

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES MICHAEL HOUCK,

Defendant-Appellant.

UNPUBLISHED

July 23, 2009

No. 285203

Genesee Circuit Court

LC No. 07-020307-FH

Before: Owens, P.J., and Servitto and Gleicher, JJ.

PER CURIAM.

Defendant pleaded guilty of possessing child sexually abusive material, MCL 750.145c(4) (count I), producing child sexually abusive material, MCL 750.145c(2) (count III), and two counts of using a computer to commit those offenses, MCL 752.796 and MCL 752.797(3)(d) and (f) (counts II and IV). The circuit court sentenced defendant to concurrent prison terms of 30 to 48 months for count I, 42 to 84 months for count II, and 95 to 240 months for counts III and IV. This Court initially denied defendant's delayed application for leave to appeal. *People v Houck*, unpublished order of the Court of Appeals, entered June 6, 2008 (Docket No. 285203). But our Supreme Court, in lieu of granting leave to appeal, remanded the case to this Court "for consideration, as on leave granted, of whether offense variable 9, MCL 777.39, and offense variable 10, MCL 777.40, were properly scored under the facts of this case." *People v Houck*, 482 Mich 1028; 757 NW2d 88 (2008). We vacate defendant's sentences and remand for resentencing.

A sentencing court generally must impose a minimum sentence within the appropriate statutory guidelines range. MCL 769.34(2). When scoring the guidelines, "[a] sentencing court has discretion in determining the number of points to be scored provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "Scoring decisions for which there is any evidence in support will be upheld." *Id.*, quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). This Court reviews scoring decisions to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). The interpretation and application of the sentencing guidelines present questions of law subject to de novo review on appeal. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

Using a computer to commit the offense of producing child sexually abusive material, MCL 752.796(1); MCL 752.797(3)(f), is a Class B offense subject to the legislative guidelines. MCL 777.17c. Under the guidelines as scored, defendant had 20 prior record variable points and 90 offense variable points, placing him in the C-VI cell of the applicable sentencing grid, which sets the minimum sentence range between 57 and 95 months. MCL 777.63.

Offense variable (OV) 9 considers the relevant number of victims. The circuit court assessed 25 points for OV 9, signifying that defendant's crime involved 10 or more victims. MCL 777.39(1)(b). Each person "placed in danger of physical injury or loss of life" counts as a victim for purposes of OV 9. MCL 777.39(2)(a). The calculation of victims under OV 9 may take into account only "those victims involved in the specific transaction that gave rise to the particular conviction for which the sentence is being imposed," and not "victims in related, but uncharged offenses." *People v Gullett*, 277 Mich App 214, 217; 744 NW2d 200 (2007), citing *People v Chesebro*, 206 Mich App 468, 471; 522 NW2d 677 (1994). In summary, "when scoring OV 9, only people placed in danger of injury or loss of life when the sentencing offense was committed (or, at the most, during the same criminal transaction) should be considered." *People v Sargent*, 481 Mich 346, 350-351; 750 NW2d 161 (2008).

In this case, the circuit court counted as victims the children depicted in thousands of pornographic images that defendant had downloaded from the internet and copied onto discs. Defendant did not place those children "in danger of physical injury or loss of life" when he committed the four offenses to which he pleaded guilty because he had no contact with the children at all, and the prosecutor acknowledges that "the correct score for offense variable 9 is zero points." Subtracting 25 points from defendant's total offense variable score places him in the C-V cell for which the minimum sentence range falls between 51 and 85 months. MCL 777.63. Because the circuit court utilized an incorrect minimum sentence range, defendant is entitled to resentencing. *People v Francisco*, 474 Mich 82, 89-92; 711 NW2d 44 (2006).

