

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN DAVID THROOP,

Defendant-Appellant.

UNPUBLISHED

November 25, 2003

No. 241662

Calhoun Circuit Court

LC No. 01-000323-FC

Before: Cooper, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendant pleaded no contest to a charge of second degree criminal sexual conduct involving a person under 13 years of age, MCL 750.520c(1)(a). He was sentenced to a term of 57 to 180 months in prison. This Court denied defendant's application for leave to appeal. See Docket No. 237151. However, the Supreme Court remanded this case to this Court for consideration as if on leave granted. We vacate defendant's sentence and remand for resentencing. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant challenges the scoring of Offense Variables (OV) 3, 8, 9 and 13. He preserved the issue only with respect to OV 3 and OV 8. In *People v Kimble*, 252 Mich App 269, 275-276; 651 NW2d 798 (2002), lv gtd 468 Mich 870 (2003), this Court held that an unpreserved challenge to scoring could be reviewed if it involved a plain error affecting the defendant's substantial rights. A sentencing error that resulted in an additional five years to the defendant's sentence was found to constitute such a plain error. *Id.* at 278-279. We will uphold a trial court's scoring of a guidelines variable on appeal if there is any supporting evidence. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

The trial scored ten points under OV 3 for "[b]odily injury requiring medical treatment." MCL 777.33(1)(d). The presentence investigation report indicates that following the instance of sexual molestation for which the defendant was charged, the victim was taken to an emergency room where it was determined that she had "suffered no apparent injuries." She never received medical treatment and there was no evidence of penetration. On these facts, we find no support for the trial court's apparent conclusion that a sexual touching will always constitute a bodily injury. In this case, there was no evidence on the record to adequately support the particular score. *Hornsby*, *supra* at 468.

To the extent defendant claims the trial court erroneously scored fifteen points under OV 8 for asportation of the victim, we disagree. Although the victim was in her own home and there was no evidence of a struggle, an asportation can be accomplished without using force against the victim. *People v Spanke*, 254 Mich App 642, 646-647; 658 NW2d 504 (2003). The evidence supported this particular score because defendant moved the victim to a bedroom within the home where they could not be observed. See *id.* at 648.

We further find no error in the trial court's score of twenty-five points for OV 13. Defendant asserts that only the particular offense may be scored under OV 13. But pursuant to MCL 777.43(2)(a), "all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." Because the trial court was directed to look at offenses besides the one resulting in a conviction, there was no error.

If OV 3 had been properly scored at zero points, defendant would have received an offense variable score of seventy. This would have put him in Offense Variable Level V, and his sentencing range would have been reduced from 29 to 57 months to 19 to 38 months. See MCL 777.64. Even assuming, without deciding, that defendant was improperly scored ten points under OV 9, he would still be within Offense Variable Level V. Accordingly, we decline to address this unpreserved scoring issue as defendant cannot establish plain error affecting his substantial rights. See *Kimble, supra* at 278-279.

Because defendant was sentenced to a minimum of 57 months, he is entitled to resentencing. See MCL 769.34(2); *People v Babcock*, 469 Mich 247, 272-273; 666 NW2d 231 (2003).

The judgment of sentence is vacated and the case is remanded for resentencing. We do not retain jurisdiction.

//s/ Jessica R. Cooper

/s/ Jane E. Markey

/s/ Patrick M. Meter