STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM MAURICE BONNER,

Defendant-Appellant.

UNPUBLISHED
June 17, 2021

No. 352623
Wayne Circuit Court
LC No. 19-004000-01-FH

Before: MURRAY, C.J., and FORT HOOD and RICK, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for five counts of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(b)(*ii*) (sexual contact with a victim at least 13 but less than 16 years of age and related by blood or affinity), and one count of being a felon in possession of ammunition (felon-in-possession), MCL 750.224f(4). The trial court sentenced defendant, as a second-offense habitual offender, MCL 769.10, to 5½ to 22½ years' imprisonment for each count of CSC-II and one to five years' imprisonment for felon-in-possession. We affirm defendant's convictions and sentences, but remand for the trial court to determine whether its assessment of OV 4 was proper, and if not, to correct defendant's sentencing information report.

I. FACTUAL BACKGROUND

Defendant's convictions arise out of multiple incidents of alleged sexual contact between defendant and two of his biological daughters, JB and AB. At the time of the offenses, defendant, JB, and AB lived in a home with defendant's third daughter, MB. Defendant's wife at the time also lived in the home with her three daughters from previous relationships, KC, MH, and MC. While executing a search warrant related to the sexual contact allegations, police officers discovered ammunition in defendant's bedroom, despite defendant being prohibited from possessing ammunition due to a previous felony conviction.

II. GREAT WEIGHT AND SUFFICIENCY OF THE EVIDENCE

Defendant contends that his convictions of CSC-II were against the great weight of the evidence because of the degree to which three of the prosecution's witnesses were impeached. He

further argues that his felony-in-possession conviction was against the great weight of the evidence, and that there was insufficient evidence to support the verdict. Defendant argues that there was no evidence as to where the ammunition was found, thus precluding a finding that he possessed the ammunition beyond a reasonable doubt. We disagree.

Generally, a challenge based on the great weight of the evidence would be reviewed "to determine if the evidence preponderates heavily against the verdict and a serious miscarriage of justice would occur if the conviction were allowed to stand." *People v Williams*, 294 Mich App 461, 471; 811 NW2d 88 (2011) (quotation marks and citation omitted). However, defendant failed to preserve his great-weight challenges by moving for a new trial below. *People v Lopez*, 305 Mich App 686, 695; 854 NW2d 205 (2014). "Unpreserved challenges to the great weight of the evidence are reviewed for plain error affecting the defendant's substantial rights." *Williams*, 294 Mich App at 471. To be entitled to reversal under the plain-error rule,

> (1) error must have occurred, (2) the error was plain, (3) the plain error affected substantial rights, and (4) the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. An error is plain if it is clear or obvious. An error has affected a defendant's substantial rights when there is a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. A defendant bears the burden of persuasion with respect to prejudice. [*People v Walker*, 504 Mich 267, 276; 934 NW2d 727 (2019) (quotation marks and citations omitted).]

With respect to sufficiency of the evidence, no action need be taken to preserve a challenge. When considering whether there was sufficient evidence to support a conviction, the evidence is viewed in the light most favorable to the prosecution to determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010). "Questions regarding the weight of the evidence and credibility of witnesses are for the jury, and this Court must not interfere with that role even when reviewing the sufficiency of the evidence." *People v Carll*, 322 Mich App 690, 696; 915 NW2d 387 (2018). Thus, "conflicts in the evidence are resolved in favor of the prosecution." *Id*. (quotation marks and citation omitted).

A. CSC-II CONVICTIONS

A person is guilty of CSC-II under MCL 750.520c(1)(b)(*ii*) "if the person engages in sexual contact with another person and . . . [t]hat other person is at least 13 but less than 16 years of age and . . . [t]he actor is related by blood or affinity to the fourth degree to the victim." Sexual contact is defined to include intentionally touching the victim's "intimate parts" or the clothing covering the victim's intimate parts "if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification." MCL 750.520a(q). "[T]he primary genital area, groin, inner thigh, buttock, or breast of a human being" are intimate parts. MCL 750.520a(f).

JB and AB both provided direct evidence that supported defendant's convictions for CSC-II. JB, who was 15 years old at the time of defendant's trial, testified about three incidents when defendant, her father, touched her in a manner that made her uncomfortable. On one occasion, defendant carried JB from upstairs, where the other girls in the home were present, to the empty

living room, set JB on his lap, and put his hands on JB's buttock under her underwear. Another time, defendant summoned JB to his bedroom in the basement and rubbed his hands back and forth on JB's breasts while they were lying on defendant's bed. Finally, while driving his vehicle with JB in the front passenger seat and MB in the backseat, defendant put his hand on JB's thigh and either touched JB's vagina or the clothing over JB's vagina with his pinky finger. JB testified that the first and third incident occurred a few months before defendant's trial; thus, she was either 14 or 15 years old at the time. JB testified that she was 14 years old at the time of the second incident.