With respect to OV 10, this variable addresses the exploitation of a vulnerable victim. If the defendant exploits a vulnerable victim, he can be assessed five or ten points, depending on the nature of the victim's vulnerability. MCL 777.40(1)(b) (10 points for exploitation of "a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status"), (c) (five points for exploitation of a "difference in size or strength, or both, or . . . a victim who was intoxicated, under the influence of drugs, asleep, or unconscious"). The circuit court scored 15 points, indicating that it found defendant had engaged in predatory conduct. MCL 777.40(1)(a). The Legislature defined "vulnerability" as "the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." MCL 777.40(3)(c). The statute also defines "exploit" as "to manipulate a victim for selfish or unethical purposes," MCL 777.40(3)(b), and "predatory conduct" as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). Thus, to assess 15 points under OV 10, the defendant must exploit a vulnerable victim and engage in conduct that meets the statutory definition of predatory. *Cannon*, *supra* at 159.

Defendant came to law enforcement attention because of his inappropriate friendships with several 12-year-old girls. The prosecutor theorized that defendant had begun “grooming” the girls for sexual exploitation, which qualified them as victims under OV 10. The circuit court agreed, explaining, “If it was merely a possession charge, . . . I’d agree with [defense counsel], but Count III is not just possession, but also activity.”¹

Our review of the record presented does not support the circuit court’s scoring of OV 10, which must rest on a defendant’s exploitation of the victim of a sentencing offense, and should not take into account exploitation of third persons. *People v Hindman*, 472 Mich 875, 876; 693 NW2d 384 (2005). While this Court has recognized that “grooming” may support a 15-point scoring of OV 10, *People v Steele*, ___ Mich App ___, ___ NW2d ___ (Docket No. 280509, issued April 21, 2009), slip op at 9-10, the victims of defendant Steele’s grooming behavior were the same victims of the sentencing offenses. Here, however, the record contains no indication that defendant’s young female friends had any relationship as victims to any of his sentencing offenses, or even to any of the many charged offenses that the prosecution dismissed as part of defendant’s plea agreement. According to the presentence report, defendant took photographs “of the girls sleeping in bed, drinking alcohol, and smoking cigarettes,” but the report documents no suggestion that defendant photographed the girls nude or engaged in sexual activity. There simply is no evidence that the girls who visited defendant were victims of the criminal activity of which defendant stood convicted, i.e., the making and possession of child sexually abusive material and using a computer to commit those offenses; nothing in the record suggests that the young girls appeared in or viewed the child sexually abusive materials that defendant produced and possessed.² Although defendant may have engaged in preoffense conduct directed at the girls for purposes of victimization, they fortunately had not yet become the victims of any criminal activity committed by defendant. See *People v Albers*, 258 Mich App 578, 593; 672 NW2d 336 (2003) (observing that the term “victim,” when not otherwise defined by an offense variable, “includes any person harmed by the criminal actions of the charged party”). Thus, defendant’s grooming actions in this case did not warrant the scoring of points under OV 10.³

In conclusion, we vacate defendant’s sentences and remand for resentencing.

To the extent that the parties disagree whether the circuit court should have prepared and scored separate sentencing information reports for each conviction, we will not consider this

¹ The court apparently referred to the fact that information count III charged defendant with “Child Sexually Abusive Activity.” Despite this caption, the count charged that defendant “did produce or make any child sexually abusive material[.]”

² While the presentence report mentions that some of the girls watched pornography with defendant, the only title specifically referenced in the report, “White Chicks, Honey, and Girls Gone Wild,” apparently was a commercial adult movie.

³ The circuit court suggested that if it had erred in scoring OV 10 on the basis of defendant’s grooming behavior, it “could have used that grooming activity outside of the guidelines as a justification for a sentence, perhaps even to have exceeded the guidelines.” We express no opinion whether defendant’s alleged grooming behavior would justify a departure from the guidelines.

question because it goes beyond the scope of the Supreme Court's remand order. *Taxpayers of Michigan Against Casinos v State of Michigan*, 478 Mich 99, 111-112; 732 NW2d 487 (2007). We simply note that on remand, the circuit court should score the offenses in accordance with MCL 777.21(2) and MCL 771.14(2)(e).

We vacate defendant's sentences and remand for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens

/s/ Deborah A. Servitto

/s/ Elizabeth L. Gleicher