

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
May 15, 2012

v

WILLIAM WHITNEY,
Defendant-Appellant.

No. 303399
Wayne Circuit Court
LC No. 09-014455-FH

Before: MURPHY, C.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

On remand from this Court, defendant was resentenced to 85 months to 15 years' imprisonment for third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(c) (sexual penetration of a victim who is physically helpless). He appeals as of right. We affirm.

Defendant was convicted by a jury of two counts of CSC III. The first count was based on an act of cunnilingus while the intoxicated victim was passed out on a bathroom floor, and the second count was based on defendant's insertion of his penis into the victim's vagina after she awoke and tried to get away from defendant. Both convictions were based on MCL 750.520d(1)(c), which pertains to an act of sexual penetration with another person who the defendant knows or has reason to know is physically helpless. In Docket No. 294760, this Court determined that the evidence established that at the time defendant penetrated her vagina with his penis, the victim was awake, communicated to defendant her unwillingness to engage in sexual acts, and physically resisted defendant's advances. Therefore, there was insufficient evidence to support the conviction on the second count relative to the act of vaginal intercourse, as there was no proof that she was physically helpless at that point. *People v Whitney*, unpublished opinion per curiam of the Court of Appeals, issued January 25, 2011 (Docket No. 294760), slip op at 7. This Court reversed the conviction on the second count and remanded "to the trial court to determine whether it would impose a different sentence given the changed guidelines scoring, in which case it may enter an order granting resentencing." *Id.*, slip op at 9. Defendant had originally been sentenced to 10 to 15 years' imprisonment. After remand, the trial court resentenced defendant to 85 months to 15 years' imprisonment on the remaining CSC III count.

On appeal, defendant first challenges the trial court's scoring of offense variable (OV) 3, MCL 777.33, and OV 11, MCL 777.41. Defendant preserved his objections to the scoring of these variables by raising them during the sentencing hearing. MCL 769.34(10); *People v*

Endres, 269 Mich App 414, 417; 711 NW2d 398 (2006). “If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence.” MCL 769.34(10). “A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score.” *Endres*, 269 Mich App at 417, citing *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). “A trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence,” and “[w]e review for clear error a court’s finding of facts at sentencing.” *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2006), citing *People v Drohan*, 475 Mich 140, 142-143; 715 NW2d 778 (2006), and *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). “Additionally, we review de novo as a question of law the interpretation of the statutory sentencing guidelines.” *Endres*, 269 Mich App at 417.

With respect to OV 3, MCL 777.33(1)(d) provides that ten points are scored for “[b]odily injury requiring medical treatment.” MCL 777.33(3) provides, “As used in this section, ‘requiring medical treatment’ refers to the necessity for treatment and not the victim’s success in obtaining treatment.” For purposes of OV 3, “bodily injury” includes physical damage to a victim’s body. *People v Cathey*, 261 Mich App 506, 514; 681 NW2d 661 (2004). This Court has also held that “‘bodily injury’ encompasses anything that the victim would, under the circumstances, perceive as some unwanted physically damaging consequence.” *People v McDonald*, 293 Mich App 292, 298; __ NW2d __ (2011).

In this case, evidence was presented at trial that the victim experienced vaginal pain after the sexual assault. The victim told the sexual assault nurse that her vagina hurt after the assault and that it felt like her vagina was stretched. With respect to pain and OV 3, in *Endres*, 269 Mich App at 417-418, this Court ruled that the trial court erred in finding bodily injury when scoring OV 3 where there was no record support for such a conclusion, noting that “[w]hile the prosecutor’s file notes indicated that the victim experienced rectal pain as a result of defendant’s assaults, that information was not placed on the record.” This language reflects that pain can form the basis for a finding that a victim sustained bodily injury, as long as there exists support in the record, which is the case here. There is also record evidence that the victim received medical treatment as a result of the sexual assault. Trial testimony indicated that the victim underwent two examinations and received prophylactic medication to prevent or diminish the effects of sexually transmitted diseases (STDs). We hold that the evidence that the victim experienced pain and that she received medical treatment supported the score of ten points for OV 3; the trial court did not clearly err in its factual findings, nor was the statute misconstrued.

Next, with respect to OV 11, the trial court scored 25 points. MCL 777.41(1) provides that the number of points scored for OV 11 is based on the number of criminal sexual penetrations of the victim. Twenty-five points are to be scored when “[o]ne criminal sexual penetration occurred.” MCL 777.41(1)(b). MCL 777.41(2)(a) provides that all sexual penetrations “arising out of the sentencing offense” are counted for purposes of scoring OV 11. However, pursuant to MCL 777.41(2)(c), the one penetration that forms the basis of a CSC III offense is not to be counted in scoring OV 11. “Arising out of” requires a causal connection, which is more than incidental, between the penetration contemplated for scoring and the penetration forming the sentencing offense. *People v Johnson*, 474 Mich 96, 100-101; 712

NW2d 703 (2006). The penetrations must result or spring from each other. *Id.* at 102. Penetrations arise out of the sentencing offense when they occur at the same place, under the same circumstances, and during the same course of conduct as the sentencing offense. *Id.* at 100, citing *People v Mutchie*, 251 Mich App 273, 277; 650 NW2d 733 (2002), *aff'd* 468 Mich 50 (2003). The phrase “arising out of the sentencing offense” refers to penetrations that arise “out of the entire assault.” *People v Wilkens*, 267 Mich App 728, 743; 705 NW2d 728 (2005).

