STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID WAYNE MILLER,

Defendant-Appellant.

UNPUBLISHED
April 15, 2021

No. 353836
Chippewa Circuit Court
LC No. 17-003321-FC

Before: SHAPIRO, P.J., and CAVANAGH and REDFORD, JJ.

PER CURIAM.

Defendant was convicted by a jury on two counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(b); MCL 750.520b(2)(a) (multiple variables). He was sentenced to serve concurrent prison terms of 15 to 40 years for each conviction. Defendant appeals by right, challenging his sentences. We affirm.

I. RELEVANT FACTS

This case arises out of the sexual assault of the victim by defendant in approximately 2006, when the victim was 14 years old. On one occasion, defendant brought the victim to his motel room and they rented a movie. After watching the movie, defendant asked the victim to kiss him. Defendant then performed oral sex on the victim, after which they had sexual intercourse. On another occasion, the victim was staying overnight with defendant's mother and defendant was staying in his mother's spare bedroom. Defendant told the victim to go into the spare bedroom after his mother fell asleep. Defendant and the victim went into the bedroom together and had sexual intercourse. The victim reported the sexual assaults to the police in 2017.

II. SCORING OF OFFENSE VARIABLES

Defendant challenges the scoring of offense variables (OVs) 3, 8, and 11. We review de novo whether the trial court's interpretation and application of the legislative sentencing guidelines was proper. *People v Sours*, 315 Mich App 346, 348; 890 NW2d 401 (2016) (citation omitted). On appeal, the trial court's "factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *Id*. (quotation marks and citation omitted). Clear

error occurs "when the reviewing court is left with a definite and firm conviction that an error occurred." *People v McChester*, 310 Mich App 354, 358; 873 NW2d 646 (2015) (quotation marks and citation omitted). A court may consider "all record evidence, including the contents of a PSIR, plea admissions, and testimony presented at a preliminary examination," when calculating the sentencing guidelines. *Id*.

A. OV 3

Defendant argues that the trial court erred by assessing five points for OV 3 because there was insufficient evidence that he caused physical injury to the victim. We disagree.

OV 3 addresses physical injury to a victim. MCL 777.33(1). Five points are assessed for OV 3 when a victim experienced "[b]odily injury not requiring medical treatment . . . ." MCL 777.33(1)(e). "Bodily injury encompasses anything that the victim would, under the circumstances, perceive as some unwanted physically damaging consequence." *People v Barnes*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 348038); slip op at 2 (quotation marks and citation omitted).

The trial court properly assessed five points for OV 3 on the basis of the victim's testimony that a significant amount of blood was present after the sexual assault at the motel. Defendant argues that there was insufficient evidence that defendant injured the victim and that the victim was likely menstruating. However, the victim testified that she was *not* on her period at the time. Further, because the victim testified that she was alarmed when she saw the blood, there was evidence that the blood was an "unwanted physically damaging consequence." See *Barnes*, ___ Mich App at ___; slip op at 2. Therefore, the trial court did not clearly err by assessing five points for OV 3 because a preponderance of the evidence demonstrated that the victim suffered a bodily injury that did not require medical treatment.

B. OV 8

Defendant argues that the trial court erred by assessing 15 points for OV 8 because there was insufficient evidence that he moved the victim to a place of greater danger. We disagree.

Defendant failed to object to the scoring of OV 8 at sentencing, and did not move for resentencing or to remand, so this issue is unpreserved. See *Sours*, 315 Mich App at 348 (citation omitted). We review unpreserved scoring errors for plain error affecting substantial rights. *People v Chelmicki*, 305 Mich App 58, 69; 850 NW2d 612 (2014). However, because we conclude that the trial court did not err by assessing 15 points for OV 8, there is no error, plain or otherwise.

OV 8 addresses victim asportation or captivity. MCL 777.38(1). Fifteen points are properly assessed for OV 8 when "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense . . . ." MCL 777.38(1)(a). A victim is "asported to a place or situation involving greater danger when moved away from the presence or observation of others." *Chelmicki*, 305 Mich App at 70-71.

Defendant argues that his conduct before the sentencing offense could not be considered for the scoring of OV 8 because it is a so-called *McGraw* variable. In *People v McGraw*, 484 Mich 120, 135; 771 NW2d 655 (2009), our Supreme Court held that the OVs "are properly scored by reference only to the sentencing offense except when the language of a particular offense variable statute specifically provides otherwise." In *People v Barrera*, 500 Mich 14, 22; 892 NW2d 789 (2017), our Supreme Court specifically held "that movement of a victim that is incidental to the commission of a crime nonetheless qualified as asportation under OV 8." In this case, defendant brought the victim to his motel room—away from the presence or observation of others—before sexually assaulting her and that conduct may be considered for purposes of scoring OV 8.

