

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALSTAIR ALEXANDER RICHARDSON,

Defendant-Appellant.

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UNPUBLISHED

August 10, 2010

No. 289067

Wayne Circuit Court

LC No. 08-008157-FH

Before: MARKEY, P.J., and ZAHRA and GLEICHER, JJ.

ZAHRA, J. (*concurring*).

I concur in the result and reasoning supporting the majority opinion affirming defendant's conviction and sentence. I write separately to address the claim by my dissenting colleague that "[t]he plain language of MCL 777.21(1)(a) and MCL 777.22(1) precluded the trial court from . . . considering psychological injury to members of the victim's family." Nothing in either of the above-cited statutes precludes the trial court from considering the psychological injuries sustained by the victim's children for purposes of supporting an upward departure from the applicable sentencing guideline range.

In my view, the plain language of MCL 777.21(1)(a) required the trial court to "determine the offense variables to be scored for that offense category and score only those offense variables for the offender . . . ." The offense variables to be taken into account in a first-degree criminal sexual conduct case are found in MCL 777.22(1), which provides in pertinent part that the sentencing court shall "score offense variables 1, 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, 14, 19 and 20." As noted in the dissent, the Legislature did not direct sentencing courts to take into account offense variable 5, which addresses psychological injuries sustained by members of the victim's family, when calculating the applicable sentencing range under the sentencing guidelines. Notably, the trial court followed the statutory directive and did not score or otherwise take into account offense variable 5 when calculating the applicable guideline range.

My dissenting colleague nonetheless concludes that since the Legislature did not direct trial courts to take into account the factors applicable under offense variable 5 when calculating defendant's guideline range, the Legislature must have intended to bar the sentencing court from considering for any purpose the psychological injuries sustained by the members of the victim's family. I disagree. The Legislature expressed its view on what can and cannot be considered to support a departure from the applicable guideline range. MCL 769.34(3)(b) provides that "[t]he court shall not base a departure on an offense characteristic already taken into account in

determining the appropriate sentence range . . . .” Here, as stated above, the psychological injuries sustained by the victim’s family members were not previously taken into account when scoring the guidelines. Accordingly, these injuries may be considered pursuant to MCL 769.34(3)(b) to support an upward departure from the guidelines. See *People v Armstrong*, 247 Mich App 243, 435-26 (2001) (finding in a CSC case that an upward departure from the applicable sentencing guideline range was appropriate where the guidelines did not take into account “the violation of the victim’s parents’ trust in defendant, the effect on the family occasioned by the victim’s loss of trust in all men, including his own father, or the effect on the victim and his sister from having to learn about sexual matters at such a young age”). For these reasons, I conclude the trial court’s upward departure from the applicable sentencing guideline range was appropriate.

/s/ Brian K. Zahra