

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN A. DIXON,

Defendant-Appellant.

UNPUBLISHED
December 6, 2002

No. 234124
St. Clair Circuit Court
LC No. 99-002164-FH

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

PER CURIAM.

Following a jury trial, defendant was convicted of four counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a) (sexual penetration of a person aged 13 to 15), and sentenced as a second habitual offender, MCL 769.10, to serve concurrent terms of 10 to 22½ years' imprisonment for each count. Defendant appeals by leave granted. We affirm.

The sole issue on appeal is whether the trial court abused its discretion in scoring defendant's offenses under the legislative sentencing guidelines, MCL 769.31 *et seq.* Specifically, defendant argues that offense variables (OV) 10 and 11 were incorrectly scored. Defendant failed to preserve this issue for review by objecting to the scoring on the grounds now raised on appeal at sentencing. MCR 6.429(C). Therefore, we review these alleged errors for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-763; 597 NW2d 130 (1999).

Defendant challenges the scoring of OV 10 on two grounds. Defendant first claims the record is devoid of evidence to support the scoring of this variable at fifteen points, which is assigned upon a finding that "[p]redatory conduct" was involved, MCL 777.40(1)(a). Predatory conduct is defined as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). Here, the record reflects that approximately two weeks before the first act of penetration, the thirty-four-year-old defendant enticed his fifteen-year-old victim to a location remote from her home, then drove her to a motel where the two lay on the bed, hugging and kissing while watching television. This evidence of "conditioning" the victim for later penetration was adequate to support the scoring of OV 10 for predatory conduct, as defined in MCL 777.40(3)(a). Accordingly, we find no plain error affecting defendant's substantial rights in the scoring of OV 10. See *People v Hoffman*, 205 Mich App 1, 24; 518 NW2d 817 (1994) (a trial court's scoring decision will not be reversed if evidence exists to support the score).

Defendant further claims that his victim's vulnerability was typical of all criminal sexual conduct victims of the same age as the victim here, and that, therefore, OV 10 should have been scored at zero. See MCL 777.40(1)(d) ("[t]he offender did not exploit a victim's vulnerability"). However, even were we to accept defendant's argument that this fact supports a score of zero under MCL 777.40(1)(d), MCL 777.40(1) requires that the trial court score the highest number of points properly assignable under OV 10. As discussed above, the predatory nature of defendant's conduct supports the scoring of fifteen points for this variable. Accordingly, OV 10 was properly scored at the higher rate of fifteen points. MCL 777.40(1).

Defendant's second claim of error relates to OV 11, which considers the number of criminal sexual penetrations arising out of the sentencing offense, MCL 777.41. Defendant claims he was incorrectly scored fifty points for OV 11 for two reasons: (1) two criminal sexual penetrations were improperly counted in the scoring where one of those penetrations was the basis for the sentencing offense, see MCL 777.41(2)(c), and (2) each of the four convictions were not scored on separate sentence information report (SIR) forms.

Even assuming *arguendo* that defendant is correct on the first argument, he is entitled to no relief. There was record evidence showing that two penetrations, one penile and one digital, occurred during the first offense in January 1999. These penetrations would support the scoring of twenty-five OV 11 points, decreasing defendant's total OV score from 100 to 75 points. This would not, however, change the guidelines' sentencing range or the recommended sentence because 75 points still falls within OV level VI. MCL 777.64.¹ Because defendant's four convictions bear identical concurrent sentences, and the record supports at least one of those sentences, the alleged error in scoring OV 11 on the remaining counts would not have affected the outcome. Therefore, defendant has failed to show plain error affecting his substantial rights.

Defendant also appears to claim that OV 11 was incorrectly scored because each of his four convictions were not scored on a separate SIR. See MCL 777.21(2). However, four completed SIR forms are contained in the lower court record, one for each conviction. Therefore, there was no error.

We affirm.

/s/ Christopher M. Murray

/s/ Mark J. Cavanagh

/s/ Richard A. Bandstra

¹ Although the offense of third-degree criminal sexual conduct, MCL 750.520d, was reduced from a Class C to a Class B offense by enactment of 2000 PA 279, effective October 1, 2000, because defendant was sentenced on December 13, 1999, the sentencing grids applicable to a Class C offense apply here.