

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN PAUL SIMON,

Defendant-Appellant.

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UNPUBLISHED

September 30, 2010

No. 291624

Macomb Circuit Court

LC No. 2008-001685-FH

Before: O'CONNELL, P.J., and METER and OWENS, JJ.

PER CURIAM.

Defendant pleaded guilty to two counts of distributing or promoting child sexually abusive material, MCL 750.145c(3), and one count of communicating with another to commit a crime using the Internet, MCL 750.145d(2)(d). The plea was tendered pursuant to a plea agreement whereby eight additional counts were dismissed and defendant agreed to pay restitution of \$1,000 to Macomb County. Defendant was sentenced to concurrent prison terms of two to seven years each for the child sexually abusive material convictions and two to ten years for the remaining conviction. He appeals by delayed leave granted. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant first challenges the trial court's scoring of offense variable (OV) 10 and OV 13 of the sentencing guidelines. Issues involving "the proper interpretation and application of the legislative sentencing guidelines . . . are legal questions that this Court reviews de novo." *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

The trial court erred in scoring ten points for OV 10, which deals with the exploitation of a vulnerable victim. MCL 777.40. MCL 777.40(1)(b) states that ten points should be assessed if "[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status[.]" Defendant's communications with a law enforcement officer posing as a child did not warrant the assessment of points for OV 10. *People v Russell (On Remand)*, 281 Mich App 610, 615; 760 NW2d 841 (2008).

However, the trial court did not err in scoring 25 points for OV 13, which deals with a continuing pattern of criminal behavior. MCL 777.43. MCL 777.43(1)(c) states that 25 points should be assessed if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person[.]" Contrary to defendant's argument, the scoring of OV 13 is

not limited to criminal activity that has resulted in a prior criminal record, and the instructions do not differentiate between criminal activity that is part of the same transaction and criminal activity arising from separate transactions. In fact, the instructions provide that “*all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.*” MCL 777.43(2)(a) (emphasis added). As a factual basis for his plea, defendant admitted that he sent “numerous images” of child sexually abusive material over the Internet to someone he believed was a 14-year-old girl. Further, the presentence report, which defendant agreed was “factually correct,” indicates that defendant sent nine images of child sexually abusive material to “Karen,” who he believed was 14 years old. Defendant also used the Internet to send child sexually abusive material; this was a separate crime under MCL 750.145d(2)(d). The evidence supported the trial court’s determination that “[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person[.]” MCL 777.43(1)(c). Thus, the trial court did not err in scoring 25 points for OV 13.

The change in the scoring of OV 10 from ten points to zero points reduces defendant’s total OV score from 60 to 50 points. This reduction does not change defendant’s placement in OV level V, which corresponds in this case to total OV scores of 50 to 74 points. MCL 777.65. Thus, the error does not affect the guidelines range. “Where a scoring error does not alter the appropriate guidelines range, resentencing is not required.” *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

Next, the trial court did not err by failing to evaluate defendant’s ability to pay before ordering him to pay attorney fees. *People v Jackson*, 483 Mich 271, 298; 769 NW2d 630 (2009). Further, we reject defendant’s request for a remand for an evidentiary hearing concerning his ability to pay. If defendant “believes that his unique individual financial circumstances rebut [MCL 769.1l]’s presumption of nonindigency, he may petition the [trial] court to reduce or eliminate the amount that the remittance order requires him to pay.” *Jackson*, 483 Mich at 296.<sup>1</sup>

Lastly, defendant waived any challenge to the amount of restitution when he agreed to the restitution amount as part of his plea agreement, and then did not object when the court ordered restitution in the agreed amount at sentencing. *People v Grant*, 455 Mich 221, 242-244; 565 NW2d 389 (1997); *People v Gahan*, 456 Mich 264, 276; 571 NW2d 503 (1997). Having expressly agreed to the amount of restitution that was ordered, defendant cannot now argue that the amount was incorrect. See, generally, *People v Shuler*, 188 Mich App 548, 551-552; 470 NW2d 492 (1991).

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<sup>1</sup> We note that although defendant’s statement of this issue also refers to the costs that the court ordered him to pay, he does not address this aspect of the order separately from his analysis of the order requiring him to pay attorney fees. MCL 769.1k authorizes the imposition of costs and does not require the court to consider a defendant’s ability to pay them. Defendant has not shown any error in this regard.

Affirmed.

/s/ Peter D. O'Connell

/s/ Patrick M. Meter

/s/ Donald S. Owens