STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 8, 2011
v	No. 298504 St. Joseph Circuit Court
MICHAEL EARL MCCLOUD, JR., Defendant-Appellant.	LC No. 09-015865-FC

Before: GLEICHER, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted his sentence for first-degree criminal sexual conduct, MCL 750.520b(2)(b). Defendant was sentenced to 30 to 60 years' imprisonment. We vacate defendant's sentence and remand for resentencing consistent with this opinion.

Defendant pleaded guilty to first-degree criminal sexual conduct, MCL 750.520b(1)(a). He admitted to performing cunnilingus on a five-year-old girl. In exchange for defendant's plea, the prosecution dismissed charges of first-degree criminal sexual conduct based on an alleged act of fellatio, MCL 750.520b(1)(a), and failure to comply with the Sex Offenders Registration Act, MCL 28.729(1)(a).

On appeal, defendant challenges the scoring of offense variables (OVs) 8, 11, 12, 13, and 19. "This Court reviews a trial court's scoring decision under the sentencing guidelines to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009) (quotation marks and citation omitted). We will uphold a scoring decision for which there is any evidence in support. *Id.* However, defendant failed to preserve his challenges to the scoring of OVs 11 and 12. We review unpreserved challenges to the scoring of offense variables for plain error affecting substantial rights. *People v Odom*, 276 Mich App 407, 411; 740 NW2d 557 (2007). In addition, plain error only warrants reversal when the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003).

Defendant claims that the trial court erred in scoring 15 points for OV 8 because his movement of the victim to the laundry room does not constitute "asportation." Fifteen points may be scored for OV 8 when a "victim was asported to another place of greater danger or to a

situation of greater danger . . . ." MCL 777.38(1)(a). In *Steele*, 283 Mich App at 490-491, the defendant took one of his victims to a trailer and another victim to a tree stand where he sexually assaulted them. This Court held that the trailer and the tree stand were places or situations of greater danger because they were places where others were less likely to see the defendant committing the crimes. *Id.* at 491. The same is true of the laundry room in this case. Defendant was less likely to be discovered sexually assaulting the victim in the laundry room than in the more public living room of the residence. Thus, defendant asported the victim to a place of greater danger. The trial court properly scored 15 points for OV 8.

Defendant claims that the trial court erred in scoring 25 points for OV 13 because his two juvenile adjudications for home invasion could not be considered in finding a pattern of felonious criminal activity. Twenty-five points may be scored for OV 13 if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c). This Court has specifically rejected the argument that juvenile adjudications cannot be considered in determining the number of points to be scored for OV 13. In *People v Harverson*, ___ Mich App ___; ___ NW2d ___ (2010), this Court held that the plain language of MCL 777.34 permits consideration of juvenile adjudications because the statute only requires "criminal activity," not criminal convictions. Accordingly, OV 13 was properly scored at 25 points.

Defendant asserts that the trial court erred in scoring ten points for OV 19. A trial court may score ten points for OV 19 if "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). Here, there was evidence that defendant told the victim not to tell anyone about the sexual assault. In *Steele*, 283 Mich App at 492-493, this Court held that OV 19 was properly scored at ten points when the defendant told his victims not to disclose the sexual assaults. The Court held that a threat is not required, and that when a defendant tells his victims not to tell anyone it is a "clear and obvious attempt" to "diminish" the victims' "willingness and ability to obtain justice." *Id.* at 493. Thus, OV 19 was properly scored at ten points.

Defendant argues that the trial court erred in scoring 25 points for OV 11 because there was no evidence that he engaged in an act of criminal sexual penetration other than the penetration that formed the basis of the first-degree criminal sexual conduct offense to which he pleaded guilty. In determining the number of points to be scored for OV 11, a trial court is to "[s]core all sexual penetrations of the victim by the offender arising out of the sentencing offense." MCL 777.41(2)(a). Twenty-five points are to be scored if one criminal sexual penetration occurred. MCL 777.41(1)(b). However, no points are to be scored for the one penetration that forms the basis for the first- or third-degree criminal sexual conduct offense that constitutes the sentencing offense. MCL 777.41(2)(c); *People v McLaughlin*, 258 Mich App 635, 676; 672 NW2d 860 (2003).

