

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NEIL PATRICK BENNETT,

Defendant-Appellant.

UNPUBLISHED

December 22, 2009

No. 287180

Oakland Circuit Court

LC No. 2006-206697-FH

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

PER CURIAM.

A jury convicted defendant of two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(b). The trial court sentenced defendant as an habitual offender, second offense, MCL 769.10, to concurrent prison terms of 13½ to 22½ years for each conviction. Following a remand for resentencing from this Court, the trial court imposed the same sentence after reevaluating the court's scoring decision concerning offense variable (OV) 10 (exploitation of victim vulnerability). Defendant again appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant was convicted of engaging in separate acts of digital and penile penetration with his former girlfriend's daughter between June 1996 and June 2001. At trial, the prosecutor presented evidence that defendant's sexual conduct continued after he moved out of the home that defendant shared with the victim and his former girlfriend, including one instance of penile penetration that allegedly occurred when the victim was 13 years old and visiting with defendant at his mother's home. During the initial sentencing, the trial court scored OV 10 at 15 points for defendant's predatory conduct. See MCL 777.40(1)(a). On appeal, defendant challenged this scoring on the ground that the trial court inappropriately relied solely on an uncharged act, which occurred after defendant moved out of the victim's home. This Court agreed and remanded for resentencing, without prejudice to the trial court considering whether preoffense conduct supports a score of 15 points for OV 10. *People v Bennett*, unpublished per curiam opinion of the Court of Appeals, issued April 8, 2008 (Docket No. 274390).

On remand, the prosecutor argued that the scoring was appropriate given defendant's overall long-term conduct in "grooming" the victim through his relationship with the victim's mother and his attempts to manipulate the victim into situations where she was alone with defendant. The prosecutor also argued that scoring was appropriate given defendant's actions prior to the digital penetration where he waited until the victim's mother had gone out and left

him in charge of the victim before entering the victim's room and molesting her. The trial court agreed.

In general, “[a] sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score.” *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). We review questions of law involving the interpretation of the sentencing guidelines de novo. *Id.*

Under OV 10, 15 points are scored if predatory conduct was involved. MCL 777.40(1)(a). The statute defines “predatory conduct” as “preoffense conduct directed at a victim for the primary purpose of victimization.” MCL 777.40(3)(a). The timing and location of a sexual assault may constitute evidence that a defendant engaged in preoffense predatory conduct. *People v Witherspoon*, 257 Mich App 329, 336; 670 NW2d 434 (2003). In *Witherspoon*, this Court found scoring OV 10 at fifteen points was appropriate where the nine-year-old victim testified that her mother's boyfriend approached her while she was folding clothes in the basement and molested her when the two were alone in the home. The Court held:

We conclude that the *timing* of the assault (when no other persons were present) and its *location* (in the isolation and seclusion of the basement) are evidence of preoffense predatory conduct. . . . [I]t may be inferred from the evidence that defendant *watched* his victim and *waited* for any opportunity to be alone with her in an isolated location. [*Id.* at 336 (citation omitted) (emphasis in original).]

Here, the victim testified that at some point in 2000, her mother was at a meeting and defendant was watching her. Defendant had locked the doors to the home. The victim told defendant to come and see the fort she was making with her sheets on the bed in her bedroom. Defendant entered the room, got under the covers, lay over the victim, undid her pants, and digitally penetrated her. Defendant stopped after the victim's mother arrived home and began knocking on the outside door of the home to gain entrance. The victim stated that she did not immediately report the abuse because she knew her mother loved defendant, and because she was scared of defendant. The victim's testimony about defendant's actions here, like those in *Witherspoon*, supported the trial court's scoring decision. As in *Witherspoon*, defendant committed one of the charged acts of penetration under circumstances that inferred that defendant manipulated both his relationship with the victim and the circumstances of the encounter in order to be alone with her in an isolated location.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder