

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY JAMES SMITH,

Defendant-Appellant.

UNPUBLISHED

March 22, 2012

No. 302519

Berrien Circuit Court

LC No. 2010-000592-FC

Before: STEPHENS, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM.

Defendant pleaded guilty of two counts of accosting a child for immoral purposes, MCL 750.145a; and aggravated indecent exposure, MCL 750.335a(2)(b). The trial court sentenced defendant to 23 to 48 months in prison for each of the two counts of accosting a child, and 122 days in prison for aggravated indecent exposure. We granted defendant's delayed application for leave to appeal pursuant to MCR 7.205. For the reasons set forth below, we affirm.

Defendant argues that the trial court erred in scoring Offense Variable (OV) 9, MCL 777.39 (number of victims) at ten points. We review a trial court's scoring decision to "determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). "Scoring decisions for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

OV 9 allows the trial court to assign a score of ten points if there are two to nine victims placed in danger of physical injury or death. MCL 777.39(1)(c). A victim under MCL 777.39 is "each person who was placed in danger of injury or loss of life." MCL 777.39(2)(a). OV 9 must be scored solely on the basis of defendant's conduct during the sentencing offense. *People v McGraw*, 484 Mich 120, 133-134; 771 NW2d 655 (2009). At sentencing, defendant argued that the trial court could not score OV 9 at ten points for each incident of accosting a child for immoral purposes because each victim was alone in a room with defendant when he accosted them. The trial court did not respond to the factual nature of defendant's argument nor make a factual finding. *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003). Moreover, the record does not establish that more than one child was accosted by defendant during either incident.

However, in *People v Waclawski*, 286 Mich App 634, 684; 780 NW2d 321 (2009), this Court upheld the scoring of OV 9 at ten points though the evidence showed that the three victims were victimized individually. *Id.* at 682. In *Waclawski*, the three victims sometimes spent the night together at the defendant's home. *Id.* at 684. While the victims spent the night, the defendant would choose a victim while the other boys were present. *Id.* This Court ruled that the trial court in *Waclawski* "properly scored defendant 10 points for OV 9 because the record supports the inference that at least two other victims were placed in danger of physical injury when the sentencing offenses were committed." *Id.*

Here, the two victims lived together at defendant's house. Defendant watched pornographic films with both victims while they were alone and he repeatedly accosted one victim and abused the other. Defendant had access to both victims and he could choose, at will, which child to victimize. As in *Waclawski*, the trial court did not abuse its discretion in scoring OV 9 at ten points because the record supports the inference that both victims were in danger of physical injury when the sentencing offenses occurred. *Id.*

Defendant also argues that his sentence is disproportionate and violates both the guarantee against cruel and/or unusual punishment set forth in the United States Constitution, US Const, Am VIII and also Michigan law. We review for an abuse of discretion whether the sentence imposed by the trial court is proportionate. See *People v Milbourn*, 435 Mich 630, 653-654; 461 NW2d 1 (1990). An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). While "this Court may not consider challenges to a sentence based exclusively on proportionality, if the sentence falls within the guidelines," *People v Pratt*, 254 Mich App 425, 429-430; 656 NW2d 866 (2002), that limitation does not apply to defendant's constitutional claim. *People v Conley*, 270 Mich App 301, 316; 715 NW2d 377 (2006). Because defendant was sentenced within the recommended minimum sentence range of the legislative guidelines, we limit our review to defendant's constitutional claim.

In *People v Babcock*, our Michigan Supreme Court recognized that the Michigan Legislature subscribed to the principle of proportionality when it promulgated the sentencing guidelines. *Babcock*, 469 Mich at 263-264. Accordingly, a sentence within the guidelines range is presumptively proportionate, and a sentence that is proportionate is not cruel or unusual punishment. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). "In order to overcome the presumption that the sentence is proportionate, a defendant must present unusual circumstances that would render the presumptively proportionate sentence disproportionate." *People v Lee*, 243 Mich App 163, 187; 622 NW2d 71 (2000).

Here, defendant argues that his sentence was disproportionate because the court sentenced him at the top end of the recommended minimum sentence range and an offender who fell within the same guidelines range but who had higher prior record variable (PRV) and OV scores than defendant could not be more severely punished than defendant. However, this would occur in almost every case in which a defendant is sentenced at the top end of the recommended minimum sentence range. Defendant has not overcome the presumption that his sentence is proportionate, and a sentence that is proportionate does not constitute cruel or unusual punishment. *Powell*, 278 Mich App at 323.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Mark J. Cavanagh

/s/ Henry William Saad