

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERANCE CHARLES HICKS,

Defendant-Appellant.

UNPUBLISHED

June 25, 2009

No. 284462

Wayne Circuit Court

LC No. 05-007825-FC

Before: Jansen, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals as of right his sentence of 10 to 15 years' imprisonment that he received at resentencing for his jury trial conviction of second-degree criminal sexual conduct (CSC), MCL 750.520c. We vacate defendant's sentence and remand for resentencing. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with several counts of first- and second-degree CSC based on allegations that his daughter, who was 13 years old at trial, made against him. The jury convicted him of a single count of second-degree CSC. The recommended minimum sentence range under the legislative guidelines was 29 to 57 months. The trial court deviated from the guidelines and sentenced defendant to a term of 10 to 15 years' imprisonment. Defendant appealed to this Court, arguing, in part, that the sentencing court failed to articulate substantial and compelling reasons to deviate from the guidelines. In *People v Hicks*, unpublished opinion per curiam of the Court of Appeals, issued March 15, 2007 (Docket No. 266510), this Court affirmed defendant's conviction but agreed that two of the sentencing court's proffered reasons for deviating from the guidelines—the nature of the offense and the need to protect society—were not substantial and compelling reasons. However, this Court held that the trial court was within its right to deviate from the guidelines based on its conclusion that Offense Variable (OV) 10, MCL 777.40, did not adequately take into account defendant's exploitation of his daughter's vulnerabilities. *Id.* Defendant was assessed 15 points under OV 10 because of the predatory nature of the offense. OV 10 allows for a ten-point assessment based on the exploitation of a victim's vulnerabilities, but because defendant was assessed the higher number of points for predatory conduct, his exploitation of his daughter's vulnerabilities was not truly taken into account. *Id.* This Court remanded for resentencing "because it is unclear whether the trial court would have departed to the same extent on the basis of the inadequate weight given to OV 10 alone." *Id.* Because the Court remanded for resentencing, it did not address defendant's argument that his ten-year minimum sentence was disproportionate.

At defendant's resentencing, the trial court again exceeded the recommended minimum sentence range of 29 to 57 months and imposed a term of 10 to 15 years' imprisonment. It explained that it "finds that the scoring of OV-10 does not afford proper weight to the exploitation of the victim's vulnerabilities and that is very clear on this record, very clear."

On appeal, defendant argues that the trial court erred in scoring 50 points for OV 11, MCL 777.41. Defendant also argues that, even if the trial court's scoring of OV 11 was proper, resentencing is required because the sentencing court lacked substantial and compelling reasons to deviate from the guidelines and because his sentence of 10 to 15 years' imprisonment is disproportionate. We will uphold a trial court's scoring decision if record evidence adequately supports the score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). We review a trial court's determination that substantial and compelling reasons justify a departure from the recommended minimum sentence range for an abuse of discretion. *People v Babcock*, 469 Mich 247, 274; 666 NW2d 231 (2003). Likewise, we review the extent of the departure for an abuse of discretion. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). "A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes." *Id.*

We agree with defendant that the trial court erred in scoring 50 points for OV 11. Points are scored under OV 11 for "sexual penetrations of the victim by the offender arising out of the sentencing offense." MCL 777.41(2)(a). Our Supreme Court has held that "[s]omething that 'arises out of,' or springs from or results from something else, has a connective relationship, a cause and effect relationship, of more than an incidental sort with the event out of which it has arisen. . . . [T]his requires that there be such a relationship between the penetrations at issue and the sentencing offenses." *People v Johnson*, 474 Mich 96, 101; 712 NW2d 703 (2006). Because the victim in *Johnson* testified that she had sex with the defendant on two different occasions in November 2001, it was clear that there was no more than an incidental relationship between the two penetrations. *Id.* at 101-102. This was in contrast to *People v Mutchie*, 251 Mich App 273, 276; 650 NW2d 733 (2002), aff'd on other grounds 468 Mich 50 (2003), wherein the sexual penetrations occurred "'at the same place, under the same set of circumstances, and during the same course of conduct.'" *Johnson, supra* at 100. Here, as in *Johnson*, there is no more than an incidental relationship between the sentencing offense and any sexual penetration.

