

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH LEN THOMAS,

Defendant-Appellant.

UNPUBLISHED
November 6, 2007

No. 273575
Kalamazoo Circuit Court
LC No. 03-001046-FH

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

PER CURIAM.

Defendant appeals as of right from his sentences of 4 to 15 years in prison imposed on remand for his convictions of criminal sexual conduct in the second degree (CSC II), the victim being under 13 years of age, MCL 750.520c(1)(a). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was convicted by a jury of two counts of CSC II. The trial court scored Offense Variable (OV) 13, MCL 777.43, continuing pattern of criminal behavior, at 25 points because it found that defendant engaged in three or more incidents of sexual activity with the seven-year-old victim. Defendant objected to the scoring of OV 13, arguing that the finding that he engaged in other misconduct was not supported by any evidence. The trial court rejected defendant’s challenge to the scoring of OV 13 and sentenced defendant to concurrent terms of 4 to 15 years in prison.

Defendant appealed that ruling, arguing that the trial court erred both by scoring OV 13 at 25 points, and by basing scoring decisions on facts not found beyond a reasonable doubt by a jury, as required by *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). In *People v Thomas*, unpublished per curiam opinion of the Court of Appeals, issued February 28, 2006 (Docket No. 256301), another panel of this Court affirmed defendant’s convictions, but remanded for resentencing. This Court found that defendant was entitled to resentencing because the prosecutor failed to present evidence of other misconduct to support the scoring of OV 13 at 25 points. The *Thomas* Court observed that “[a]t the resentencing hearing the parties may submit evidence pertaining to OV 13 and the trial court is free to make appropriate fact findings.” *Thomas*, slip op at 3. In addition, the *Thomas* Court rejected defendant’s argument based on *Blakely*, *supra*. *Id.*

At the resentencing hearing, the trial court again scored OV 13 at 25 points, relying on three pieces of evidence presented by the prosecution. The trial court again sentenced defendant to concurrent terms of 4 to 15 years in prison.

On appeal, defendant again argues that he is entitled to resentencing because the trial court scored OV 13 at 25 points based on facts that were not found beyond a reasonable doubt by the jury, as required by *Blakely, supra*.¹ Defendant acknowledges that our Supreme Court has held that the principles articulated in *Blakely, supra*, do not apply to Michigan's indeterminate sentencing scheme. See *People v Drohan*, 475 Mich 140, 159-160, 164; 715 NW2d 778 (2006). Defendant also acknowledges that we are obligated to follow the law of the case, *People v Herrera (On Remand)*, 204 Mich App 333, 340; 514 NW2d 543 (1994), and hold, in accordance with our initial decision, that *Blakely* does not apply to defendant's sentence. *Thomas, supra*. Nevertheless, defendant contends that our earlier decision in this case and *Drohan, supra*, were wrongly decided. Without any demonstration that the law of the case would work an injustice in this case, see *Herrera, supra*, defendant's argument does not persuade us that we should disregard the law of the case doctrine or deviate from the course we set in our previous decision. Moreover, we are bound by stare decisis to follow Supreme Court precedent even if we were inclined to disregard our earlier opinion. *People v Hall*, 249 Mich App 262, 270; 643 NW2d 253 (2002). Because *Blakely* does not apply to the trial court's sentences, *Drohan, supra*, defendant fails to demonstrate any error.

Affirmed.

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

¹ Defendant does not challenge the validity of his convictions of CSC II.