

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DOYLE EDWARD ROWLAND,

Defendant-Appellant.

UNPUBLISHED

August 21, 2008

No. 278010

Monroe Circuit Court

LC No. 06-034936-FH

Before: Murray, P.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

Defendant Doyle Rowland pleaded guilty to second-degree criminal sexual conduct (CSC).¹ The trial court sentenced him to 5 to 15 years' imprisonment. He appeals by delayed leave granted. We affirm.

I. Basic Facts And Procedural History

Initially, the prosecution charged Rowland with one count of third-degree CSC.² Rowland, at all relevant times represented by counsel, entered into a plea agreement in April 2006. Pursuant to the plea agreement, the prosecution agreed to dismiss at sentencing the third-degree CSC charge in exchange for Rowland's agreement to plead guilty to a new charge of one count of second-degree CSC. The written plea agreement further stated that "no promise or agreement as to any term of sentence: either party may advocate as it sees fit." Rowland and his attorney signed the agreement.

That same day, the trial court held a plea hearing. The trial court inquired whether the agreement constituted the complete agreement, to which the parties responded in the affirmative. The trial court then asked Rowland whether he understood the plea bargain as it was stated on the record, and Rowland indicated that he did. Rowland indicated that he was aware that he was

¹ MCL 750.520c(1)(b) (sexual contact with a victim who is at least 13 years of age but less than 16 when the defendant is in a position of authority over the victim and uses this authority to coerce the victim to submit).

² MCL 750.520d(1)(a) (sexual penetration with a victim at least 13 years old but less than 16).

waiving his trial rights and acknowledged signing and understanding an advice of rights form that detailed all of the rights that Rowland was waiving by pleading guilty. The trial court read the amended information to Rowland, and Rowland stated that he understood the charge and was pleading guilty to second-degree CSC.

Rowland explained to the trial court that in November 2005, he touched the breasts of the complainant, his daughter's 13-year-old half-sister, who would visit his home every other weekend. Rowland stated that he essentially acted as the complainant's babysitter and was in a position of authority over her. He stated that he used his authority to touch her breasts. The trial court once more reaffirmed that there had been no agreement regarding Rowland's penalty. The trial court stated in conclusion that it found Rowland's plea to be voluntary, understanding and knowing, and the trial court accepted the plea.

The trial court sentenced Rowland in May 2006. During the sentencing hearing, but before the trial court imposed the sentence, Rowland objected to the scoring of multiple offense variables, including Offense Variable (OV) 11, which is scored for criminal sexual penetration of a victim. The trial court assessed Rowland 25 points for OV 11 for penetrating the complainant. Rowland objected, pointing out that he never admitted to penetration, and, in fact, the crime involving penetration as an element (third-degree CSC) was dismissed pursuant to the plea agreement. Rowland maintained that because he pleaded guilty to second-degree CSC (involving sexual touching, not penetration), he should be assessed points on the basis of that crime only. The trial court responded that, if penetration could be proven, it would be appropriate to assess points for penetration. Rowland then moved to withdraw his guilty plea on the basis that any assessment of points for OV 11 would be impermissible given the dismissal of the third-degree CSC charge. The trial court denied Rowland's motion.

At the sentencing hearing, the complainant testified under oath that, on the evening in question, she was sleeping in a bedroom downstairs when Rowland came in and took off her clothes. She testified that Rowland touched her all over her body, including her breasts and genital area, then penetrated her vagina with his penis. She testified that the incident was against her will and, prior to the incident, she had been a virgin. She also indicated that the incident caused her back to hurt for a day. She stated that she was examined at the hospital, but the examination did not reveal anything.

The complainant further testified that Rowland sent her a handwritten letter after the incident. In the letter, Rowland professed his love for the complainant and stated that age did not matter. He also asked her to "not go away," directed her to write him back and asked her to ensure that her half-sister did not say anything about the letter. The letter was not signed, but the complainant testified that she knew it to be in Rowland's handwriting. In addition, Rowland's 12-year-old daughter, the complainant's half-sister, testified that Rowland gave her the letter to deliver to the complainant.

Rowland testified under oath and denied engaging in penetration with the complainant. He did admit to touching her breast, but denied writing the letter.

At the conclusion of the testimony, the trial court found that there was more than sufficient evidence to establish penetration. Accordingly, the trial court assessed Rowland 25 points for OV 11. Rowland once more moved to withdraw his plea. The trial court denied

Rowland's motion, stating that dissatisfaction concerning one's sentence was an insufficient ground for plea withdrawal. The trial court then sentenced Rowland to 5 to 15 years' imprisonment, which constituted an upward departure from Rowland's minimum sentence range of 19 to 38 months.

