

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MATTHEW THOMAS COOK,

Defendant-Appellant.

UNPUBLISHED

December 10, 2009

No. 287411

Kent Circuit Court

LC No. 07-002979-FH

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

PER CURIAM.

Defendant pleaded guilty to solicitation to commit first-degree criminal sexual conduct, MCL 750.157b(3)(a) and MCL 750.520b(1)(a), and attempting to procure an act of gross indecency between a male and a female, MCL 750.338b. He was sentenced as a sexually delinquent person, MCL 750.10a, to a prison term of seven years to life for the gross indecency conviction, and as a second habitual offender, MCL 769.10, to a concurrent prison term of three to five years for the solicitation conviction. This Court originally denied defendant's delayed application for leave to appeal, but our Supreme Court, in lieu of granting leave to appeal, subsequently remanded the case to this Court "for consideration, as on leave granted, of whether twenty-five points were properly assessed for OV 13 (MCL 777.43), and whether the trial court satisfied the provisions of MCL 767.61a when, without objection by the defendant, it reviewed documents but did not call witnesses in determining that the defendant was a sexually delinquent person." *People v Cook*, 483 Mich 1023; 765 NW2d 342 (2009). We affirm the trial court's determination of defendant's status as a sexually delinquent person, but vacate his sentences and remand for resentencing.

I. Facts

As a factual basis for his plea, defendant stated that he asked a prostitute to bring him a child between ten and twelve years of age for the purpose of mutually engaging in oral sex. Defendant clarified that the prostitute's role "was to find the child and hold her for me."

II. Sexual Delinquency Determination

The gross indecency statute prescribes a maximum sentence of five years' imprisonment, or, alternatively, "if such person was at the time of the said offense a sexually delinquent

person,” a term of imprisonment “the minimum of which shall be 1 day and the maximum of which shall be life.” MCL 750.338b.

MCL 750.10a defines “sexually delinquent person” as

any person whose sexual behavior is characterized by repetitive or compulsive acts which indicate a disregard of consequences or the recognized rights of others, or by the use of force upon another person in attempting sex relations of either a heterosexual or homosexual nature, or by the commission of sexual aggressions against children under the age of 16.

MCL 767.61a provides that in prosecutions exposing the defendant to an indeterminate sentence of one day to life as a sexually delinquent person,

the indictment shall charge the offense and may also charge that the defendant was, at the time said offense was committed, a sexually delinquent person. In every such prosecution the people may produce expert testimony and the court shall provide expert testimony for any indigent accused at his request. *In the event the accused shall plead guilty to both charges in such indictment, the court in addition to the investigation provided for in section 35 of chapter 8 of this act, and before sentencing the accused, shall conduct an examination of witnesses relative to the sexual delinquency of such person and may call on psychiatric and expert testimony.* All testimony taken at such examination shall be taken in open court and a typewritten transcript or copy thereof, certified by the court reporter taking the same, shall be placed in the file of the case in the office of the county clerk. Upon a verdict of guilty to the first charge or to both charges or upon a plea of guilty to the first charge or to both charges the court may impose any punishment provided by law for such offense. [Footnote omitted; emphasis added.]

In this case, after placing defendant under oath, the trial court advised defendant at the plea proceeding that he was alleged to be a sexually delinquent person, and asked defendant if he understood all the allegations against him, and defendant answered in the affirmative. Defendant then pleaded guilty to the crimes charged, including to being a sexually delinquent person. After establishing the factual basis for the underlying offenses, the court stated that the sexually delinquent person statute “specifies the taking of evidence to decide whether someone is sexually delinquent.” The court acknowledged defendant’s earlier conviction of possession of child sexually abusive material, read a letter defendant had written, and considered defendant’s testimony that was used to establish the factual basis for the plea. Citing the statutory definition of “sexually delinquent person,” the court stated:

[T]he use of force upon another person in attempting sexual relations applies, as does the commission of sexual aggressions against children under the age of 16.

