

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RALPH HENRY MILLER, JR.,

Defendant-Appellant.

UNPUBLISHED

November 16, 2010

No. 293843

Clinton Circuit Court

LC No. 09-008407-FH

Before: MURPHY, C.J., and METER and SHAPIRO, JJ.

PER CURIAM.

Defendant was convicted by a jury of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(d) (victim related to the offender), and was sentenced as a third-offense habitual offender, MCL 769.11, to nine to thirty years' imprisonment. He appeals as of right, and we affirm.

On appeal, defendant challenges the scoring of Offense Variable (OV) 4 and OV 11 of the sentencing guidelines. Because the minimum sentence of nine years was within the appropriate guidelines range, defendant was required to preserve the alleged scoring errors by raising the issues at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in this Court. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004); see also MCR 6.429(C). Defendant did not raise the issues at sentencing or in a motion for resentencing. Moreover, because defendant's motion to remand was untimely, it was not proper for purposes of preserving the alleged scoring errors. See, generally, *People v Walker*, 428 Mich 261, 266; 407 NW2d 367 (1987), abrogated in part on other grounds by *People v Mitchell*, 454 Mich 145, 176; 560 NW2d 600 (1997).

Because his sentencing issues are not preserved, defendant, to obtain relief, must show plain, i.e., clear or obvious, error that affected his substantial rights, i.e., that affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant must also show that the error resulted in the conviction of an innocent person or seriously affected the fairness, integrity or public reputation of judicial proceedings. *Id.* at 763-764. An error in scoring an OV that results in an increased sentence for the defendant amounts to a plain error affecting substantial rights. *People v Brown*, 265 Mich App 60, 66-67; 692 NW2d 717 (2005), rev'd on other grounds 474 Mich 876; 704 NW2d 462 (2005). Scoring decisions will be upheld if there is any evidence to support them. *People v Elliot*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

OV 11

There was a sufficient evidentiary basis to support the trial court's finding that "one criminal sexual penetration occurred" beyond the penetration that formed the basis of the CSC III charge. See MCL 777.41(1)(b). The victim testified that, before there was any penile-vaginal contact,

I was sitting on the couch and he was sitting on the chair, and he came in front of me and he started to pull down my pants, and I told him no, that I didn't want to do this, and he said "No, it's fine. It's fine," and I said no, it's not, and then he pulled off my pants and started to perform oral sex on me

"An act of cunnilingus, by definition, involves an act of sexual penetration." *People v Legg*, 197 Mich App 131, 132; 494 NW2d 797 (1992). As such, we conclude that there was no clear or obvious error in the scoring of OV 11 at 25 points. MCL 777.41.

OV 4

Defendant contends that OV 4 was erroneously scored at 10 points. Ten points must be assessed for OV 4 if "[s]erious psychological injury requiring professional treatment occurred to a victim[.]" MCL 777.34(1)(a). MCL 777.34(2) states that 10 points should be assessed "if the serious psychological injury *may* require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive" (emphasis added).

We are not persuaded by defendant's contention that there was no evidence of serious psychological injury to the victim requiring professional treatment. In *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004), a CSC III case, we held that the trial court correctly scored OV 4 at 10 points because "the victim testified that she was fearful during the encounter with defendant." See also *People v Wilkens*, 267 Mich App 728, 741; 705 NW2d 728 (2005) (an OV 4 score of 10 points was held to be appropriate in this CSC I case where "evidence indicate[d] that defendant's actions caused the female victim anxiety, altered her demeanor, and caused her to withdraw").

There was evidence that the victim was fearful during the sexual encounter with defendant, *Apgar*, 264 Mich App at 329, and that defendant's actions caused her anxiety, *Wilkens*, 267 Mich App at 741. The victim stated that she was concerned about staying at defendant's home on the night in question because of prior incidents of inappropriate touching. She testified that she was scared to tell anyone about those prior incidents. The victim testified that, when the instant sexual encounter began, "I told him no, that I didn't want to do this, and he said, 'No, it's fine. It's fine,' and I said no, it's not" The morning after the encounter, defendant "told [the victim] not to tell anyone . . . , if I told anybody, there would be consequences, and that's why I didn't tell for a very long time." The victim told her grandmother about the incident four months later because she "couldn't hold it inside any more [sic]." She stated that she was "scared" about telling her grandmother.

In light of the testimony, we find no clear or obvious error with respect to the scoring of OV 4. Nevertheless, even if we were to conclude that OV 4 was incorrectly scored, resentencing

would not be required because the sentencing guidelines range would not be affected. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

Affirmed.

/s/ William B. Murphy

/s/ Patrick M. Meter

/s/ Douglas B. Shapiro