

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARLOS MARCELINO GONZALEZ,

Defendant-Appellant.

UNPUBLISHED
September 1, 2009

No. 286414
Macomb Circuit Court
LC No. 2005-003996-FC

Before: M. J. Kelly, P.J., and K. F. Kelly and Shapiro, JJ.

PER CURIAM.

Following a remand from Our Supreme Court, defendant appeals by right the sentence imposed on his jury trial conviction of criminal sexual conduct in the first degree (CSC I), MCL 750.520b(1)(f). The trial court sentenced defendant to 15 to 30 years in prison for this offense, to run concurrently with his sentence of five to 15 years for criminal sexual conduct in the second degree, MCL 750.520c(1)(c), and his sentences of five to ten years for three counts of assault with intent to commit criminal sexual penetration, MCL 750.520g(1).¹ Because we conclude that there were no sentencing errors warranting relief, we affirm. We have decided this appeal without oral argument under MCR 7.214(E).

Defendant first argues that the trial court erred when it scored offense variable (OV) 13 (continuing pattern of criminal behavior) at 25 points for three crimes against a person within a five-year period. Defendant argues that his concurrent convictions cannot form the basis for the scoring, because they did not constitute a “pattern” of criminal behavior under MCL 777.43.

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.* Questions of statutory interpretation are questions of law, which are reviewed de novo. *People v Stead*, 270 Mich App 550, 551; 716 NW2d 324 (2006).

¹ Our Supreme Court’s remand order pertained only to the sentence for CSC I. *People v Gonzalez*, 480 Mich 1150; 746 NW2d 303 (2008).

In *People v Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001), this Court held that OV 13 was properly scored at 25 points on the basis of “defendant’s four concurrent convictions” in that case. The defendant was convicted of four counts of making child sexually abusive material, which involved photographing two 15-year-old girls. The defendant took four photographs—two of each girl—on a single date, which supported his four convictions. *Id.* at 525.

Here, defendant engaged in sequential, yet distinct assaults on the victim. According to the presentence investigation report (PSIR), defendant first grabbed the victim’s breasts, then sexually penetrated her vagina, subsequently attempted twice more to do so, and then after a brief hiatus, attempted to have her perform oral sex on him. This is not a situation in which multiple convictions resulted from only one act. Under *Harmon*, these separate occurrences could properly form the basis for the trial court’s scoring of OV 13. And while MCL 777.43(2)(e) and (f) contain exceptions for scoring contemporaneous drug offenses, those exceptions do not apply here. Defendant has not shown he is entitled to resentencing on this ground.

Defendant also argues that the trial court misscored prior record variable (PRV) 5 (prior misdemeanor convictions) at 20 points. Defendant’s challenge to the scoring of PRV 5 was not properly raised during resentencing and, therefore, is unpreserved. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Thus, our review is limited to plain error affecting defendant’s substantial rights. *Id.* at 312.

MCL 777.55(1)(a) states in part that 20 points are to be scored when the offender has “7 or more prior misdemeanor convictions or prior misdemeanor juvenile adjudications.” Here, defendant first argues that the scoring was inappropriate because, while he has eight prior misdemeanors listed in his PSIR, he was unrepresented by counsel for six of them and those convictions thus cannot be counted for purposes of scoring this PRV. See *People v Carpentier*, 446 Mich 19, 28-30; 521 NW2d 195 (1994). However, his sole citation in support of his claim is to his PSIR, which does not state that counsel was not provided during his earlier proceedings, only that it is “unknown” whether counsel was present. This is insufficient to show that the trial court clearly erred by including these prior convictions. There was no plain error.

Defendant also argues that one of his prior misdemeanor convictions for drunkenness should not have been counted. Even accepting defendant’s argument as correct, seven misdemeanors would remain, resulting in no change in PRV 5.

There were no sentencing errors warranting relief.

Affirmed.

/s/ Michael J. Kelly
/s/ Kirsten Frank Kelly
/s/ Douglas B. Shapiro