However, although not addressed by either party, criminal sexual penetrations that extend beyond the sentencing offense may be scored under OV 13, MCL 777.43. See *id.* at 102 n 3. Specifically, OV 13 allows for 25 points to be scored when "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c). Thus, given the testimony of defendant's daughter regarding multiple instances of sexual abuse involving penetration, the sentencing court should have scored OV 11 at zero and OV 13 at 25. Had it done so, the minimum sentence range would have been 19 to 38 months' imprisonment instead of 29 to 57 months. MCL 777.64.

An erroneous scoring of the sentencing guidelines does not require resentencing if the trial court would have imposed the same sentence regardless of the error. See *People v Mutchie*, 468 Mich 50, 51-52; 658 NW2d 154 (2003); see also *People v Schaafsma*, 267 Mich App 184, 186; 704 NW2d 115 (2005) ("[W]hen a reviewing court determines that a sentencing court would prescribe the same sentence notwithstanding a misunderstanding of the law or irregularity in the proceedings, the reviewing court may simply affirm the sentence."). Based on a reading of

the sentencing transcript, it is clear that, even if OV 11 and OV 13 had been correctly scored below, the trial court would have imposed the same sentence of 10 to 15 years' imprisonment. Accordingly, instead of remanding for resentencing under correctly scored guidelines, we will address the remaining issues whether the trial court had substantial and compelling reasons to depart and whether the imposed sentence is disproportionate.

In defendant's first appeal, this Court determined that the failure of the guidelines to give proper weight to defendant's exploitation of his daughter's vulnerabilities provided a substantial and compelling reason to depart from the recommended minimum sentence range. *Hicks, supra*. Accordingly, the trial court had a substantial and compelling reason to depart from the guidelines.

Nonetheless, a minimum sentence must be proportionate, and, "[w]hen fashioning a proportionate minimum sentence that exceeds the guidelines recommendation, a trial court must justify why it chose the particular degree of departure." *Smith, supra* at 318. Here, the trial court offered no explanation for the extent of the departure independent of the reason it provided for exceeding the recommended minimum sentence range. The trial court's departure was a substantial departure. The imposed 10-year minimum sentence, which was the maximum-minimum sentence allowed under the two-thirds rule, see *People v Harper*, 479 Mich 599, 617; 739 NW2d 523 (2007), was more than three times longer than the recommended minimum sentence range of 19 to 38 months. In fact, a 10-year minimum sentence for any defendant convicted of a class C crime would constitute a departure from the recommended minimum sentence range. See MCL 777.64.¹ The maximum-minimum sentence range provided by the guidelines for a defendant convicted of a class C crime is 114 months, and such a sentence may be given to a defendant whose PRV and OV scores correspond to the E-VI, F-V, or F-VI levels of the class C crime grid. *Id.* Thus, defendant received a sentence that would constitute a departure from the recommended minimum sentence range that the Legislature reserved for the most egregious class C offenses and the more recidivist criminals. See *Babcock, supra* at 263. The trial court departed from the recommended sentence range because the guidelines failed to take into account defendant's exploitation of his daughter's vulnerabilities, a factor that generally adds 10 points to a defendant's OV score. MCL 777.40(1)(b). If an additional ten points are added to defendant's OV score, his OV score is within the 75 points contemplated by the Legislature. MCL 777.64. Because defendant's OV score is not un contemplated and because defendant had no criminal background, we cannot discern why the trial court believed that a minimum sentence that exceeded the highest maximum-minimum sentence for a class C crime was proportionate.² We vacate defendant's sentence and because we believe the trial judge will

¹ In determining whether a sentence is proportionate, a court may reference the applicable class crime sentencing grid because the grid "provides objective factual guideposts" that can aid the court in "ensuring that the offenders with similar offense and offender characteristics receive substantially similar sentences." *Smith, supra* at 309 (quotation omitted).

² In response to the dissent, we do not dispute that a trial court, in sentencing a defendant, is free to consider other CSC charges of which the defendant has been acquitted. See *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998). Here, however, the trial court did not identify defendant's acquittal on other CSC charges as a basis for departure. Rather, the only ground stated by the trial court for departing from the recommended minimum sentence range

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have substantial difficulty in putting aside her previously expressed views, *People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997), we remand for resentencing before a different judge.

Vacated and remanded for resentencing. We do not retain jurisdiction.

/s/ Joel P. Hoekstra

/s/ Jane E. Markey

(...continued)

was the guidelines failure to adequately consider defendant's exploitation of his daughter. Although defendant's course of conduct toward his daughter was reprehensible, we may not substitute or speculate about conceivable other reasons to justify the departure. *Smith, supra* at 318.