STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 15, 2009
v	No. 286547 Osceola Circuit Court
DONALD EUGENE BROWN, JR., Defendant-Appellant.	LC No. 07-004060-FC

Before: Beckering, P.J., and Cavanagh and M. J. Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim under the age of 13), and was sentenced to a prison term of 60 to 360 months. Defendant appeals as of right. We affirm defendant's conviction, but remand for resentencing.

Defendant first argues that MCL 768.27a is an unconstitutional legislative intrusion on the Supreme Court's exclusive authority to establish the rules of practice and procedure for the courts. Specifically, defendant argues that MCL 768.27a conflicts with MRE 404(b). The Michigan Constitution vests in our Supreme Court the sole authority to establish the rules of practice and procedure to be used in the courts. Const 1963, art 6, § 5. Generally, if a court rule and a statute conflict, the court rule governs when the matter pertains to rules of practice and procedure. *People v McGuffey*, 251 Mich App 155, 165; 649 NW2d 801 (2002). Under MRE 404(b)(1), the prosecution is not permitted to introduce prior bad acts evidence against a defendant explicitly for the purpose of proving character. However, in a criminal case involving criminal sexual conduct, the prosecution is permitted under MCL 768.27a to introduce evidence of other acts of criminal sexual conduct committed by the defendant if the other acts are relevant, for any other purpose. MCL 768.27a(1).

In *People v Pattison*, 276 Mich App 613, 619-620; 741 NW2d 558 (2007), this Court rejected the same constitutional argument defendant raises. In *Pattison*, we agreed that the Legislature may not constitutionally enact a purely procedural rule. *Id.* at 619. A procedural rule is "one that is not backed by any clear identifiable policy consideration other than the administration of judicial functions." *Id.*, citing *McDougall v Schanz*, 461 Mich 15, 29-31; 597 NW2d 148 (1999). "[R]ules of evidence are not always purely procedural, and may have legislative policy considerations as their primary concern." *Id.* We held that MCL 768.27a was not a procedural rule, but rather a substantive rule of law because it reflected the "Legislature's

policy decision that, in certain cases, juries should have the opportunity to weigh a defendant's behavioral history and view the case's facts in the larger context that the defendants' background affords. . . . [I]t is no less a policy choice because it is contrary to the choice originally made by our courts." *Id*. at 619-620.[1] We agree and follow this precedent.

Next, defendant argues that the application of MCL 768.27a in this case violates the Ex Post Facto Clause, Const 1963, art 1, § 10, because all of the alleged abuse occurred before the statute took effect on January 1, 2006. *Pattison* also rejected such a claim. Again, we agree and follow this precedent.

Lastly, defendant argues that the trial court improperly scored 25 points for offense variables (OVs) 11 and 13. Defendant properly preserved this issue by challenging the scoring of these variables at sentencing. See MCL 769.34(10).

To assess 25 points for OV 11, the trial court must find that defendant committed one sexual penetration against a victim. MCL 777.41(1)(b). The instructions for OV 11 state that "[a]ll sexual penetrations of the victim by the offender arising out of the sentencing offense must be counted in scoring OV 11." MCL 777.41(2)(a). However, the sexual penetration used to convict the defendant of CSC I cannot be counted in the scoring of OV 11. MCL 777.41(2)(c). In other words, to assess 25 points for OV 11, the trial court must find that a criminal defendant committed multiple sexual penetrations against the victim and that those penetrations arose out of the sentencing offense.

Sexual penetrations that occur on separate dates do not automatically arise out of the sentencing offense. *People v Johnson*, 474 Mich 96, 100-101; 712 NW2d 703 (2006). In *Johnson*, this Court affirmed the trial court's assessment of 25 points for OV 11 where the evidence showed that the defendant sexually penetrated the victim twice, but on different dates. *Id*. at 97, 100, citing *People v Johnson*, unpublished per curiam opinion of the Court of Appeals, issued October 28, 2004, (Docket No 248480). In reversing that decision, our Supreme Court opined that the language "arising out of" suggests "a causal connection between two events that is more than just incidental. Something that 'aris[es] 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." *Id*. at 101. The Supreme Court noted that, although the victim testified that she had sexual intercourse with the defendant on two different dates, there was no testimony that there was any sort of connection between the occasions. *Id*. at 102. Without any evidence to support a finding that the sexual penetrations were in some way connected, it was improper to score the penetrations under OV 11. *Id*.

Here, like in *Johnson*, there was testimony that defendant allegedly committed multiple sexual penetrations against various victims on different dates. However, there was no testimony establishing that multiple penetrations occurred during a single instance or that any of the sexual

[1] Defendant references our Supreme Court's grant of leave to appeal this Court's decision in *People v Watkins*, 277 Mich App 358; 745 NW2d 149 (2007), lv gtd 480 Mich 1167, order vacated and lv den 482 Mich 1114 (2008). Initially, our Supreme Court granted leave to consider the constitutional validity of MCL 768.27a, but subsequently denied leave because it was no longer persuaded that the Court should review the issue.

penetrations were connected to one another. Therefore, it was error for the trial court to assess 25 points for OV 11. Had the trial court not scored 25 points for OV 11, the recommended sentencing range for defendant would have been 42 to 70 months instead of 51 to 80 months. Thus, defendant's minimum sentence of 60 months was within the corrected range. An erroneous scoring of the guidelines range does not require resentencing if the trial court would have imposed the same sentence regardless of the error. *People v Mutchie*, 468 Mich 50, 51-52; 658 NW2d 154 (2003). It is not clear in this case whether the trial court would have imposed the same sentence if it had used the modified range. Therefore, defendant is entitled to resentencing.

To assess 25 points for OV 13, the sentencing court must find that the defendant's "offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(b). The instructions for OV 13 allow the sentencing court to consider all crimes committed by the defendant against a person without regard to whether the defendant was convicted for the offense. MCL 777.43(2)(a). The crimes, which may include the sentencing offense, must occur during a five-year period. MCL 777.43(2)(a). There is no requirement that in sexual assault cases the only crimes that can be counted are sexual penetrations. *Id*. Unlike under OV 11, the sentencing offense can be used for scoring OV 13. *Id*. However, any conduct scored in the calculation of OV 11 cannot also be used to calculate OV 13 unless the "offense was related to membership in an organized criminal group." MCL 777.43(2)(c).

The testimony at trial established that defendant had committed at least three felonious acts against a person within five years. Since the sexual penetration erroneously scored under OV 11 may be counted, the other two acts involving the victim comprise three acts that may be properly scored under OV 13. For that reason, it was not error to assess 25 points under OV 13.

We affirm defendant's convictions, but remand for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Mark J. Cavanagh
/s/ Michael J. Kelly