Momentarily setting aside the issue of impeachment, it is clear that JB's testimony supported the jury's findings of guilt on the three counts of CSC-II for which JB was the named victim. JB was 14 or 15 years old at the time of each of the incidents, she is related to defendant by blood, and defendant made sexual contact with JB's genital area, inner thigh, buttock, and breasts. MCL 750.520c(1)(b)(*ii*); MCL 750.520a(f); MCL 750.520a(q). Moreover, the circumstances surrounding each incident, in particular the fact that defendant ensured he was alone with JB on two of the three occasions, indicate defendant made contact with JB intentionally, and that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification. MCL 750.520a(q).

AB, who was 16 years old at the time of defendant's trial, also testified about several incidents when defendant, her father, made sexual contact with her. On one occasion, when AB was 14 or 15 years old, defendant and AB were cuddling on the couch and defendant put his hands under AB's shirt and cupped her breasts over her bra. Another time, while massaging AB's legs as they laid on defendant's bed, defendant moved his hand under AB's shorts and massaged her vagina.[1] Defendant also once massaged AB's vagina under her shorts while they were sitting on the couch. While AB initially testified that defendant asked her if it felt good during the incident on the couch, she later testified that he asked her this during the incident on defendant's bed. She was clear, however, that he only asked her this once. Finally, on more than one occasion, defendant massaged AB's back, but moved his hands down until they were under her pants and on her buttocks.

Again, setting aside the issue of impeachment, AB's testimony supported the jury's guilty verdicts on the two counts of CSC-II for which AB was the named victim. Each of the incidents described involved defendant making sexual contact with a blood relative under circumstances that could reasonably be construed as being for the purpose of sexual arousal or gratification. MCL 750.520c(1)(a)(*ii*); MCL 750.520a(f); MCL 750.520a(q). Further, AB's testimony explicitly established the first incident occurred when she was 14 or 15 years old. MCL 750.520c(1)(*ii*). And while she did not provide an estimated age for the other incidents, there was enough testimony from which the jury could conclude AB was 13, 14, or 15 years old. Specifically, AB's testimony indicated defendant had been touching her sexually since before she was 11 years old. AB also testified that she did not realize what defendant was doing was inappropriate until she got a boyfriend when she was 14 years old. Taken together, there was ample evidence to support the

[1] It is unclear from AB's testimony whether defendant touched her vagina directly or over her underwear, but this discrepancy makes no substantive difference in light of the definition of sexual contact under MCL 750.520a(q).

conclusion that AB was 13, 14, or 15 years old at the time of each of the other incidents described above occurred. MCL 750.520c(1)(a)(*ii*). Moreover, MB and MH, who were 11 and 16 years old at the time of their testimony, both testified about times when defendant touched them inappropriately and made them feel uncomfortable, lending further support to JB's and AB's testimony.

Nevertheless, as defendant points out, there were reasons the jury could have concluded the prosecution's witnesses were not trustworthy. For example, Children's Protective Services (CPS) had been to the home multiple times over the years to investigate allegations of Hansen physically abusing the children. And, while the children would tell CPS about Hansen's abuse, none ever reported defendant's sexual contact. In fact, none ever reported defendant's sexual contact to anyone, except each other, until JB told her basketball coach and the dean of her school. Moreover, AB and MB both made statements at trial that they failed to report the incidents to the police during their interviews. Specifically, AB did not tell the police that defendant touched her vagina, and MB did not tell the police that defendant touched her thighs. In addition, MB referred to defendant touching her "breasts" at trial, but she did not use that term when the police interviewed her. Further, JB testified that defendant limited her ability to visit Shawley, yet MB and MH testified that JB and MB visited Shawley every weekend.

Despite the above credibility issues, defendant's contention that the girls' testimony was so impeached as to render the jury's verdicts against the great weight of the evidence is unpersuasive. "[A]bsent exceptional circumstances, issues of witness credibility are for the jury." *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). Exceptional circumstances may exist if

> the testimony contradicts indisputable physical facts or laws, . . . testimony is patently incredible or defies physical realities, . . . testimony is material and is so inherently implausible that it could not be believed by a reasonable juror, . . . [or] testimony has been seriously impeached and the case marked by uncertainties and discrepancies. [*Id*. at 643-644 (quotations marks and citations omitted).]