II. Assessment Of Points Under Offense Variable 11

A. Standard Of Review

Rowland first argues that his plea was illusory because the trial court improperly assessed points for offense variable (OV) 11,³ and the trial court erred in denying his motion to withdraw his plea. We review a trial court's decision regarding a motion to withdraw a guilty plea for an abuse of discretion.⁴ Further, we review de novo the proper interpretation and application of sentencing guidelines.⁵

B. Analysis

Rowland's sole basis for claiming that the plea agreement was illusory is his argument that the trial court erred in assessing him points under OV 11, which considers whether criminal sexual penetration of the victim occurred. The prosecution initially charged Rowland with second- and third-degree CSC. Rowland insists that because the plea agreement called for a dismissal of the third-degree CSC charge, which charge involved the element of penetration while the crime he pleaded guilty to did not, the trial court should not have assessed him any points for penetration. For the reasons set forth below, Rowland's claim is unavailing.

The complainant, 13 years old at the time of the incident, testified under oath during the sentencing hearing that, on November 13, 2005, Rowland entered the bedroom she was in and took off her clothes. He touched her all over her body, including her breasts and genital areas, and penetrated her vagina with his penis. All of this was done against the complainant's will. Rowland admitted that he was in a position of authority over the complainant, essentially acting as her babysitter, and that he used that authority to inappropriately touch the complainant's breasts. Although Rowland denied penetrating the complainant, the trial court was entitled to believe the complainant's testimony.⁶ Accordingly, the trial court acted properly in assessing Rowland 25 points for OV 11 because a criminal sexual penetration occurred pursuant to MCL 777.41(1)(b).⁷

³ MCL 777.41(1)(b).

⁴ *People v Wilhite*, 240 Mich App 587, 594; 618 NW2d 386 (2000).

⁵ *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

⁶ MCL 750.520h (providing that victim's testimony need not be corroborated); *People v Martin*, 199 Mich App 124, 125; 501 NW2d 198 (1993) (stating that the trial court is in the best position to judge witness credibility).

⁷ See *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003) (the sentencing court's scoring should be upheld if there is any support in the record for it).

Rowland cannot sustain his claim that penetration cannot be considered in sentencing him for second-degree CSC on the basis that penetration is an element of the dismissed third-degree CSC charge only. Although offense variables are generally to be scored on the basis of solely the sentencing offense, where the offense variable statute specifically provides otherwise or the non-sentencing offense arises out of the same transaction as the sentencing offense, scoring on the basis of a non-sentencing offense is proper.⁸ MCL 777.41, the statute concerning the assessment of points under OV 11, provides, in relevant part, that a sentencing court should “[s]core all sexual penetrations of the victim by the offender arising out of the sentencing offense.”⁹

Here, the evidence suggests that the penetration arose out of the sentencing offense. Although the act of penetration was separate from the act of breast touching (to which Rowland admitted, and for which he was convicted), it was all part of the same criminal transaction of CSC. There is no evidence to suggest that the two acts, which indisputably took place on the same date and at the same location, were part of separate incidents. Indeed, both Rowland and the complainant testified under oath at the sentencing hearing to only one sexual assault incident. The trial court did not need to look beyond the criminal transaction supporting the conviction to assess points for penetration. Accordingly, because the penetration “arose out of” the sentencing offense, the trial court did not err in assessing points for penetration.¹⁰

This result is consistent with the general case law concerning the assessment of points for facts underlying dismissed charges. A sentencing court may assess points for facts underlying dismissed charges so long as reliable evidence supports those facts and they are part of the same criminal transaction that gives rise to the conviction for which the defendant is being sentenced.¹¹

⁸ *People v Sargent*, 481 Mich 346, 349-350; 750 NW2d 161 (2008).

⁹ MCL 777.41(2)(a). MCL 777.41 further provides that the sentencing court should not score points for the one penetration that forms the basis of a first- or third-degree CSC offense. MCL 777.41(2)(c). Here, the trial court’s decision to assess points for penetration was in keeping with this directive, the purpose of which is to exclude, as an aggravating offense factor, a factor (sexual penetration) already given weight as an element of the sentencing offense. *People v Mutchie*, 251 Mich App 273, 280; 650 NW2d 733 (2002). First- and third-degree CSC require proof of penetration, while second- and fourth-degree CSC do not. MCL 750.520b, c, d, and e. Assessing points for penetration when the sentencing offense itself is second- or fourth-degree CSC, like it is here, is permissible because the court is not assessing points for a factor already given weight as an element of the sentencing offense. See *Mutchie*, *supra* at 280.

¹⁰ *People v Johnson*, 474 Mich 96, 101; 712 NW2d 703 (2006); *Mutchie*, *supra* at 276-277 (applying the common dictionary definition of “arising out of” and concluding that it was appropriate to assess points for penetration that occurred during the nonsentencing CSC offense because that penetration occurred at the same place, under the same set of circumstances, and during the same course of conduct, as the sentencing CSC offense).

