

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN ANDREW BLACKWOOD,

Defendant-Appellant.

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UNPUBLISHED

February 5, 2004

No. 243324

Livingston Circuit Court

LC No. 01-012373-FH

Before: Cooper, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his sentence of 5 to 15 years in prison for his conviction of third degree criminal sexual conduct (CSC III), the victim being physically helpless, MCL 750.520d(1)(c), imposed after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with two counts of CSC III and one count of furnishing alcohol to a minor, MCL 436.1701, as a result of allegations made by complainant, the seventeen-year-old daughter of his girlfriend, that he engaged in two acts of sexual intercourse with her when she was so intoxicated as to be physically helpless. Complainant testified that defendant engaged in sexual intercourse with her against her will on two occasions. She denied that any other type of sexual activity occurred. Defendant admitted that he engaged in sexual intercourse with complainant on two occasions, but contended that the activity was consensual and that complainant was not physically helpless. Defendant asserted that prior to engaging in sexual intercourse complainant performed fellatio on him and he penetrated her vagina with his fingers. He maintained that these acts were consensual. The jury found defendant guilty of one count of CSC III and of furnishing alcohol to a minor, and acquitted him of the second count of CSC III.

The applicable statutory sentencing guidelines for CSC III recommended a minimum term range of 36 to 60 months. Offense Variable (OV) 11, MCL 777.41, criminal sexual penetration, allows the scoring of fifty points if two or more sexual penetrations occurred in addition to the penetration that formed the basis of the conviction. MCL 777.41(1)(a), (2)(c). Defendant objected to the scoring of OV 11 at fifty points on the ground that the three penetrations on which the scoring was based, the acts of digital penetration and fellatio and the act of sexual intercourse of which he was acquitted, were not criminal acts because they were consensual. The trial court concluded that the scoring of OV 11 at fifty points was appropriate, and found that a preponderance of the evidence showed that at least one nonconsensual act of

digital penetration occurred in addition to the act of sexual intercourse of which defendant was acquitted. The trial court sentenced defendant to 5 to 15 years in prison for CSC III, with credit for 40 days, and fined him \$1,000 for furnishing alcohol to a minor.

In calculating the sentencing guidelines, the trial court has discretion to determine the number of points to be scored, provided that evidence in the record supports a particular score. We will not reverse a scoring decision for which there is any evidence in the record. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Defendant argues that the trial court abused its discretion by scoring OV 11 at fifty points, and that he is entitled to resentencing on his conviction of CSC III.<sup>1</sup> We disagree and affirm defendant's sentence. The trial court used the penetration underlying the charge of CSC III of which defendant was acquitted and the digital penetration admitted by defendant as the basis of its scoring of OV 11 at fifty points. MCL 777.41(1)(a). The trial court properly considered the penetration underlying the charge of which defendant was acquitted. *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991). Furthermore, the trial court was entitled to rely on defendant's testimony that he engaged in digital penetration with complainant, *People v Walker*, 428 Mich 261, 267, n 18; 407 NW2d 367 (1987), but was not required to accept his characterization of the act as consensual. The evidence on which the jury relied to find that defendant sexually penetrated complainant when she was so intoxicated as to be physically helpless also supported the trial court's finding that the act of digital penetration was not consensual. Furthermore, defendant cites no authority to support his assertion that independent proof of the corpus delicti of another act must be admitted before a trial court can consider the testimony of an accused when scoring the guidelines. A trial court may consider all record evidence when calculating the guidelines, including defendant's bare admissions. *People v Warner*, 190 Mich App 26, 28; 475 NW2d 397 (1991); *Walker, supra*. The trial court did not abuse its discretion by scoring OV 11 at fifty points, so defendant is not entitled to resentencing.

Affirmed.

/s/ Jessica R. Cooper  
/s/ Peter D. O'Connell  
/s/ Karen M. Fort Hood

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<sup>1</sup> Defendant does not challenge his sentence for his conviction of furnishing alcohol to a minor.