In this case, the lone sentencing offense is the CSC III conviction based on defendant’s performance of cunnilingus on the victim; therefore, said penetration cannot be scored under OV 11. MCL 777.41(2)(c); *People v McLaughlin*, 258 Mich App 635, 676; 672 NW2d 860 (2003) (“[T]he proper interpretation of OV 11 requires the trial court to exclude the one penetration forming the basis of the offense when the sentencing offense itself is first-degree or third-degree CSC.”). Defendant’s subsequent penetration of the victim’s vagina with his penis occurred at the same place, under the same set of circumstances, and during the same course of conduct as the cunnilingus. The two penetrations resulted or sprang from each other, thereby having a causal connection that was more than an incidental; they arose out of each other and the entire assault. Accordingly, the trial court did not err in scoring 25 points for “[o]ne criminal sexual penetration” under OV 11. MCL 777.41(1)(b).

We find no merit in defendant’s contention that this Court’s prior reversal of the second conviction prohibits consideration of the second penetration in scoring OV 11. The plain language of MCL 777.41(2)(a) directs the trial court to score penetrations arising out of the sentencing offense; it does not require those penetrations to result in conviction to be scored. See *Wilkens*, 267 Mich App at 743 (“The evidence supports the score of 25 points for OV 11 for count I because defendant was charged with only one penetration, yet he penetrated the female victim more than once during the making of the videotape.”). Moreover, this Court’s reversal of defendant’s conviction was not based on a finding that the second penetration did not occur, but rather on the Court’s finding that the victim was awake and alert during the second penetration and was therefore not physically helpless. MCL 777.41 does speak of “criminal” sexual penetrations, which, while not requiring a conviction, necessarily demands that a scored penetration constitute a criminal act, as opposed to a consensual act between two adults not falling within any violation of the Penal Code. There was testimony that the act of vaginal intercourse was forced upon the victim without her consent and that she resisted and had informed defendant to get off of her. This evidence would support a charge for CSC III under MCL 750.520d(1)(b) (force used to accomplish sexual penetration). Accordingly, the sexual penetration that formed the basis for the 25-point score under OV 11 was indeed “criminal” in nature.

Finally, defendant contends that his sentence is disproportionate and constitutes cruel and/or unusual punishment. Because defendant failed to preserve this argument by raising it before the trial court, our review is for plain error affecting substantial rights. *McLaughlin*, 258 Mich App at 670. Defendant’s sentence is within the recommended minimum sentence range under the legislative guidelines. “[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) (citations omitted). “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). Defendant argues that the guidelines did not take into account the victim's irresponsible behavior and the "inevitability" of sexual conduct under the circumstances. However, this Court previously considered and rejected this proportionality argument during the first appeal of his convictions where the sentence was 10 to 15 years' imprisonment. There, as now, defendant argued that his sentence was disproportionate "because the circumstances created a scene set for sexual activity and the guidelines fail to account for the complainant's irresponsible behavior." *Whitney*, slip op at 4. The panel found that defendant's argument failed to overcome the presumption of proportionality:

We reject defendant's argument that the complainant's irresponsibility in getting into the situation that le[d] to the rape makes defendant's decision to rape her while incapacitated less offensive such that punishing him in accordance with the guidelines range would be disproportionate. Both parties drank excessively on the evening in question, but only defendant engaged in criminal sexual conduct. Accordingly, we find that defendant's sentence did not constitute cruel or unusual punishment[.] [*Id.*]

Defendant nevertheless presents the same argument in this appeal, claiming that his new minimum sentence of 85 months is disproportionate, despite the fact that the underlying facts of the case remained unchanged and that defendant's new minimum sentence is nearly three years less than the original 120-month minimum sentence that this Court found was not constitutionally disproportionate. While the second conviction of CSC III was vacated in the previous opinion, there is no material difference between the two appeals that would dictate a different resolution of the same constitutional argument. See *People v Herrera (On Remand)*, 204 Mich App 333, 340-341; 514 NW2d 543 (1994) (acknowledging that the law of the case doctrine generally applies in criminal cases, yet there is more flexibility to avoid the doctrine to prevent injustice in criminal cases and it does not automatically doom a criminal defendant's arguments). To the extent that the law of the case doctrine should not be employed here, we independently determine that the sentence is proportionate and does not constitute cruel or unusual punishment. Defendant's argument to the contrary is unavailing and does not excuse his conduct nor diminish the seriousness of the offense.

Because we find that the trial court did not err in scoring OV 3 and OV 11, and because we find that defendant's sentence is constitutionally sound, defendant is not entitled to resentencing, and we thus need not address defendant's argument that resentencing should be conducted by a different judge.

Affirmed.

/s/ William B. Murphy
/s/ Cynthia Diane Stephens
/s/ Michael J. Riordan