STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDUARDO RAMIREZ CERVANTES,

Defendant-Appellant.

UNPUBLISHED
February 19, 2008

No. 273301
Gratiot Circuit Court
LC No. 06-005171-FC

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

PER CURIAM.

Defendant was convicted of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(b), and second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(b). On September 5, 2006, he was sentenced to concurrent prison terms of 7 to 15 years for each conviction. Defendant appeals as of right, raising only sentencing issues. We affirm defendant's sentences.

Defendant first argues that he is entitled to resentencing because the trial court erred when it scored ten points for offense variable (OV) 4 and ten points for OV 10. Since defendant challenged the scoring of OV 10 in his motion for resentencing, we review his challenge to the scoring of OV 10 for an abuse of discretion, *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004); *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003), upholding the scoring decision if there is any evidence to support it, *People v Cox*, 268 Mich App 440, 454; 709 NW2d 152 (2005). Although defendant also challenged the scoring of OV 4 in his motion for resentencing, we conclude that defendant waived any challenge to OV 4 when, at the hearing on defendant's motion for resentencing, defense counsel agreed that she had "abandoned" her argument regarding the scoring of OV 4 based on a report from a clinician indicating that the victim had suffered psychological injury.[1] See *People v Carter*, 462 Mich 206, 215; 612 NW2d

[1] In any event, we would uphold the scoring of OV 4 on its merits. Evidence that the victim suffered the traumatic experience of being sexually penetrated and otherwise molested by her stepfather, that she went to counseling as a result, and that she expressed that defendant's sexual molestation of her "put [her] through a lot of stress and pain mentally," was clearly sufficient to support a finding that she suffered serious psychological injury requiring professional treatment. MCL 777.34; *Cox, supra* at 454.

144 (2000) (defining waiver as "the intentional relinquishment or abandonment of a known right").

Ten points should be scored for OV 10 where the defendant exploited a victim's youth, "a domestic relationship," or the defendant's "authority status." MCL 777.40(1)(b). In this regard, "exploit" means "to manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(b). However, the mere existence of one of the relevant factors, i.e., a victim's youth, a domestic relationship, or authority status, does not automatically equate with victim vulnerability. MCL 777.40(2). Here, however, there was evidence of all three factors.

According to the victim's trial testimony, defendant penetrated her vagina with his finger while she was sleeping. In our view, one could reasonably infer that defendant most likely knew that the victim was or would be awakened by his conduct, which is further supported by the victim's testimony that she "jolted" when defendant penetrated her vagina. From this, it is reasonable to conclude that defendant exploited the victim's young age, his domestic relationship with her as residents of the same household, and his authority status over her as her stepfather, to commit the sexual penetration in reliance on her intimidation, fear, or deference to him which would prevent her from resisting or reporting the penetration. Accordingly, there is ample evidence in the record to support the trial court's scoring decision. Therefore, the trial court did not abuse its discretion when it scored ten points under OV 10. *Cox, supra* at 454.

Defendant next argues that the scoring of OV 4, OV 10 and OV 13 were improperly based on facts not proven to the jury beyond a reasonable doubt, in violation of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).[2] Our Supreme Court has definitively ruled that the limitation imposed on factual findings by *Blakely* applies only to determinate sentencing schemes, and thus does not affect the indeterminate sentencing scheme embodied in the Michigan sentencing guidelines. *People v McCuller*, 479 Mich 672, 676-681; 739 NW2d 563 (2007).

Defendant's final argument on appeal is that he is entitled to resentencing on his CSC II conviction because the trial court erred when it both failed to score sentencing guidelines for that offense, resulting in a minimum sentence outside the appropriate sentencing guidelines range, and imposed a sentence that violated the principles of proportionality. Whether the trial court was required to score the sentencing guidelines for defendant's CSC II conviction where it scored the guidelines for his CSC I conviction, and the sentences for the two crimes are concurrent, is a question of law which we review de novo. *McCuller, supra* at 681.

As previously noted, the trial court sentenced defendant to concurrent sentences for his CSC I conviction, a class A felony, and his CSC II conviction, a class C felony. MCL 777.16y. The trial court was therefore only required to score the sentencing guidelines for defendant's CSC I conviction (his highest crime class felony conviction). MCL 777.21(2); MCL

[2] In *Blakely* the United States Supreme Court struck down, as violative of the Sixth Amendment, a determinate sentencing scheme in which the sentencing judge was allowed to increase the defendant's sentence on the basis of facts that were not reflected in the jury's verdict or admitted by the defendant. *Blakely, supra* at 296.

777.14(2)(e); *People v Mack*, 265 Mich App 122, 127-129; 695 NW2d 342 (2005).[3] Accordingly, the trial court did not err when it failed to score sentencing guidelines for defendant's CSC II conviction. And as noted in *Mack*, whether defendant's CSC II sentence is proportional is not at issue because it did not exceed the concurrent sentence imposed for defendant's CSC I conviction. *Mack, supra* at 126-129.

Affirmed.

/s/ Jane E. Markey
/s/ Patrick M. Meter
/s/ Christopher M. Murray

[3] Defendant argues that *Mack* was wrongly decided, citing *People v Johnigan*, 265 Mich App 463; 696 NW2d 724 (2005). Although the lead opinion in *Johnigan* questioned the holding in *Mack*, that view was not adopted by a majority of the panel. See *Johnigan, supra* at 478-479 (opinion by SCHUETTE, J.) and 479-482 (opinion by O'CONNELL, J.). *Mack* is therefore binding. Additionally, *Johnigan's* lead opinion acknowledged that the result reached in *Mack* would be correct if the Legislature were to have referenced section 14 of chapter XI (MCL 771.14) instead of section 14 of chapter IX (MCL 769.14) in MCL 777.21(2). *Johnigan, supra* at 470-471. Since the decisions in *Mack* and *Johnigan*, the Legislature has amended MCL 777.21(2), effective January 9, 2007, to do just that. The newly amended statute now provides, "[I]f the defendant was convicted of multiple offenses, subject to section 14 of chapter XI [MCL 771.14], score each offense as provided in this part."