

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN LEE HILL,

Defendant-Appellant.

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UNPUBLISHED  
February 19, 2009

No. 281055  
Muskegon Circuit Court  
LC No. 04-051083-FH

Before: Sawyer, P.J., and Servitto and M. J. Kelly, JJ.

PER CURIAM.

This case is before this Court for the second time. In a prior appeal, this Court affirmed the trial court's denial of defendant's motion to quash his bindover on charges under MCL 750.145c(2) and held that that statute is not unconstitutionally vague. See *People v Hill*, 269 Mich App 505; 715 NW2d 301 (2006). After a bench trial on remand, the trial court convicted defendant of five counts of arranging for, producing, making, or financing child sexually abusive material, MCL 750.145c(2), three counts of installing a device for observing, photographing, or eavesdropping in a private place, MCL 750.539d, and five counts of using a computer to commit a crime, MCL 752.796 and MCL 752.797(3)(f). The trial court sentenced defendant to concurrent prison terms of one day for installing a device for observing, photographing, or eavesdropping in a private place, and to 57 months to 20 years for each of the remaining convictions. Defendant now appeals his convictions and sentences as of right. Because we conclude that there were no errors warranting a new trial, we affirm defendant's convictions. However, we also conclude that the trial court improperly scored defendant's offense variables. For that reason, we vacate defendant's sentences and remand for resentencing.

The evidence presented at trial established that defendant installed a hidden camera in a "boom box" to observe foreign exchange students showering in his bathroom. The images displayed on a television located in defendant's bedroom and were recorded onto VHS tapes and CD-Rs. Police officers also recovered two laptop computers and several CD-Rs from defendant's home containing over 100,000 images, 70 to 80 percent of which were pornographic images of minor males "from toddlers to teens." In this appeal, defendant challenges the scoring of certain offense variables (OVs) and reiterates his argument that MCL 750.145c(2) is unconstitutionally vague as applied to him.

Defendant argues that the trial court improperly scored OVs 4, 9, and 12. "Under MCL 769.34(10), if a minimum sentence is within the appropriate guidelines sentence range, we must

affirm the sentence and may not remand for resentencing absent an error in scoring the sentencing guidelines or reliance on inaccurate information in determining the sentence.” *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). A sentencing court has discretion in determining the number of points assessed for each variable, provided that record evidence adequately supports a given score. *Id.* “Scoring decisions for which there is any evidence in support will be upheld.” *Id.*

OV 4 involves “psychological injury to a victim.” See MCL 777.34. A trial court should score OV 4 at ten points if “[s]erious psychological injury requiring professional treatment occurred to a victim[.]” MCL 777.34(1)(a). Further, MCL 777.34(2) provides “[s]core 10 points if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive.” Defendant argues that the trial court erroneously relied on *People v Girardin*, 165 Mich App 264; 418 NW2d 453 (1987), in assessing ten points under OV 4.

In *Girardin*, this Court was not confronted with the proper interpretation of the current sentencing guidelines, which became mandatory as of January 1, 1999. See MCL 769.34(2). Instead, the defendant argued that the trial court improperly departed from the judicial sentencing guidelines based on the potential psychological harm to a child victim without record evidence to support the trial court’s finding. *Id.* at 266. The Court determined that the trial court properly considered the possibility of future psychological repercussions for the victim despite the lack of record evidence:

We think it is fair to say, and fair for the trial court to consider, that many children, abused sexually while very young, have substantial psychological repercussions. Simply because psychological damage is not present in all cases or not manifested immediately does not mean that the trial court may not take into account the possibility of future trauma. In a sense, the trial judge took judicial notice of the fact that young sexually abused children may suffer psychological damage in the future even if it is not manifested at the time of sentencing. We believe this was proper since common experience indicates the accuracy of this position. [*Id.* at 266-267.]

Similar to *Girardin*, the trial court in this case essentially took judicial notice that child victims of pornography typically suffer psychological injuries that may require counseling. While we do not disagree with the reasoning of the trial court, or that of the Court in *Girardin*, we do not agree that a trial court may score OV 4 based on a presumption of psychological injury. To support a score of ten points under OV 4, there must be evidence that a “[s]erious psychological injury . . . occurred to a victim[.]” MCL 777.34(1)(a) (emphasis added). Hence, there must be some record evidence that the defendant’s actions actually caused a victim to suffer a psychological injury. Although a video may contain sufficient indication of a victim’s psychological injury to warrant scoring OV 4, see *People v Wilkens*, 267 Mich App 728, 740-741; 705 NW2d 728 (2005), in this case there is no record evidence that defendant’s actions actually caused a victim to suffer a psychological injury. Therefore, on the record before us, we must conclude that the trial court erred when it assessed ten points under OV 4.