In this case, none of these exceptional circumstances apply.

First, it is not inherently implausible that the girls would tell CPS about the physical abuse Hansen inflicted upon them but fail to report defendant's conduct given the perceived stigma associated with being the victim of sexual offenses and JB's and AB's testimony that Hansen's conduct put them at greater risk of physical harm. *Id*. at 644. Second, the degree to which JB and MB visited Shawley was not particularly important to the prosecution's or defendant's cases. Admittedly, JB's testimony left the impression that defendant was controlling her by limiting her access to Shawley, but that impression was fairly insignificant in light of JB's and AB's direct testimony about defendant's conduct. *Id*. Third, while MB and AB made statements at trial that were absent from the statements they made to the police, their trial testimony was not truly inconsistent from their previous statements; they merely provided more information to the jury than they provided to the police or, in MB's case, used different language. *Id*. Put simply, the inconsistencies defendant points out do not seriously undermine the credibility of the witnesses, let alone present a real concern that defendant is actually innocent or pose the possibility of

manifest injustice to permit the jury's verdicts to stand. *Id*. at 644-645. Therefore, defendant's convictions for CSC-II are not against the great weight of the evidence.

B. FELONY-IN-POSSESSION CONVICTION

A person is guilty of felon in possession of ammunition if he or she possesses ammunition after being convicted of a specified felony but before his or right to possess ammunition has been restored. MCL 750.224f(4).[2] Possession may be either constructive or actual, *People v Minch*, 493 Mich 87, 91; 825 NW2d 560 (2012), and it may be sole or joint, *People v Strickland*, 293 Mich App 393, 400; 810 NW2d 660 (2011). "The test for constructive possession is whether the totality of the circumstances indicates a sufficient nexus between defendant and the contraband." *Minch*, 493 Mich at 91-92 (quotation marks and citation omitted). "[A] person has constructive possession if he knowingly has the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons . . . ." *Id*. at 92 (quotation marks and citation omitted). "Possession can be proved by circumstantial or direct evidence and is a factual question for the trier of fact." *People v Johnson*, 293 Mich App 79, 83; 808 NW2d 815 (2011).

Detective Kenneth May participated in the execution of a search warrant at defendant's home. He testified a firearm magazine with .223 caliber high-powered rifle bullets was found near a television stand in the basement of defendant's home and that the basement looked like it was being used as a bedroom.[3] Specifically, however, Detective May testified that while he was photographing the scene, another officer discovered the ammunition and alerted him to its location to be photographed. As such, Detective May testified he did not know precisely from where the ammunition was recovered. However, he also testified that, as a general rule, evidence is not moved until after it is photographed, and notably, Detective May's photograph of the firearm magazine on the television stand was introduced as an exhibit at trial.

In light of the above evidence, there was sufficient evidence to support a finding that defendant, at least constructively, possessed the ammunition, and such a finding was also not against the great weight of the evidence. Defendant relies heavily on the fact that Detective May could not testify with certainty that the ammunition was found in the basement that served as defendant's bedroom. However, Detective May's testimony that evidence is generally not removed from the place where it is located until after it is photographed sufficiently supported the conclusion that the ammunition was found where Detective May photographed it.

Moreover, the fact that the ammunition was found in or near defendant's bedroom is strong circumstantial evidence that defendant knew of its location and knew of his ability to exercise control over it. *Minch*, 493 Mich at 92 (defining constructive possession); *Johnson*, 293 Mich App at 83 (noting that circumstantial evidence may be enough to prove constructive possession). Thus, "the totality of the circumstances indicates a sufficient nexus between defendant and the

[2] Defendant stipulated that he was prohibited from possessing ammunition due to a previous felony conviction.

[3] JB testified that defendant used the basement as a bedroom.

contraband." *Minch*, 493 Mich at 91-92 (quotation marks and citation omitted). That defendant shared the bedroom with Hansen and there were others living in the home did not negate such a finding because possession need not be exclusive. *Strickland*, 293 Mich App at 400. Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to support defendant's conviction. *Tennyson*, 487 Mich at 735. Further, the evidence did not preponderate heavily against the jury's verdict. *Williams*, 294 Mich App at 471.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues his trial counsel was inefficient for failing to investigate and discover certain witnesses that would have been beneficial to defendant at trial, and by failing to use AB's and MB's Kids Talk interviews as impeachment evidence.[4] We disagree.

