STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 23, 2007
v	No. 272276 Lenawee Circuit Court
T.J. LEE ROSE, Defendant-Appellant.	LC No. 06-012133-FH

Before: Zahra, P.J., and White and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from a prison sentence of 86 to 180 months imposed on a jury conviction of second-degree criminal sexual conduct, MCL 750.520c(1)(a). We remand for resentencing. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

At the time of the offense, defendant and his fiancée, the victim's aunt, were baby-sitting the victim and her sisters while their parents were out of town. The victim testified that while she was in bed, defendant entered her bedroom, rubbed her genital area with his hand, and asked, "Do you like that?" The victim said no and defendant left. He later returned and apologized. When the victim's mother returned home, she noticed that the victim had become withdrawn, but a physician suggested that the victim's behavior was attributable to normal pubescent changes. Several months later, when there were tentative plans for defendant to baby-sit by himself, the victim revealed what had happened. The victim's younger sister then revealed that defendant had touched her genital area with his foot while baby-sitting and then warned her not to tell anybody. During questioning, defendant denied touching the children in an inappropriate manner and suggested that a third person had broken into the house and molested the victim after he passed out from drinking. After being questioned, defendant called the victim's mother and "said that he loved the girls and that he was sorry; that he didn't mean to hurt them."

The victim's aunt testified that the victim never indicated that defendant had done anything inappropriate. Further, the aunt never noticed any change in the victim's behavior. She identified a picture of the smiling victim and another sister taken with defendant a month after the offense. Defendant denied having touched the victim. He admitted to having touched her sister with his foot, but said it had happened accidentally. Defendant said that he apologized to the girls' mother not because he had molested them but because "I felt bad and I thought I was drinking and somebody broke in." Upon further reflection, defendant realized that he had not

been drinking the night of the offense and conceded that his theory about a break-in "doesn't seem very plausible."

The jury found defendant guilty of sexually molesting the victim, but acquitted him of the charge relating to the victim's sister.

Defendant first contends that the trial court erred in scoring offense variables 7 and 9 of the sentencing guidelines.

"A sentencing court has discretion in determining the number of points to be scored provided that evidence of record adequately supports a particular score." *People v Hornsby,* 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision "for which there is any evidence in support will be upheld." *People v Elliott,* 215 Mich App 259, 260; 544 NW2d 748 (1996). "Where effectively challenged, a sentencing factor need be proved only by a preponderance of the evidence." *People v Harris,* 190 Mich App 652, 663; 476 NW2d 767 (1991). This Court reviews the scoring to determine whether the sentencing court properly exercised its discretion and whether the record evidence adequately supported a particular score. *People v McLaughlin,* 258 Mich App 635, 671; 672 NW2d 860 (2003).

OV 7 takes into account "aggravated physical abuse" of the victim. MCL 777.37(1). Defendant was assessed 50 points, reflecting that the "victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a).

The trial court found that defendant should be assessed 50 points because criminal sexual conduct, by its nature, is done for the defendant's gratification and the victim's testimony indicated that she found the act to be humiliating. While we do not find fault with these conclusions, we do not agree that they support the scoring decision. The statute defines "sadism" as "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.37(3). According to the plain language of the statute, it is the excessive pain or humiliation that is inflicted for the offender's gratification in the course of the offense that is to be considered, not any gratification that might arise from the commission of the offense itself. Further, there was nothing in the record to support a finding that the victim was subjected to extreme or prolonged humiliation. Therefore, OV 7 should have been scored at zero points.

OV 9 takes into account the number of victims involved in the offense. MCL 777.39(1). Defendant was assessed ten points, indicating that there were two to nine victims. MCL 777.39(1)(c).

The trial court found that defendant should be assessed ten points because it determined that a preponderance of the evidence adduced at trial indicated that defendant had molested the victim's sister. It is well established that the scoring of the guidelines need not be consistent with the jury's verdict. *People v Perez,* 255 Mich App 703, 712; 662 NW2d 446 (2003), vacated in part on other grounds 469 Mich 415 (2003). However, OV 9 is to be scored "only with respect to the specific criminal transaction that gives rise to the conviction for which the defendant is being sentenced," *People v Chesebro,* 206 Mich App 468, 471; 522 NW2d 677 (1994), taking into account the victim of the offense itself as well as those persons present during

the commission of the offense. MCL 777.39(2)(a); *People v Morson*, 471 Mich 248, 262; 685 NW2d 203 (2004); *People v Kimble*, 252 Mich App 269, 274; 651 NW2d 798 (2002), aff'd 470 Mich 305 (2004). In this case, the victim was the only person placed in danger during the event giving rise to the conviction. The victim's sister was molested several months later in a wholly separate event and thus was not a victim of the criminal transaction for which defendant was being sentenced. *Chesebro, supra* at 469-470. Therefore, OV 9 should have been scored at zero points.

Because a change in the scoring of OV 7 and OV 9 would result in a change in the minimum sentencing range, defendant is entitled to resentencing. *People v Francisco*, 474 Mich 82, 91-92; 711 NW2d 44 (2006).

In light of our resolution of this issue, we need not address defendant's claim that the trial court engaged in impermissible fact-finding in violation of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). We note, however, that our Supreme Court has determined that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v McCuller*, 479 Mich 672, 676, 686; ___ NW2d ___ (2007); *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006).

Remanded for resentencing. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Helene N. White
/s/ Peter D. O'Connell