Defendant was charged with having committed two acts of sexual penetration, one of cunnilingus and the other of fellatio. Defendant pleaded guilty to engaging in the act of cunnilingus with the victim. Apparently, OV 11 was scored based on the allegation of fellatio in the count that was dismissed. Evidence regarding whether an act of fellatio occurred in this case appears in the record in only two places, defendant's plea hearing and the presentence report.

At the plea hearing, defendant testified that after he performed cunnilingus on the victim, he "asked her to do the same." He stated that the victim "just stuck out her tongue, but . . . she's like, 'That's nasty.'" "[F]or purposes of the CSC I statute, 'fellatio' does *not* consist merely of 'any oral contact with the male genitals,' but rather requires entry of a penis into another person's mouth." *People v Reid*, 233 Mich App 457, 479-480; 592 NW2d 767 (1999) (emphasis in original). Therefore, defendant's statement that the victim only licked his penis does not establish a sexual penetration in addition to the penetration that formed the basis of the first-degree criminal sexual conduct offense that is the sentencing offense.

According to the presentence report, the victim told a police officer that defendant pulled down her panties and licked her vagina. He then asked the victim if she wanted to do it to him. The victim stated, "I did it to him and it was weird." The victim's statement does not specify what the victim "did" to defendant. When considered in context, the victim's statement provides no indication that she did anything more than what she reported defendant did to her, which was some licking. Accordingly, it cannot be inferred from the victim's statement that defendant's penis entered her mouth.

Under these circumstances, the record contains no evidence that defendant engaged in a criminal sexual penetration in addition to the penetration that formed the basis of the first-degree criminal sexual conduct offense to which he pleaded guilty. The trial court plainly erred in scoring 25 points for OV 11.

Defendant claims that the trial court erred in scoring one point for OV 12 because it scored the alleged act of fellatio under OV 11. OV 12 considers contemporaneous felonious criminal acts, and one point is to be scored if "[o]ne contemporaneous felonious criminal act involving any other crime was committed." MCL 777.42(1)(f). However, conduct that is scored in OV 11 cannot be scored for OV 12. MCL 777.42(2)(c). In light of the trial court's score of 25 points for OV 11, it appears that the trial court plainly erred in scoring one point for OV 12.

An error in the scoring of the offense variables that results in an increased sentence for the defendant is error affecting the defendant's substantial rights. *People v Brown*, 265 Mich App 60, 66-67; 692 NW2d 717 (2005), rev'd in part 474 Mich 876 (2005). Here, when zero points are scored for OV 11, defendant has an OV point total of 76, which is OV Level IV, and the recommended minimum sentence range is 135 to 225 months. Accordingly, the trial court's error in scoring OV 11 affects defendant's substantial rights as it resulted in an increased sentence. Moreover, the scoring error "seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Jones*, 468 Mich at 355. "It is difficult to imagine what could affect the fairness, integrity and republic reputation of judicial proceedings more than sending an individual to prison and depriving him of his liberty for a period longer than

authorized by the law." *People v Kimble*, 470 Mich 305, 313; 684 NW2d 669 (2004). Accordingly, we vacate defendant's sentence and remand for resentencing.[1]

On remand, the trial court shall score zero points for OV 11. However, OV 12 may be scored because the record supports a finding that the victim licked defendant's penis, which is conduct that constitutes the offense of second-degree criminal sexual conduct, MCL 750.520c(1)(a), and OV 11 will not be scored.

We vacate defendant's sentence and remand for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens

[1] Because of our conclusion that defendant is entitled to be resentenced based on the trial court's plain error of scoring 25 points for OV 11, we need not address defendant's claim that counsel was ineffective for failing to object to the scoring of OV 11.