¹¹ *People v Gullet (On Remand)*, 277 Mich App 214, 217-218; 744 NW2d 200 (2007), citing *People v Chesebro*, 206 Mich App 468, 471; 522 NW2d 677 (1994); *People v Lawrence*, 206 Mich App 378, 379; 522 NW2d 654 (1994).

Here, the evidence of penetration was reliable. There was no evidence to suggest that the complainant's testimony was untruthful. Indeed, the letter Rowland wrote to the complainant after the incident serves as additional proof that Rowland took further steps to perpetuate a woefully inappropriate sexual relationship with the complainant. Moreover, penetration "arose out of" the sentencing offense, as noted above, and it was part of the same criminal transaction that gave rise to the conviction for which Rowland was being sentenced. Thus, assessment of points for OV 11 was proper.¹²

Accordingly, we conclude that Rowland's plea was not illusory and that the trial court did not err in denying his motion to withdraw his plea.¹³ Likewise, because the trial court did not err in assessing points under OV 11, Rowland's claim that his waiver of his trial rights was unknowing and involuntary, which is based solely upon his illusory plea argument, is unavailing.¹⁴

III. Scoring Of OVs 3, 4, and 11

A. Standard Of Review

Rowland argues that the trial court erroneously scored OV 3, 4, and 11. We review for an abuse of discretion a trial court's scoring decision to determine whether the evidence adequately supports a particular score.¹⁵ We will uphold the trial court's scoring decision if there is any evidence in the record to support it.¹⁶

B. OV 3

OV 3 is scored for physical injury to a victim.¹⁷ Rowland received five points for OV 3 because bodily injury not requiring medical treatment occurred to a victim.¹⁸ The technical

¹² See *Mutchie*, *supra* at 277.

¹³ Furthermore, Rowland's claim that the plea agreement provided that sentencing would be based solely on the elements of second-degree CSC is contrary to the evidence. Nowhere in the written plea agreement, nor in the plea hearing transcript, is there mention of any such sentencing agreement. In fact, the plea agreement expressly provides that no agreement was reached regarding sentencing.

¹⁴ For a plea to be valid, it must be tendered knowingly, voluntarily, and understandingly. *People v Haynes*, 221 Mich App 551, 569; 562 NW2d 241 (1997). Here, the court complied with MCR 6.302 concerning the taking of pleas. Rowland was expressly informed at the plea hearing that he would be waiving his trial rights if he pleaded guilty. Rowland stated that he understood and wished to waive his trial rights. He also signed an advice of rights form that detailed all of the trial rights that he was waiving. Accordingly, Rowland has no basis upon which to argue that the waiver of his trial rights was unknowing and involuntary.

¹⁵ *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

¹⁶ *Spanke*, *supra* at 647.

¹⁷ MCL 777.33.

¹⁸ MCL 777.33(1)(e).

dictionary definition of “bodily injury” is “physical damage to a person’s body.”¹⁹ The complainant testified that Rowland inserted his penis into her vagina and had vaginal intercourse with her against her will. She testified that she was a virgin before the incident occurred, and she suffered back pain for a day as a result of the incident. She even sought medical treatment after the incident. On these facts, it was not an abuse of discretion for the trial court to determine that a 13-year old virgin, who was vaginally penetrated against her will and experienced back pain as a result of the assault, suffered bodily injury for purposes of OV 3.

C. OV 4

OV 4 is scored for psychological injury to a victim.²⁰ Rowland received ten points for OV 4 because serious psychological injury requiring professional treatment occurred to a victim.²¹ Evidence that a victim suffered from nightmares and a disrupted life following the incident is sufficient to support an assessment of ten points for OV 4.²² The complainant testified that Rowland took off her clothes, touched her all over her body, and had vaginal intercourse with her—all against her will. She stated that her entire life changed as a result of Rowland’s sexual assault. She indicated that Rowland’s actions have caused her to be very afraid of people, to suffer from nightmares, and to feel very hurt and emotional. The record further indicates that the complainant has been in counseling as a result of the incident. On these facts, it is reasonable to conclude that the complainant suffered serious psychological injury requiring professional treatment. Thus, we conclude that it was not an abuse of discretion for the trial court to assess Rowland ten points for OV 4.

D. OV 11

OV 11 is scored for criminal sexual penetration.²³ Rowland received 25 points for OV 11 because a criminal sexual penetration occurred.²⁴ “Sexual penetration” is defined as “sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body[.]”²⁵ The complainant testified that Rowland inserted his penis into her vagina and had sexual intercourse with her against her will. This testimony constitutes sufficient evidence of penetration, and there is nothing on the record to suggest that the complainant was not a credible witness. Further, as we concluded above, it is not error for the trial court to assess points for

¹⁹ *People v Cathey*, 261 Mich App 506, 514; 681 NW2d 661 (2004), citing Black’s Law Dictionary (7th ed) (interpreting “bodily injury” with respect to scoring OV 3 in the context of a CSC case).