Where no evidentiary or *Ginther*[5] hearing has taken place, our review of ineffective assistance of counsel claims is limited to errors that are apparent on the record. *People v Abcumby-Blair*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 347369); slip op at 8. "A claim of ineffective assistance of counsel is a mixed question of law and fact. A trial court's findings of fact, if any, are reviewed for clear error, and this Court reviews the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo." *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008) (citation omitted). "Effective assistance of counsel is presumed, and a defendant bears a heavy burden to prove otherwise." *People v Traver (On Remand)*, 328 Mich App 418, 422; 937 NW2d 398 (2019) (quotation marks and citation omitted). Additionally, "the defendant necessarily bears the burden of establishing the factual predicate for his claim." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

To succeed on a claim of ineffective assistance of counsel, a defendant must prove: "(1) that trial counsel's performance was objectively deficient, and (2) that the deficiencies prejudiced the defendant." *People v Randolph*, 502 Mich 1, 9; 917 NW2d 249 (2018). To prove prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. (quotation marks and citation omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. (quotation marks and citation omitted). "Moreover, the failure to call a particular witness at trial is presumed to be a matter of trial strategy, and an appellate court does not substitute its judgment for that of counsel in matters of trial strategy." *People v Seals*, 285 Mich App 1, 21; 776 NW2d 314 (2009). However, the decision not to call a witness cannot be insulated from review as a matter of trial strategy if that decision was made without engaging in a reasonable investigation of the defendant's defense. *People v Trakhtenberg*, 493 Mich 38, 55; 826 NW2d 136 (2012).

Defendant first asserts that his counsel was ineffective for failing to discover and interview defendant's former sister-in-law, Sally Jones, and former mother-in-law, Gail Hansen. Defendant has provided affidavits on appeal indicating that, at the very least, Jones might have provided

[4] Kids Talk is an independent group specializing in forensic interviews of minor children.

[5] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

favorable testimony to defendant,[6] but some of the most pertinent of Jones' statements are based on hearsay, and defendant makes no argument about what strategy he might have employed to see them admitted at trial. Other information Jones may have testified to were introduced by other witnesses at trial. More importantly, there is no information in the record—and little in the way of assertions from defendant—that indicates what actions trial counsel performed or failed to perform in his investigation. For instance, Jones indicates in her affidavit that she "kept asking [defendant] to have his trial counsel contact" her, but defendant makes no indication or assertion that he followed through with this request. With the above in mind, we have no basis to conclude that defense counsel's investigation was objectively deficient, let alone that the deficiency prejudiced the outcome of the trial.

With respect to the Kids Talk interviews, defendant has further failed to show that counsel's performance was deficient. Defendant alleges that, during AB's interview, AB can be seen looking at her cell phone at numerous points, and that AB indicated a preference to be with her mother. Defendant also contends that AB's interview could have been used to impeach the credibility of JB because JB testified that defendant inappropriately touched her on the living room couch on a Friday, and that he stopped when AB came downstairs to let the dog outside. Defendant alleges that AB indicated in her Kids Talk interview that this did not happen. Assuming defendant's description of AB's Kids Talk interview is accurate, we cannot discern any error on his counsel's part for failing to use it to impeach either AB or JB.

First, defendant's attempt to suggest that a teenager periodically checking her cell phone is probative as to the issue of manipulation and truthfulness is, at best, unconvincing. We cannot hold that defendant's counsel was deficient for declining to present that theory to the jury. Moreover, that AB wanted to spend more time with her mother was addressed at trial ad nauseum, and we see little purpose and likely risk in opening the trial to the corroborative statements contained in the interview in order to present cumulative evidence of dubious value. To that end, we also see little evidentiary value in attempting to impeach JB's testimony that she was inappropriately touched with AB's interview, wherein AB purportedly indicated that she did not recall a specific time that she let out her dog. Defendant has not overcome his burden to establish ineffective assistance with respect to AB's interview.

Defendant contends that MB's interview was important impeachment evidence because, at trial, MB testified that she became upset while being interviewed by police. She testified that a police officer left the room and a family member came in to calm her. Defendant notes that, upon reviewing the Kids Talk interview, this did not occur. Again, however, this fact was introduced elsewhere at trial when the very police officer present for the interview could not recall the incident. Moreover, we are unpersuaded by defendant's suggestion that this discrepancy "would have destroyed any credibility [MB] had."