Here, we don’t have any actual aggression of a child of that age, just a desire for it. . . . I guess we don’t have any actual force, because we never did have any acts here. But, we have an admission of a plan to engage in both of the

latter kinds of activities. And, a letter here which lays out in great detail a desire to do that. Not only a desire to do it, but it becomes very apparent from reading this letter that the desire to do it is repetitive. He's proposing to do lots of things here, and clearly shows a sexual compulsion well beyond that involved in the act, itself.

The law says I have to take evidence, but it doesn't say of what kind. I haven't heard any objection from anybody to the use of this evidence. So, I'm prepared to conclude that the definition in section 10a of the Penal Code has been proven in a way required by section 61a of the Code of Criminal Procedure.

* * *

I also think, frankly, solid evidence of what constitutes the kind of compulsion we're talking about here as the earlier conviction for utilizing a computer to take advantage of child sexually abusive material. That that act, in and of itself and the use of that kind of material, supports findings that would satisfy section 10a.

A trial court's general conduct of trial is reviewed for an abuse of discretion. See *People v Romano*, 181 Mich App 204, 220; 448 NW2d 795 (1989); *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988). Statutory interpretation presents a question of law, calling for de novo review. *People v Denio*, 454 Mich 691, 698; 564 NW2d 13 (1997). At the plea proceeding, defense counsel answered affirmatively when the trial court asked if it had satisfied the procedural requirements for making the sexual delinquency determination, thus leaving this issue unpreserved. Unpreserved issues are reviewed for plain error affecting substantial rights. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

In *People v Helzer*, 404 Mich 410, 418-419; 273 NW2d 44 (1978), our Supreme Court addressed the procedure under MCL 767.61a for determining a defendant's status as a sexually delinquent person in conjunction with a conviction of gross indecency, stating:

It is . . . clear that proof of the sexual delinquency charge may involve more than simple ministerial considerations. Very broad substantive factors come into play when the court or jury decide this question. MCL 767.61a provides for a separate hearing and record, involving psychiatric and expert testimony on the question. Even where defendant pleads guilty, the court is ordered to separately investigate the charge of sexual delinquency. [Footnotes and citation omitted.]

The Court also stated that although MCL 767.61a does not expressly call for it, "we find a separate hearing and record directed by clear implication," and that "the alternate nature of the sentence requires a hearing and record before a *separate* jury in cases where defendant does not waive jury trial," expressing the concern that the jury that decided the underlying charge might tend automatically to also find sexual delinquency. *Id.* at 419 n 13, 422-423 (emphasis in the original). Although the instant case arises from a guilty plea, the Supreme Court's insistence that, in a case involving a jury trial, the delinquency question must be decided in a wholly separate proceeding before a new jury underscores the importance of deciding the delinquency question as something apart from the indecency question.

Here, the trial court conducted a hearing on whether defendant was a sexually delinquent person, specifically noting its obligation to take evidence on the issue. As noted, the trial court did take evidence on this issue, and there was no request by either party for the submission of additional evidence. The record and findings were transcribed and placed in the record. Thus, the statute was satisfied.

However, even if it were not, a reviewing court should not reverse over an unpreserved error unless defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines, supra* at 763. The error in this case does not meet this standard. Defendant protests that there were no witnesses, but defendant himself was placed under oath, and he confirmed that he was a sexually delinquent person.¹ The court also took into account an earlier conviction involving child sexually abusive material, and a letter in which defendant admitted having the desire to engage in sex with underage persons. In light of the guilty plea and lack of objections, this evidentiary record is more than sufficient to establish defendant's status as a sexually delinquent person.

