

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
December 11, 2012

V

No. 307892
Calhoun Circuit Court
LC No. 2011-001830-FC

JULIO CESAR RODRIGUEZ,
Defendant-Appellant.

Before: O'CONNELL, P.J., and CAVANAGH and DONOFRIO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (sexual contact with a person under 13 years of age). The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to 18 to 36 years' imprisonment. He appeals as of right. Because defendant is not entitled to resentencing given that offense variables (OVs) 11 and 13 were properly scored, we affirm.

Defendant's conviction arises out of his sexual assault of "MR," who was 11 years old at the time of trial. MR identified defendant as her cousin's father. According to MR, defendant, who was living with MR's family at the time of the sexual abuse, came into her bedroom at night on multiple occasions, pulled her pajama bottoms down, and "would rub [her vagina] and stick his finger in [her]." The prosecution charged defendant with first-degree criminal sexual conduct, MCL 750.520b(1)(a) (sexual penetration with a person under 13 years of age), but the jury convicted him of the lesser offense of second-degree criminal sexual conduct.

On appeal, defendant challenges the trial court's scoring of OV 11 and OV 13. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). A trial court abuses its discretion when it selects an outcome that falls outside the principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). "Scoring decisions for which there is any evidence in support will be upheld." *Endres*, 269 Mich App at 417.

MCL 777.41(1), pertaining to criminal sexual penetration, directs a sentencing court to score 50 points for OV 11 if "[t]wo or more criminal sexual penetrations occurred." The provision also directs that a court should score 25 points if "[o]ne criminal sexual penetration occurred," and that a court should score zero points if "[n]o criminal sexual penetration

occurred.” Defendant argues that he was denied his right to due process when the trial court scored 25 points for OV 11 because the jury acquitted him of first-degree criminal sexual conduct, which contains penetration as an element, and convicted him of second-degree criminal sexual conduct, which does not contain penetration as an element. Defendant contends that the trial court effectively sentenced him for an offense of which the jury acquitted him.

The trial court did not abuse its discretion by scoring 25 points for OV 11 because the evidence supported the score. MCL 777.41(2)(a) instructs that a sentencing court should “[s]core all sexual penetrations of the victim by the offender *arising out of* the sentencing offense.” (Emphasis added.) Our Supreme Court has recognized that “‘arising out of the sentencing offense’ means that the ‘sexual penetration of the victim must result or spring from the sentencing offense.’” *People v Johnson*, 474 Mich 96, 100; 712 NW2d 703 (2006), quoting *People v Mutchie*, 251 Mich App 273, 276; 650 NW2d 733 (2002), aff’d on other grounds 468 Mich 50 (2003). Our Supreme Court further opined, “[s]omething that ‘arises out of,’ or springs from or results from something else, has a connective relationship, a cause and effect relationship, of more than an incidental sort with the event out of which it has arisen.” *Johnson*, 474 Mich at 101 (brackets omitted). “[T]his requires that there be such a relationship between the penetration[] at issue and the sentencing offense[.]” *Id.*

MR testified that defendant rubbed her vagina with his hand and stuck “his finger in [her].” The penetration arose out of the sentencing offense because it occurred during the offense, had a connective relationship with the offense, and was not merely incidental to the offense. In fact, the penetration was wholly and completely linked to the sentencing offense. Because the evidence supported the trial court’s scoring decision, we must uphold the decision. *Endres*, 269 Mich App at 417. Further, although defendant contends that the trial court disregarded the jury’s determination that no penetration occurred, “the standard of proof applicable to the guidelines scoring process differs from the reasonable doubt standard underlying conviction of an offense. A trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence.” *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). Thus, the fact that the jury acquitted defendant of first-degree criminal sexual conduct did not preclude the trial court’s scoring of 25 points under OV 11 based on its determination that penetration had occurred.

Defendant also argues that the trial court erroneously scored 25 points for OV 13, regarding a “continuing pattern of criminal behavior,” because he was convicted of only one offense involving a crime against a person within a five-year period. MCL 777.43(1)(c) directs that 25 points should be scored if “[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person.” MCL 777.43(2)(a) provides that “all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.” In *People v Francisco*, 474 Mich 82, 86; 711 NW2d 44 (2006), our Supreme Court clarified that “only those crimes committed during a five-year period that encompasses the sentencing offense can be considered.” Further, conduct scored under OV 11 should not be scored again under OV 13. MCL 777.43(2)(c).

The record supports the trial court’s scoring of 25 points under OV 13. MR testified that defendant sexually assaulted her in the same manner “more than once.” Thus, not counting the conduct that was scored under OV 11, there was at least one other incident involving sexual

penetration committed by defendant against MR. The record also shows that defendant assaulted MR's ten-year-old sister, with whom MR shared a bedroom, and that the assault involved sexual contact. In addition, MR testified that when her sister got out of bed to tell her mother what defendant was doing to MR, defendant blocked the door so that MR's sister could not leave the room. Defendant's actions constituted unlawful imprisonment in violation of MCL 750.349b(1)(c), which provides:

A person commits the crime of unlawful imprisonment if he or she knowingly restrains another person under any of the following circumstances:

* * *

(c) The person was restrained to facilitate the commission of another felony or to facilitate flight after commission of another felony.

It was not necessary for defendant's crimes to result in conviction in order to be counted for the purpose of scoring OV 13. MCL 777.43(2)(a). Moreover, the prosecution presented evidence that all of the offenses occurred between January and May of 2010, when defendant was living with MR's family. As such, they occurred within "a five-year period that encompass[e]d the sentencing offense." *Francisco*, 474 Mich at 86. Further, unlawful imprisonment, first-degree criminal sexual conduct, and second-degree criminal sexual conducts are all crimes against a person. See MCL 777.16q; MCL 777.16y. Accordingly, the record supports the trial court's determination that the sentencing offense was part of a pattern of felonious criminal activity involving three or more crimes against a person. We therefore uphold the trial court's scoring decision. *Endres*, 269 Mich App at 417.

Affirmed.

/s/ Peter D. O'Connell
/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio