

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT ALAN McREYNOLDS,

Defendant-Appellant.

UNPUBLISHED

June 30, 2009

No. 282582

Lenawee Circuit Court

LC No. 07-013270

Before: Markey, P.J., and Fitzgerald and Gleicher, JJ.

PER CURIAM.

Defendant pleaded nolo contendere to third-degree criminal sexual conduct, MCL 750.520d(1)(b), and the trial court sentenced him to a prison term of 60 to 180 months. Defendant appeals by leave granted, challenging the scoring of 50 points for offense variable (OV) 7, MCL 777.37. We vacate defendant's sentence and remand for resentencing.

I

Defendant's plea arises from the molestation of a six-year old boy, A. According to the presentence investigation report, the boy was in his backyard by the side of his garage that bordered defendant's property line. The boyfriend of the boy's mother reported that he "lost track" of the boy for a few minutes while he was cooking. He went outside and found him by the side of the garage. The boy's brother stated that "A had it in his mouth." The brother kept saying, "Robert did it." Upon further questioning, the boys indicated that defendant touched A through the fence. A told his mother that "McReynolds touched his penis and he touched McReynold's penis."

The probation department recommended scoring OV 7 at zero points. The trial court disagreed with that position and explained the basis for scoring OV 7 as follows:

The court believes it is appropriate to score that and there are 50 points scored for that. It states that 50 points should be scored where the victim is treated with sadism, torture, or excessive brutality. The definition under sadism is conduct that subjects the victim to extreme humiliation for the offender's gratification. That's how the court reads those portions of that definition.

It's clear to this court that the victim in this case was subjected to extreme humiliation and will produce suffering for a long time for that individual. The purpose of that was for the offender's own gratification.

Defendant objected, stating:

OV-7, I believe, is for to give an example: For example when a rape victim is beaten and then raped and beaten again. It is offensive conduct that is not necessary to the offense[,] conduct that is not necessary to accomplish the offense but extra conduct that is meant to inflict extreme or prolonged pain or humiliation on the victim.

. . . But we believe the case law is that OV-7 should be restricted to only offense conduct at the time that the offense is committed. That being said we again strenuously object to the scoring of 50 points for aggravated physical abuse.

The change in the scoring increased defendant's total offense variable score from 45 to 95 points, thereby placing him in offense variable level VI instead of IV, and increasing the guidelines range from 21 to 35 months to 36 to 60 months.

II

At issue in this case is the interpretation of the statutory definition of "sadism." "The proper interpretation and application of the legislative sentencing guidelines are questions of law that this Court reviews de novo." *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008). "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). This Court reviews for clear error a court's findings of fact at sentencing. *Id.* A reviewing court will uphold a scoring decision for which there is any evidence in support. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Fifty points should be scored for OV-7 if a victim was "treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). Sadism is defined as "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.37(3).

Defendant maintains that "sadism" as used in the statute denotes conduct that exceeds that inherent in the commission of the charged offense. Support for defendant's argument is found by examining "sadism" in the context of the other grounds for scoring this variable. *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 114; 754 NW2d 259 (2008) (the statutory context of a term is used to ascertain the legislature's intended meaning).

In MCL 777.37(1)(a), "sadism" is grouped with "torture," "excessive brutality," and "conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." The inclusion of the adjective "excessive" in "excessive brutality" is noteworthy. "Excessive" means going beyond the usual, necessary, or proper limit or degree; characterized by excess." *Random House Webster's College Dictionary* (1997). Thus, "excessive brutality"

implies that there may be brutality in the commission of a crime, but the variable is scored for brutality that is “beyond the usual” occurring in the commission of the crime. Similarly, in the phrase, “conduct designed to substantially increase the fear and anxiety a victim suffered during the offense,” the inclusion of the words “substantially increase” is noteworthy. The phrasing implicitly recognizes that there is a baseline level of fear and anxiety a victim suffers during an offense, and the scoring of the variable is appropriate for conduct that is designed to substantially increase that level. This phrasing also suggests that the Legislature intended the scoring to be based on conduct beyond that necessary to commit the offense. The context of the term “sadism” with other terms that contemplate conduct beyond that necessary to commit the offense suggests that the conduct that forms the basis of sadism is conduct that is in addition to that necessary to commit the offense. Thus, “sadism” denotes conduct that exceeds that which is inherent in the commission of the offense.

Here, there is no evidence to support a finding that defendant engaged in any conduct beyond that inherent in the commission of the offense. Inherent in the offense of third-degree CSC under MCL 750.520d(1)(b) is “sexual penetration with another person” with “force or coercion . . . used to accomplish the sexual penetration.” No evidence of force was presented in this case. Thus, by definition of the offense, and applying the facts as provided, defendant coerced A to engage in sexual penetration. The entire course of conduct, according to the testimony of the mother’s boyfriend, took place in the span of “a few minutes.” No evidence was presented that defendant engaged in conduct beyond that necessary to commit the offense.¹ No evidence was presented to support the trial court’s finding that the victim suffered “extreme humiliation” beyond that which will result from any act of CSC, especially an act of CSC against a minor. The evidence does not adequately support the trial court’s scoring of 50 points for OV 7. Because the scoring error affects the appropriate guidelines range, defendant is entitled to resentencing. *People v Francisco*, 474 Mich 82, 92; 711 NW2d 44 (2006).

¹ While there are no published cases addressing the scoring of OV 7 within the context of MCL 750.520d(1)(b), with specific regard to sadism, the unpublished decisions of this Court on this issue illustrate the type of conduct beyond that inherent in the offense that will support a score of 50 points for OV 7. See, e.g., *People v Buchanan*, unpublished opinion per curiam of the Court of Appeals, issued April 27, 2006 (Docket No. 258575) (“according to the complainant’s testimony, she was screaming in pain from defendant’s repeated and forceful slapping of her buttocks, ramming his fingers into her vagina, and pulling at her hair. She testified that the pain from this was severe enough to cause her to vomit.”); *People v Washington*, unpublished opinion per curiam of the Court of Appeals, issued October 20, 2005 (Docket No. 256061) (this Court held that defendant’s conduct of threatening the victim with physical force when she refused to remove her pants and underwear, while the victim cried and was very scared, and his conduct of calling her a “bitch” and telling her that she was not going to make it home that night and threatening to kill her and her mother if she told anyone what had happened, was contemporaneous with the alleged assaults and was designed to increase the fear and anxiety she was suffering from the assaults); *People v Stevenson*, unpublished opinion per curiam of the Court of Appeals, issued April 14, 2005 (Docket No. 253752) (the assaults took place over a prolonged period of time, and defendant persisted despite the victim’s requests to stop; defendant told the victim that he would hit her with a vase, knock her out, lock her in the basement and duct tape her to a chair, and kill her if she did not become pregnant as a result of the assault).

The trial court's decision to reject the probation department's recommendation of zero points for OV 7 and to score 50 points appears to have been based on the testimony of the victim's mother that, as a result of the offense, the victim no longer felt safe, that he had become defiant, and that he was engaged in weekly counseling. However, these facts are properly taken into account in scoring OV 4, "Psychological Injury to the Victim." Defendant received a score of 10 points for OV 4 for "serious psychological injury requiring professional treatment."

Defendant's conviction is affirmed, but vacate his sentence and remand for resentencing. Jurisdiction is not retained.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Elizabeth L. Gleicher