Although we conclude that—on this record—the trial court erred in scoring OV 4, we nevertheless disagree with defendant’s contention that the trial court could not score points under

OV 4 because defendant had no contact with the child victims, had no role in creating the original images, and merely obtained the images from the Internet. We note that MCL 777.34 does not require that a defendant personally sexually abuse a victim or play a role in creating the original images to score points under OV 4. Defendant fails to recognize that his behavior resulted in the revictimization of the children depicted in the downloaded images. Such revictimization is separate from the original sexual exploitation of the children and causes a different type of emotional harm:

Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography. [*New York v Ferber* 458 US 747, 759 n 10; 102 S Ct 3348; 73 L Ed 2d 1113 (1982) (quotation omitted).]

Defendant's actions validate child sexual abuse victims' fears of revictimization. As the trial court recognized, the recorded images "never go away. They remain out there forever." Thus, where the record contains evidence that a child victim has suffered a psychological injury as a result of the continued distribution of the illicit images, it may be appropriate to score OV 4 for a defendant who merely downloaded and manufactured copies of the images, but did not participate in their initial creation.

Defendant next argues that the trial court erred when it scored OV 9, which addresses the number of victims, at 25 points. At the relevant time,<sup>1</sup> MCL 777.39(1)(b) provided that a trial court should score OV 9 at 25 points if "[t]here were 10 or more victims[.]" Further, MCL 777.39(2)(a) directed trial courts to "[c]ount each person who was placed in danger of injury or loss of life as a victim." In *People v Melton*, 271 Mich App 590, 592-596; 722 NW2d 698 (2006), a special panel of this Court determined that MCL 777.39 encompassed only physical injuries and not psychological or financial injuries. It appears from the lower court record that the trial court improperly scored OV 9 at 25 points based on psychological injuries to the victims.

The prosecutor nevertheless argues that defendant's actions involved physical injury or the danger of physical injury because some of the images depicted children being sexually assaulted. The prosecutor's argument is misplaced. Defendant's conduct in downloading and copying the images did not cause physical injury to the victims. Rather, as previously discussed, defendant's actions involved psychological injury to the victims in that his actions resulted in their further sexual exploitation after the original, physical injuries occurred. Because defendant's conduct did not involve physical injury, the trial court erred by scoring points under OV 9. *Melton*, 271 Mich App at 592-596.

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<sup>1</sup> The Legislature amended MCL 777.39, effective March 30, 2007. See 2006 PA 548. The trial court applied the previous version of MCL 777.39 because defendant committed the offenses before the amendment took effect.

Defendant next argues that the trial court erroneously scored OV 12 at 25 points. A trial court should score OV 12 at 25 points if “[t]hree or more contemporaneous felonious criminal acts involving crimes against a person were committed[.]” MCL 777.42(1)(a). A felonious criminal act is contemporaneous if “[t]he act occurred within 24 hours of the sentencing offense.” MCL 777.42(2)(a)(i). Defendant argues that no evidence was presented that he downloaded images within 24 hours of the dates on which his sentencing offenses occurred.

Defendant was convicted of five counts of arranging for, producing, making, or financing child sexually abusive material as a result of his downloading and copying five images depicting child pornography. Although his convictions pertain to only these five images, Colleen Auer, a computer forensic examiner, recovered approximately 70,000 to 80,000 images depicting child pornography on two laptop computers and several CD-R’s found in defendant’s home. Further Sergeant Dean Lohman’s review of approximately 50 CD-R’s recovered from defendant’s home revealed several thousand images of prepubescent boys engaged in sexual activity. While there was no direct evidence that any of the uncharged images were downloaded within 24 hours of the charged images, considering the sheer volume of the images discovered, a preponderance of circumstantial evidence supports this conclusion. See *People v Perez*, 255 Mich App 703, 712; 662 NW2d 446 (2003) (noting that the facts used to score sentencing guidelines need only be proved by a preponderance of the evidence), vacated in part on other grounds 469 Mich 415 (2003). Therefore, we affirm the trial court’s scoring of OV 12 at 25 points.

The trial court’s erroneous assessment of ten points under OV 4 and 25 points under OV 9 affects the appropriate guidelines range. Without the scoring of these variables, defendant’s guidelines range decreases from 57 to 95 months to 51 to 85 months. See MCL 777.63. Accordingly, we vacate defendant’s sentences and remand for resentencing. See *People v Francisco*, 474 Mich 82, 92; 711 NW2d 44 (2006).

Defendant next invites this Court to reconsider the decision in *Hill*, 269 Mich App 505, or call a conflict panel, see MCR 7.215(J), to revisit his argument that MCL 750.145c(2) is unconstitutionally vague. We decline his invitation. This Court’s previous resolution of this issue is the law of the case and, therefore, this issue is without merit. See *People v Mitchell (On Remand)*, 231 Mich App 335, 340; 586 NW2d 119 (1998).

Because there were no errors warranting a new trial, we affirm defendant’s convictions. However, because the trial court erred when it scored OVs 4 and 9 and those errors affected the appropriate guidelines range, we vacate defendant’s sentences and remand for resentencing.

Affirmed, but remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer  
/s/ Deborah A. Servitto  
/s/ Michael J. Kelly