

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL A. AMOS,

Defendant-Appellant.

UNPUBLISHED

February 9, 2010

No. 288468

Calhoun Circuit Court

LC No. 05-001959-FC

Before: Beckering, P.J., and Markey and Borrello, JJ.

PER CURIAM.

Defendant pleaded guilty to six counts of first-degree criminal sexual conduct, MCL 750.520b(1)(b)(ii) (relationship), and was sentenced to concurrent prison terms of 285 months to 50 years for each conviction. In a prior appeal, our Supreme Court vacated defendant's sentences and remanded the case for resentencing because the trial court "erred by assessing the defendant 50 points under offense variable 11 for penetrations that did not rise out of the particular sentencing offenses." *People v Amos*, 480 Mich 852; 737 NW2d 704 (2007). On remand, the trial court determined that its original sentences were proper and denied resentencing. Defendant again appeals by leave granted. We remand for resentencing. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant pleaded guilty to engaging in sexual intercourse with an underage victim on six different occasions. With respect to each sentencing offense, the trial court determined that it could use the separate acts of intercourse arising from each separate offense to score offense variable (OV) 11. Therefore, the court scored OV 11 at 50 (two or more sexual penetrations arising out of the sentencing offense). MCL 777.41(1)(a). Defendant argues that the trial court erred in scoring OV 11 at 50 points on the basis of penetrations arising from the separate offenses. We agree.

The instructions for OV 11 state that the court is to "[s]core all sexual penetrations of the victim by the offender arising out of the sentencing offense," but that points are not to be assessed "for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense." MCL 777.41(2)(a), (c). Thus, the court may count any penetrations other than the one forming the basis of the sentencing offense as long as they arose out of the sentencing offense. *People v McLaughlin*, 258 Mich App 635, 676; 672 NW2d 860 (2003). Multiple penetrations arise out of the sentencing offense when they occur during the same criminal episode. See *id.* at 642, 672-678; see also *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d

342 (2004). When each act of penetration occurs on a separate occasion, one does not arise out of the other. See *People v Johnson*, 474 Mich 96, 100-102; 712 NW2d 703 (2006).

In the prior appeal, the Supreme Court vacated defendant's judgment of sentence and remanded the case for resentencing. *Amos*, 480 Mich at 852. The Court explained:

The circuit court erred by assessing the defendant 50 points under offense variable 11 for penetrations that did not arise out of the particular sentencing offenses. *People v Johnson*, 474 Mich 96 (2006). If the defendant is scored points for OV 11, the trial court must indicate that the acts of sexual penetration "arose out of" the sentencing offenses. MCL 777.41(2)(a). [*Id.*]

Despite the Supreme Court's order, the trial court did not resentence defendant on remand. Nor did it find that there were acts of penetration, apart from each sentencing offense, that arose out of the sentencing offense. Instead, it relied on *People v Goodman*, unpublished opinion per curiam of the Court of Appeals, issued August 28, 2007 (Docket No. 269620), to conclude that the same five penetrations other than the sentencing offense did in fact justify the 50-point score under OV 11. Apart from the fact that the Supreme Court later determined that the circumstances in *Goodman* did not justify a 50-point score and vacated that defendant's sentences pursuant to *Johnson*, see *People v Goodman*, 480 Mich 1052; 743 NW2d 890 (2008), the trial court erred as matter of law by ruling in a manner inconsistent with the Supreme Court's remand order in this case. When a case is remanded, the lower court is obligated "to comply strictly with the mandate of the appellate court." *Rodriguez v Gen Motors Corp (On Remand)*, 204 Mich App 509, 514; 516 NW2d 105 (1994). "The power of the lower court on remand is to take such action as law and justice may require so long as it is not inconsistent with the judgment of the appellate court." *Sokel v Nickoli*, 356 Mich 460, 464; 97 NW2d 1 (1959).

Therefore, we again remand for resentencing. Although our decision to remand renders it unnecessary to consider defendant's challenge to the scoring of OV 13, MCL 777.43, we note that criminal acts of sexual penetration that do not arise from the sentencing offense, but extend beyond the sentencing offense, may be scored as permitted by OV 13. MCL 777.41(2)(b).

Remanded for resentencing. We do not retain jurisdiction.

/s/ Jane M. Beckering

/s/ Jane E. Markey

/s/ Stephen L. Borrello