²⁰ MCL 777.34.

²¹ MCL 777.34(1)(a).

²² *People v Drohan*, 264 Mich App 77, 90; 689 NW2d 750 (2004).

²³ MCL 777.41.

²⁴ MCL 777.41(1)(b).

²⁵ MCL 750.520a(p).

penetration underlying a dismissed third-degree CSC charge when the sentencing offense is second-degree CSC. Because there was evidence of penetration, the trial court did not abuse its discretion in assessing Rowland 25 points for OV 11.

IV. Departure From The Sentencing Guidelines

A. Standard Of Review

Rowland argues that the trial court lacked substantial and compelling reasons to depart from the guidelines. We review for clear error whether a particular sentencing factor exists is a factual determination for the sentencing court to determine.²⁶ We review de novo whether a particular sentencing factor is objective and verifiable.²⁷ We review for an abuse of discretion whether the objective and verifiable factors constitute substantial and compelling reasons to depart from the statutory minimum sentence.²⁸

B. Analysis

Rowland's minimum sentence range for his conviction of second-degree CSC was 19 to 38 months. The maximum sentence for his conviction is 15 years.²⁹ The trial court sentenced Rowland to 5 to 15 years' imprisonment. It indicated that it was basing its departure on the following two reasons: (1) Rowland attempted to continue an inappropriate relationship with the 13-year-old complainant after the incident, as evidenced by his letter to the complainant, and (2) Rowland has shown little or no remorse. "A court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for [the] departure."³⁰ Further, "a substantial and compelling reason must be construed to mean an objective and verifiable reason that keenly or irresistibly grabs [the court's] attention; is of considerable worth in deciding the length of a sentence; and exists only in exceptional cases."³¹ Finally,

[t]he court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.^[32]

²⁶ *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231, on rem 258 Mich App 679 (2003).

²⁷ *Id.*

²⁸ *Id.* at 264-265.

²⁹ MCL 750.520c(2)(a).

³⁰ MCL 769.34(3).

³¹ *Babcock*, *supra* at 258, (internal quotations and citations omitted).

³² MCL 769.34(3)(b).

Rowland provides no support for his contention that the fact he sought to maintain an inappropriate relationship with the complainant after the incident cannot serve as the basis for an upward departure. First, this fact is objective and verifiable. Indeed, the letter was introduced into evidence at the sentencing hearing. There was testimony that the handwriting in the letter was Rowland's, and that Rowland gave the letter to the complainant's half-sister to deliver to the complainant. Further, not only is it disturbing that Rowland would attempt to contact his 13-year-old complainant after sexually assaulting her, even more disturbing is what Rowland expressed in the letter. Rowland told the complainant that he loved her, age did not matter, they should be together, he found it "hard to stop" his feelings for her, and she should ensure that her half-sister did not tell anyone of the letter. This content casts major doubt on Rowland's desire and potential to rehabilitate himself. There is no evidence that this factor was adequately accounted for in the guidelines. We are persuaded that this factor was objective and verifiable, and constituted a substantial and compelling reason to depart from the guidelines.

The trial court also stated that Rowland's lack of remorse justified an upward departure. At the sentencing hearing, during which the complainant and Rowland's young daughter spoke of their deep hurt, pain, and betrayal at Rowland's actions, Rowland expressed no remorse. When asked if there was anything he wanted to say, Rowland's only statement was, "It's a lie." "The sentencing court may consider evidence of a lack of remorse in determining an individual's potential for rehabilitation."³³ "Resentencing is required only if it is apparent that the court erroneously considered the defendant's failure to admit guilt, as indicated by action such as asking the defendant to admit his guilt or offering him a lesser sentence if he did."³⁴ Here, the trial court did not erroneously consider Rowland's failure to admit his guilt by offering him a lesser sentence if he did. Rowland's lack of remorse was not accounted for in the guidelines, and it is a factor that casts further doubt on his desire and potential to rehabilitate himself. We believe that this factor was objective and verifiable, and constituted a substantial and compelling reason to depart from the guidelines.

Moreover, if there is a substantial and compelling reason for the departure, the extent of the departure is reviewed for an abuse of discretion.³⁵ We find that, in light of the disturbing offense and offender characteristics discussed herein, the extent of the trial court's departure is not an abuse of discretion. Accordingly, Rowland's sentence does not violate the principle of proportionality.

Affirmed.

/s/ Christopher M. Murray
/s/ William C. Whitbeck
/s/ Michael J. Talbot

³³ *Spanke, supra* at 650.

³⁴ *Id.*

³⁵ *Babcock, supra* at 265.