[6] Although, presumably because the allegations contained in her affidavit are plainly based on triple hearsay, defendant does not argue that his counsel was ineffective for failing to call Hansen as a witness.

Most importantly for the purposes of our review, there is no actual record evidence of what occurred during AB's and MB's Kids Talk interviews. See *Abcumby-Blair*, ___ Mich App at ___; slip op at 8 (our review is limited to mistakes apparent on the record). Thus, as with trial counsel's failure to call the impeachment witnesses noted above, defendant cannot overcome the presumption that trial counsel's failure to use the Kids Talk interviews were matters of sound trial strategy. *Seals*, 285 Mich App at 21. Nor has defendant shown resulting prejudice. *Randolph*, 502 Mich at 9. As such, defendant's claims of ineffective assistance of counsel necessarily fail. *Traver*, 328 Mich App at 422.

III. SENTENCING

Defendant lastly contends that the trial court erred by assessing 10 points for offense variable (OV) 4 because there was no evidence that JB suffered serious psychological injury. Defendant also argues the trial court erred by assessing 10 points for OV 9 because JB was the only victim of the offense for which the court scored the sentencing guidelines.

"When reviewing a trial court's scoring decision, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Walker*, 330 Mich App 378, 389; 948 NW2d 122 (2019) (quotation marks and citation omitted). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013), superseded in part on other grounds by statute as recognized by *People v Rodriguez*, 327 Mich App 573, 579 n 3; 935 NW2d 51 (2019).

A sentencing court should score 10 points for OV 4 if "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). OV 4 should be scored at 10 points "if the serious psychological injury may require professional treatment," but "the fact that treatment has not been sought is not conclusive." MCL 777.34(2). Nevertheless, a victim must have actually suffered a serious psychological injury; that a reasonable person in the victim's situation would have suffered such an injury is not sufficient. *People v White*, 501 Mich 160, 163; 905 NW2d 228 (2017).

A sentencing court should score 10 points for OV 9 if "[t]here were 2 to 9 victims who were placed in danger of physical injury or death." MCL 777.39(1)(c). "A person may be a victim under OV 9 even if he or she did not suffer actual harm; a close proximity to a physically threatening situation may suffice to count the person as a victim." *People v Baskerville*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 345403) (quotation marks and citation omitted); slip op at 8. "OV 9 may not be scored on the basis of conduct outside the particular criminal transaction that gave rise to the sentencing offense." *Id.* Because OV 4 and OV 9 are both offense-specific, they "can only be scored in reference to the sentencing offense." *People v Biddles*, 316 Mich App 148, 167; 896 NW2d 461 (2016).

Before sentencing, the probation department prepared a presentence investigation report and sentencing information report that recommended defendant be sentenced to 50 to 100 months' imprisonment on his CSC-II convictions. In reaching that recommendation, the probation department only scored one of the CSC-II offenses which, based on the date of the offense, appears

to have been one of the offenses against JB. The probation department recommended assessing zero points for OV 4 and 10 points for OV 9. In a sentencing memorandum and at sentencing, the prosecution argued OV 4 should be assessed 10 points based on JB's and AB's emotional state while testifying at trial and the fact that they endured years of sexual abuse from their father. Defendant argued OV 4 should not be assessed 10 points because there was no documentation of JB or AB receiving psychological treatment. The prosecution also expressed approval of assessing 10 points for OV 9 because AB was nearby during one of the incidents of sexual contact against JB. Defendant's trial counsel did not object.

The trial court assessed 10 points for OV 4, noting the lack of psychological treatment was not dispositive and that each of the "victim witnesses" required breaks during their testimony to regain their composure. The court went on to state:

> And while psychological harm is not uniform, I'm not [sic] convinced that every single individual experiencing the conduct at issue in this case from the Defendant would result in psychological injury. For at least two of the victims in this case, that was the case, including the second youngest victim witness to testify, who, at some point, broke down during her testimony. There was a request that was made for her to testify facing the opposite, which I denied. Eventually, a support person had to stand with the witness while she was testifying.
>
> In my view, the psychological harm, at least to that victim witness, is apparent. Whether or not she has yet sought counseling, I think that may very well be a regular part of her life going forward. So I'm going to score OV 4 at 10 points.

With respect to OV 9, the trial court adopted the recommendation of the probation department and assessed 10 points.