Defendant also argues that the victim went to his motel room voluntarily, and there is insufficient evidence that he intended to move the victim to a place of greater danger in order to sexually assault her when he took her to the motel. Asportation may occur under OV 8 even if the victim voluntarily goes with the defendant, and it is therefore irrelevant that the victim voluntarily went to the motel. See *People v Dillard*, 303 Mich App 372, 379; 845 NW2d 518 (2013), abrogated in part on other grounds by *Barrera*, 500 Mich at 16. The victim testified that her mother did not know she was at the motel with defendant. The motel was a place of greater danger, because the sexual assault was less likely to be discovered there. See *Barrera*, 500 Mich at 22. Defendant asported the victim to a place of greater danger because he moved the victim away from the presence or observation of others, including the victim's mother, when he took her to the motel. See *Chelmicki*, 305 Mich App at 70-71. Therefore, the trial court did not err by assessing 15 points for OV 8 because there was sufficient evidence that defendant asported the victim to a place or situation of greater danger when he took her to the motel to sexually assault her. And because we conclude that OV 8 was scored appropriately, defendant's argument that his counsel was ineffective for failing to object to the scoring of OV 8 is without merit. Trial counsel is not ineffective for failing to raise a futile objection. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

C. OV 11

Defendant argues that the trial court erred by assessing 25 points for OV 11 because there was insufficient evidence that any other sexual penetrations occurred in addition to the sexual intercourse that formed the basis of the sentencing offense. We disagree.

OV 11 addresses criminal sexual penetration. MCL 777.41(1). OV 11 is properly assessed 25 points when a single sexual penetration occurred. MCL 777.41(1)(b). OV 11 is scored for "all sexual penetrations of the victim by the offender arising out of the sentencing offense." MCL 777.41(2)(a). For the purposes of OV 11, "arising out of" means "springs from or results from something else, has a connective relationship, a cause and effect relationship, of more than an incidental sort with the event out of which it has arisen." *People v Johnson*, 474 Mich 96, 101; 712 NW2d 703 (2006). The penetration that forms the basis of the first-degree criminal sexual conduct offense, however, cannot be considered when scoring OV 11. MCL 777.41(2)(c).

Vaginal penetrations and cunnilingus[1] "are considered separate sexual penetrations when scoring OV 11 under MCL 777.41." *People v Johnson*, 298 Mich App 128, 132; 826 NW2d 170 (2012).

Defendant argues that there was insufficient evidence that he performed oral sex on the victim. The victim testified that defendant performed oral sex on her before the first time they had sexual intercourse. Points are assessed for uncharged sexual penetrations under OV 11 when those penetrations arise out of the sentencing offense. *People v Lampe*, 327 Mich App 104, 119; 933 NW2d 314 (2019). In this case, the sentencing offense was based on penile-vaginal penetration of the victim by defendant. The assessment of points for OV 11 was based on the oral sex defendant performed on the victim, which is a form of sexual penetration. See *Johnson*, 298 Mich App at 132. The oral sex arose out of the sentencing offense, because it occurred on the same day and in the same course of conduct as the sexual intercourse between defendant and the victim at the motel. See *Lampe*, 327 Mich App at 117-118.

Defendant contends that a preponderance of the evidence does not demonstrate that he performed oral sex on the victim because the victim never told the detectives about oral sex, there is no report of oral sex, and the victim's testimony regarding the oral sex was an "afterthought." The victim testified that she *did* tell one of the detectives about the oral sex. In addition, one of the detectives at trial testified that the victim told him she remembered bits and pieces over time. Although defendant characterizes the victim's testimony regarding oral sex as an "afterthought," she was actually responding to the prosecutor's question whether there was other sexual contact when she first had intercourse with defendant. Therefore, the trial court did not clearly err by assessing 25 points for OV 11 because a preponderance of evidence indicates that defendant performed oral sex on the victim before they first engaged in sexual intercourse.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Mark J. Cavanagh
/s/ James Robert Redford

[1] The act of cunnilingus is commonly referred to as "oral sex." *People v Harris*, 158 Mich App 463, 469; 404 NW2d 779 (1987).