III. Scoring of Offense Variable 13

"This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). However, to the extent that a scoring issue calls for statutory interpretation, review is de novo. *Id.*

"This Court will uphold the trial court's scoring of the guidelines if there is evidence to support it." *People v Phillips*, 251 Mich App 100, 108; 649 NW2d 407 (2002), *aff'd* 469 Mich 390 (2003). Factual findings for sentencing purposes require a mere preponderance of the evidence. See *People v Ewing (After Remand)*, 435 Mich 443, 472-473; 458 NW2d 880 (1990) (Boyle, J., joined by Riley, C.J., and Griffin, J.). Information relied upon may come from various sources, including some that would not be admissible at trial, such as a presentence investigation report ("PSIR"). *People v Potrafka*, 140 Mich App 749, 751-752; 366 NW2d 35 (1985). See also MRE 1101(b)(3) (the rules of evidence do not apply to sentencing proceedings).

But a criminal defendant has a due process right to be sentenced on the basis of accurate information. *People v Hoyt*, 185 Mich App 531, 533; 462 NW2d 793 (1990), citing US Const, Am XIV and Const 1963, art 1, § 17. Accordingly, where the guidelines range is adjusted to account for a scoring error, but the original minimum sentence remains within the corrected

¹ Furthermore, defendant's brief on appeal includes no assertion, let alone an offer of proof, that he was not aware of all his rights when tendering his plea, or that he would have called witnesses, or otherwise opposed the sexual delinquency charge, had he been afforded additional opportunities to do so.

range, resentencing is required because such a “misapprehension of the guidelines range” constitutes a sentencing decision “in reliance upon inaccurate information.” *People v Francisco*, 474 Mich 82, 88, 89 n 7; 711 NW2d 44 (2006); MCL 769.34(10).

OV 13 concerns continuing patterns of criminal behavior. MCL 777.43(1). The trial court scored OV 13 at 25 points, which is prescribed where the offense in question “was part of a pattern of felonious criminal activity involving 3 or more crimes against a person.” MCL 777.43(1)(b). In scoring that variable, a court may take into account the sentencing offense along with other convictions stemming from the defendant’s course of conduct. *People v Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001). Defendant concedes that his earlier conviction of possession of child sexually abusive material qualifies as a felony against a person for purposes of scoring OV 13, but argues that this is the only such felony against a person in his record. Defendant is correct, as soliciting to commit first-degree criminal sexual conduct is classified as a crime against public order, not one against a person. MCL 777.16h. The same is true for gross indecency on the part of a sexually delinquent person. MCL 777.16q. Thus, neither of the instant convictions qualifies as one against a person for purposes of scoring OV 13.

At sentencing, the trial court spoke of having on hand the parent of a child who might have served as a bad-acts witness, who in turn complained of defendant’s “gross and disgusting” behavior in connection with her ten-year old daughter. Indeed, plaintiff had filed a notice of intent to use other acts evidence, which referred to prior sexual acts with a child. However, the record does not indicate precisely what form that behavior, or attendant sexual activity, took, and thus does not indicate whether it constituted a felony against a person for purposes of scoring OV 13.

The PSIR notes that defendant pleaded guilty as part of a plea agreement in which a separate charge of second-degree criminal sexual conduct was dismissed. But there is no indication that the trial court considered that charge, or found that factual support for the charge was established by a preponderance of the evidence, so it would be premature for us to decide if that matter constitutes a sufficient basis for finding a felony against a person for purposes of scoring OV 13. In any event, even if that matter could be considered, the current record still does not support a finding that defendant committed three or more crimes against a person for purposes of assessing 25 points for OV 13.

Accordingly, because the current record does not support a 25-point score for OV 13, and because a 25-point reduction in defendant’s total OV score affects the appropriate guidelines range, we vacate defendant’s sentences and remand for resentencing.²

² We do not foreclose the possibility that, on remand, the trial court might discover and articulate proper bases for counting uncharged felonies in connection with the potential bad-acts witness, or the dismissed second-degree criminal sexual conduct charge, thereby establishing an adequate basis to score 25 points for OV 13.

Affirmed in part, vacated in part, and remanded for resentencing. We do not retain jurisdiction.

/s/ Jane E. Markey

/s/ Richard A. Bandstra

/s/ Christopher M. Murray