

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BOBBY LEE HANSEN,

Defendant-Appellant.

UNPUBLISHED

November 27, 2001

No. 224328

Montcalm Circuit Court

LC No. 99-000110-FC

Before: Whitbeck, P.J., and Neff and Hoekstra, JJ.

PER CURIAM.

Defendant Bobby Lee Hansen appeals as of right his sentence of four and one-half to fifteen years in prison imposed for his second-degree criminal sexual conduct (CSC II) conviction¹ following a jury trial. We decide this appeal without oral argument pursuant to MCR 7.214(E). We vacate the sentence and remand for further proceedings.

I. Basic Facts And Procedural History

Hansen was charged with one count of first-degree criminal sexual conduct² (CSC I) and one count of CSC II. The complainant, Hansen's stepdaughter, testified that on one occasion Hansen penetrated her vagina with his penis, and made her touch his penis with her hand. She also testified that Hansen penetrated her vagina with his penis on other occasions. The jury acquitted Hansen of CSC I, but convicted him of CSC II.

The applicable statutory sentencing guidelines recommended a minimum term of twenty-nine to fifty-seven months in prison. At sentencing, Hansen objected to the fact that the presentence information report (PSIR) included statements by the complainant's sisters and a letter from one of the sisters alleging that he acted in a sexually inappropriate manner toward them. Hansen claimed that these allegations were not true. He also objected to how his offense had been scored under the guidelines. The trial court declined to strike the statements and the letter from the PSIR, or to change the scoring of the offense variables.

¹ MCL 750.520c.

² MCL 750.520b.

II. The PSIR's Accuracy

A. Standard Of Review

We review the trial court's implicit determination that the statements and the letter from the complainant's sister were accurate for an abuse of the trial court's discretion.³

B. Analysis

At sentencing, either party may challenge as inaccurate or irrelevant any information in the PSIR.⁴

The court may order an adjournment to permit the parties to prepare a challenge or a response to a challenge. If the court finds on the record that the challenged information is inaccurate or irrelevant, that finding shall be made a part of the record, the presentence investigation report shall be amended, and the inaccurate or irrelevant information shall be stricken accordingly before the report is transmitted to the department of corrections.^[5]

Hansen argues that the trial court abused its discretion by failing to strike statements made by complainant's sisters and a letter from the PSIR because the statements that he engaged in inappropriate sexual conduct with them were false. Statements by people other than the complainant can be included in the PSIR to provide the sentencing court with necessary information "so that the sentence can be tailored to fit the circumstances of the individual defendant."⁶ Contrary to Hansen's assertion, at sentencing, the trial court determined the limited accuracy of the statements by the complainant's sisters and accorded them no greater weight. This is an accepted method of resolving a challenge to the accuracy of a statement in the PSIR.⁷ Thus, the trial court did not abuse its discretion.⁸

III. Scoring The Offense

A. Standard Of Review

We review for clear error the trial court's determination that a particular factor affecting sentencing exists or does not exist.⁹

³ *People v Harrison*, 119 Mich App 491, 496; 326 NW2d 827 (1982).

⁴ MCL 771.14(6); MCR 6.425(D)(2)(b).

⁵ MCL 771.14(6).

⁶ *People v Kisielewicz*, 156 Mich App 724, 729; 402 NW2d 497 (1986).

⁷ See *People v Brooks*, 169 Mich App 360, 365; 425 NW2d 555 (1988).

⁸ See *People v Pierce*, 158 Mich App 113, 116-117; 404 NW2d 230 (1987).

⁹ See *People v Babcock*, 244 Mich App 64, 75-76; 624 NW2d 479 (2000), quoting *People v Fields*, 448 Mich 58, 77-78; 528 NW2d 176 (1995).

B. Offense Variable 9

Hansen first argues that the trial court erred by scoring offense variable (OV) 9.¹⁰ OV 9 assigns points for the number of victims of an offense. The trial court scored this variable at ten points, counting the complainant's sisters as victims. However, an offense variable should be scored only with respect to the specific transaction that gave rise to the conviction for which sentence is imposed, unless the instructions for that variable specifically direct otherwise.¹¹ Offense variable 9 refers only to the *victim* of the charged offense. The complainant was the only victim; therefore, offense variable 9 should have been scored at zero points. If ten points are subtracted from defendant's overall score, the guidelines place his minimum sentence range between nineteen and thirty-eight months, which is less than Hansen's current minimum sentence of fifty-four months. Accordingly, we vacate the sentence and remand to the trial court for resentencing. If the trial court resentences Hansen to the same or higher minimum prison term, it must determine that a substantial and compelling reason exists for the upward departure, stating its reasoning on the record.¹²

C. Offense Variable 11

Hansen contends that the trial court erroneously scored OV 11 at twenty-five points because the jury acquitted him of CSC I.¹³ OV 11 concerns criminal sexual penetration. CSC I was the only count involving penetration.

Because the prosecution must prove controverted factual assertions underlying the scoring of the sentencing guidelines by a preponderance of the evidence rather than beyond a reasonable doubt, situations may arise wherein although the factfinder declined to find a fact proven beyond a reasonable doubt for purposes of conviction, the same fact may be found by a preponderance of the evidence for purposes of sentencing.¹⁴

In short, the guidelines scoring can take into consideration criminal activity for which the defendant was acquitted.¹⁵ In this respect, the trial court properly relied on the complainant's trial testimony to conclude that Hansen engaged in sexual penetration of complainant. There was no scoring error for this variable.¹⁶

¹⁰ MCL 777.39.

¹¹ See *People v Chesebro*, 206 Mich App 468, 470; 522 NW2d 677 (1994).

¹² MCL 769.34(3); see also *Babcock*, *supra* at 75.

¹³ MCL 777.41.

¹⁴ *People v Ratkov (After Remand)*, 201 Mich App 123, 126; 505 NW2d 886 (1993), remanded 447 Mich 984 (1994).

¹⁵ See *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991).

¹⁶ See *Ratkov*, *supra* at 125.

D. Offense Variable 13

Hansen argues that the trial court erred by assigning him twenty-five points under OV 13 for engaging in a pattern of felonious criminal activity involving three or more crimes against the complainant.¹⁷ Hansen correctly notes that conduct used to score OV 11 cannot be used to score OV 13.¹⁸ However, the trial court did not count the conduct it used to score OV 11 when scoring OV 13. Rather, the trial court relied on the complainant's testimony that Hansen penetrated her fifteen to twenty times during the course of the three-year period that preceded the incidents which resulted in the charges against Hansen. Indeed, OV 13 instructs the trial court to count "all crimes within a 5-year period, including the sentencing offense . . . regardless of whether the offense resulted in a conviction."¹⁹ Thus, the trial court did not err when it scored this variable.

We vacate the sentence and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Janet T. Neff

/s/ Joel P. Hoekstra

¹⁷ MCL 777.43.

¹⁸ MCL 777.43(2)(c).

¹⁹ MCL 777.43(2)(a).