

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES ANTHONY SCHMELING,

Defendant-Appellant.

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UNPUBLISHED

January 10, 2008

No. 275220

Kalamazoo Circuit Court

LC No. 05-001736-FH

Before: Fitzgerald, P.J., and Markey and Smolenski, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted from his prison sentences of 56 months to seven years and 17 months to 48 months imposed on his plea-based convictions of using a computer to commit a crime, MCL 752.796 and MCL 752.797(3)(d), and possession of child sexually abusive material, MCL 750.145c(4). We vacate defendant's sentence for using a computer to commit a crime, and remand this matter to the trial court for resentencing on that conviction and for correction of the guidelines score for the conviction of possession of child sexually abusive material. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The police received information that defendant was taking photographs of young children in public locations, and found numerous photographs of nude young girls on defendant's computer. Defendant downloaded the majority of the photographs from the Internet. At his plea hearing, defendant admitted that he took a photograph of a girl he believed to be three or four years old, and used his computer to enlarge that portion of the photograph depicting the girl's vagina.

At sentencing, the parties disputed the scoring of Offense Variable (OV) 9, MCL 777.39, which is scored based on the number of victims. The prosecution contended that each child depicted in the photographs found on defendant's computer was a victim because the child had been sexually exploited when the photograph was taken, and that OV 9 should be scored at 25 points for ten or more victims. Defense counsel asserted that the identities of the children in the Internet photographs were unknown, the place and time of the taking of the photographs was unknown, and no evidence showed that the children depicted in the photographs had been physically abused. Therefore, OV 9 should be scored at zero points. The trial court scored OV 9 at 25 points, finding that each child depicted in the photographs became a victim when the photograph was taken.

The guidelines as scored by the trial court recommended a minimum term range of 29 to 57 months for using a computer to commit a crime, and two to 17 months for possession of child sexually abusive material. The trial court sentenced defendant to concurrent prison terms of 56 months to seven years for using a computer to commit a crime, and 17 months to four years for possession of child sexually abusive material. Subsequently, the trial court denied defendant's motion for resentencing.

The proper interpretation and application of the sentencing guidelines are legal questions that we review de novo. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

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. A scoring decision for which there is any evidence in the record will be upheld. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). We review a trial court's scoring of the guidelines to determine whether that court properly exercised its discretion and whether the evidence supports the scoring decisions. We review the trial court's findings of fact for clear error. *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004).

Offense Variable 9 is properly scored at 25 points if there were ten or more victims. MCL 777.39(1)(b). Each person placed in danger of injury must be counted as a victim. MCL 777.39(2)(a).<sup>1</sup> The danger of injury must be danger of physical injury. *People v Melton*, 271 Mich App 590, 595-596; 722 NW2d 698 (2006). Further, the danger must have arisen from the circumstances of the particular offense giving rise to the conviction for which the defendant is being sentenced. *People v Cheesebro*, 206 Mich App 468, 470-471; 522 NW2d 677 (1994) (interpreting OV 6 of the judicial sentencing guidelines, which was identical to OV 9). No evidence shows that the child photographed by defendant was placed at risk of physical injury. Furthermore, no evidence shows that the children depicted in the downloaded photographs (photographs that defendant did not take) were placed at risk of physical injury by defendant's conduct. A person need not be the complainant in a criminal case in order to be considered a victim for purposes of scoring OV 9. However, the person who is not a complainant must have been placed at risk of physical injury by the defendant's actions in order to be counted as a victim under OV 9. See, e.g., *People v Kimble*, 252 Mich App 269, 274; 651 NW2d 798 (2002) (noting that the victim's fiancé and child were properly counted as victims because they were in close proximity when the victim was shot by the defendant).

We find plaintiff's arguments that the children depicted in the photographs were placed at risk of physical injury at the time the photographs were taken and at further risk by those persons, such as defendant, who create a market for the photographs, to be compelling. And we

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<sup>1</sup> At the time of sentencing in this case, OV 9 provided that "each person who was placed in danger of injury or loss of life" was to be counted as a victim. MCL 777.39(2)(a). 2006 PA 548, effective March 30, 2007, amended MCL 777.39(2)(a) to provide that "each person who was placed in danger of physical injury or loss of life or property" was to be counted as a victim. This amendment became effective after sentencing in this matter, and does not apply to this case.

agree with plaintiff's contention that children are indeed victimized when used as subjects of child pornography. However, Michigan law requires that in order for points to be scored under OV 9, the victim must have been placed at risk of physical injury by the defendant during the commission of the criminal transaction giving rise to the conviction. *Cheesebro, supra* at 470-471. No evidence supported such a finding. The trial court erred in interpreting OV 9 as it did, *Morson, supra*, and abused its discretion by scoring OV 9 at 25 points. *Hornsby, supra*.

Had OV 9 properly been scored at zero points, the sentencing guidelines would have recommended a minimum term range of 19 to 38 months for using a computer to commit a crime, MCL 777.65, and zero to 17 months for possession of child sexually abusive material. MCL 777.67. Defendant's minimum term of 56 months for using a computer to commit a crime exceeds the properly scored guidelines; therefore, defendant is entitled to be resentenced under properly scored guidelines for that offense. Defendant does not contest the propriety of his sentence for possession of child sexually abusive material, but argues that he is entitled to have the guidelines score for that offense corrected. We agree. See *Melton, supra* at 596.

We vacate defendant's sentence for using a computer to commit a crime and remand for resentencing of that conviction and for correction of the guidelines score for the conviction of possession of child sexually abusive material. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

/s/ Michael R. Smolenski