We first conclude that the trial court did not clearly err in its assessment of OV 9. As noted, OV 9 must be assessed at 10 points if "[t]here were 2 to 9 victims who were placed in danger of physical injury or death . . . ." MCL 777.39(1)(c). In *People v Waclawski*, 286 Mich App 634, 641; 780 NW2d 321 (2009), the defendant was convicted of multiple offenses involving sexual conduct with children and production of child sexually abusive material. These convictions were based on defendant performing fellatio on a minor child, measuring three minor children's penises, and photographing each of these acts. *Id*. at 642. In discussing OV 9, this Court stated, identifying each of the defendant's victims by initial:

> [T]here was significant evidence that both M and P would sometimes spend the night at defendant's home with K. Simply because there are no pictures of M and P on the night that K was assaulted does not mean that they were not present and the same goes for the other victims. On the basis of the testimony, it seems more reasonable that the other boys were sleeping while defendant was assaulting his chosen victim. There was even testimony from P that he woke up one night and saw defendant kneeling down by K's bed. Clearly the record demonstrates that defendant had a choice of victims when K and his friends would stay the night at his house while sometimes watching pornography and drinking alcohol provided by defendant, and also supports the conclusion that defendant would choose a

> victim while the other boys were present. We conclude that the trial court properly scored defendant 10 points for OV 9 because the record supports the inference that at least two other victims were placed in danger of physical injury when the sentencing offenses were committed. [*Id*. at 684.]

We are bound to follow *Waclawski*, MCR 7.215(C)(2), and we can find no difference in the risk of physical injury posed by the conduct of the defendant *Waclawski* to the conduct of defendant in this case. Defendant made sexual contact with JB while her siblings, who were also subjected to defendant's sexual contact on other occasions, were nearby and readily available for defendant to choose to assault. Accordingly, under *Waclawski*, the trial court did not err by assessing 10 points for OV 9.[7]

With respect to OV 4, however, the trial court's explanation of why it assessed 10 points convinces us that the trial court erred. In assessing points for OV 4, it is clear the trial court considered the psychological injury to MB even though it was scoring the guidelines with respect to defendant's offense against JB. Because a victim is "any person harmed by the criminal actions of the charged party," *People v Laidler*, 491 Mich 339, 348; 817 NW2d 517 (2012) (quotation marks and citation omitted), it was proper for the trial court to consider any psychological injury that MB suffered as a result of defendant's offense against JB. However, any psychological injury MB suffered as a result of defendant's conduct against MB herself was irrelevant because that was not the "criminal action" for which defendant was convicted. *Id*. By noting that "every single individual experiencing the conduct at issue in this case" would likely suffer psychological injury and by thereafter referencing MB's lack of composure while testifying about defendant's conduct against her specifically, it appears the court relied on the psychological injury MB suffered as a result of defendant's conduct against her directly, not JB. Therefore, the trial court's explanation was insufficient to justify its assessment of OV 4.

That having been said, while the trial court's justification for assessing 10 points for OV 4 is flawed, it is possible that, under the proper legal analysis, the court may reach the same conclusion. Accordingly, we remand for the trial court to reconsider the issue and, if appropriate, to correct defendant's sentencing information report. See *Baskerville*, ___ Mich App at ___; slip op at 12 ("Defendant is entitled to have his guidelines scores corrected, because those scores may affect decisions made about him by the Department of Corrections."). However, we note that

[7] As an aside, we note that defendant arguably waived any claim of error in regard to the scoring of OV 9 when his trial counsel expressed approval of the trial court's assessment of points for any OV he did not object to. See *People v James*, 272 Mich App 182, 195; 725 NW2d 71 (2006). We elected to address the issue on the basis of defendant's corollary argument that his counsel was ineffective for failing to object to the alleged scoring error. Counsel was not ineffective for failing to object where no error in the assessment of OV 9 occurred. See *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

defendant is not entitled to resentencing because, no matter how the trial court resolves the issue of OV 4, his minimum sentencing guidelines range under will not change. *Id.*[8]

Affirmed, but remanded for the trial court to reconsider its assessment of OV 4 and, if necessary, correct defendant's sentencing information report. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Karen M. Fort Hood
/s/ Michelle M. Rick

[8] CSC-II is a Class C crime against a person, MCL 777.16y, and, as such, falls under the sentencing grid in MCL 777.64. The trial court scored 60 points for the OVs. This placed defendant in OV Level V, which is 50 to 74 points. MCL 777.64. Even if the trial court concludes it could not properly assess 10 points for OV 4 on remand, defendant would still have 50 OV points and his OV level would not change. Thus, defendant's minimum sentencing guidelines range would not change.