendant left the shoe store ostensibly after discovering that the store did not have the shoes he wanted. *Id.* The

defendant returned to the store approximately five minutes later, after the victim's coworker left the store for her break. *Id.* The defendant asked the victim to double check shoe sizes for him. *Id.* at 148-149. Complying with the defendant's request, the victim knelt down, pulled out the box of the particular shoes that the defendant wanted, and called another store to verify that they had the shoe in stock. *Id.* at 149. Once the victim stood up, the defendant lunged at her, grabbed her, and turned her around. *Id.* The defendant took the victim's phone from her and told her to keep walking as he led her into the conference room. *Id.* After inquiring about the store's surveillance system and emergency exits, the defendant advised the victim that he was "just kidding" and asked her not to tell anyone about the incident. The victim called 911 after the defendant left the store, and he was apprehended. *Id.* at 149-150. The defendant was subsequently convicted of unlawful imprisonment and assault and battery and assigned 15 points under OV 10. *Id.* at 148, 159. This Court affirmed the 15-point score, noting that predatory conduct was shown by the timing of the incident and that the defendant watched the victim and waited until she was alone to victimize her. *Id.* at 160. This Court also rejected the defendant's argument that the victim was not vulnerable as a healthy adult female working in a public space, noting that the characteristics inherent in the victim were not dispositive and the circumstances of the offense could render the victim vulnerable. *Id.* at 160-161.

In *People v Barnes*, 332 Mich App 494, 502; 957 NW2d 62 (2020), the victim was new to the area and looking for friendship. She met the defendant through a chat line. The victim apprised the defendant that she was only looking for friendship, had previously rejected other men because they wanted only a sexual encounter with her, and was nervous about in-person contact because of crimes committed against young women. *Id.* The defendant assured the victim that he also wanted a friendship, used the victim's concerns against her, and represented that she could trust him. *Id.* Consequently, the victim accepted the defendant's offer to go sightseeing. *Id.* However, the defendant drove to secluded and isolated parts of the city, including an alley, where he sexually assaulted the victim. *Id.* This Court agreed with the trial court's conclusion that the victim was vulnerable, given her unfamiliarity with the city and the fact that the defendant isolated her for the purpose of sexually assaulting her. *Id.* at 503. Moreover, the difference in the size and strength of the victim, relative to the defendant, contributed to the victim's vulnerability. *Id.* Regarding the nature of the defendant's conduct, this Court agreed with the trial court that the defendant's actions were predatory in nature. *Id.* During the days leading up to his assault, the defendant told the victim that he was merely looking for friendship and that she did not need to be afraid of him. *Id.* at 504. These misrepresentations were clearly met to assuage the victim's apprehension about meeting the defendant in person. *Id.* The defendant abused the victim's trust when he persuaded her to get into a car with him and drive to locations of his choosing. *Id.* Knowing that the victim was unfamiliar with the city, the defendant drove to an isolated location and sexually assaulted her. *Id.* This Court affirmed the 15-point score for OV 10, noting that when a defendant builds a rapport with a victim to gain her trust then abuses that trust to use his superior size and strength to sexually abuse the victim, the conduct is predatory in nature. *Id.*

In the present case, the trial court scored OV 10 at 15 points, stating that defendant had engaged in conduct of a predatory nature by following the victim in his vehicle. Moreover, the trial court noted that the victim was vulnerable because she was sixteen and walking down the street alone during the evening. The trial court stated that defendant thought that the victim was attractive, which is why he followed her in his vehicle. The trial court concluded that defendant's conduct was predatory under the circumstances.

We agree with the trial court that OV 10 was properly scored at 15 points. The record reflects that defendant engaged in predatory conduct when he began to stalk the victim almost immediately after she left her father's apartment and started to walk home. First, he honked at her in the apartment complex parking lot. He then followed the victim as she walked even when she took a shortcut home. Defendant pursued her as she walked past an elementary school where he again honked at her. He was able to make contact with the victim because she believed that the person honking at her was someone that she knew. Defendant continued to follow the victim when she crossed a street. Defendant apparently stalked the victim because he found her attractive. Defendant then enticed the victim into his vehicle with kind words that exploited their common African heritage. Defendant convinced the victim that he was a kind man, who merely wanted to help her. A few minutes later, defendant drove the victim to a secluded spot where he raped her. Defendant's building a rapport and trust with the victim only to abuse that trust and sexually assault her is not merely routine planning but constitutes predatory conduct. *Id.* at 504.

Additionally, as the trial court noted, the victim's youth and solitude reflected her vulnerability as a victim. The victim's vulnerability was also established by her circumstances; she had to walk approximately 15 minutes to get home when it was starting to get dark outside. Moreover, like the defendant and victim in *Barnes*, there was obviously a significant difference in the victim's and defendant's sizes and body weights, which enabled defendant to hold down the victim as he assaulted her. See *id.* Additionally, defendant drove the victim to an isolated spot where no one could see them. See *id.* at 502. Lastly, the victim shared a common heritage with her assailant and defendant assured the victim that she need not be afraid of him because they were part of a "big family." The victim indicated that defendant's words about their common nationality led her to believe that he was a kind man, and she was not alarmed by the fact that he was repeatedly following her. See *id.*; *Kosik*, 303 Mich App 148-149. All the circumstances established that the victim was truly vulnerable. See *Barnes*, 332 Mich App at 502.

The circumstances also established that defendant's conduct was predatory. The evidence showed that defendant stalked the victim before assaulting her; that, for reasons already stated, the victim was susceptible to physical restraint, persuasion, and temptation; and that defendant's primary purpose was to engage in sexual intercourse with the victim. See *Cannon*, 481 Mich at 162. Defendant's stalking of the victim began when she left her father's apartment and persisted until the assault took place. Defendant admittedly found the victim very attractive, which strongly indicated that his motivations were sexual from the beginning. As *Kosik*, 303 Mich App at 148-149, 160, established, predatory conduct can be shown by a stalking period of mere minutes rather than hours or days. Through his predatory actions, defendant was able to obtain the victim's trust in a very short amount of time. For these reasons, the trial court did not err when it assessed 15 points for OV 10.

Affirmed.

/s/ Michelle M. Rick
/s/ Kathleen Jansen
/s/ Anica Letica