STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED April 16, 2013
v JASON FRANK-JAMES BAUER, Defendant-Appellee.	No. 309185 Wayne Circuit Court LC No. 11-008258-FC

Before: BORRELLO, P.J., and K. F. KELLY and GLEICHER, JJ.

PER CURIAM.

Defendant was found guilty by a jury of second-degree criminal sexual conduct (person at least 13 but less than 16 years of age and same household), MCL 750.520c(1)(b), and not guilty of two counts of first-degree criminal sexual conduct (sexual penetration with 13-to-16-year-old and same household), MCL 750.520b(1)(b)(*i*). He was sentenced to 57 months to 15 years' imprisonment. The prosecution appeals as of right that sentence. For the reasons set forth in this opinion, we vacate defendant's sentence and remand for resentencing consistent with this opinion.

This case arises from a sexual assault that occurred on August 9, 2011, in Livonia. The complainant, who was then 15 years old, testified at trial that she awoke with defendant "on top of" her, face to face with her, with her underwear pulled down. When she "realized what was happening," she closed her eyes, afraid to call for her mother or stepfather, and pretended that she was asleep. The complainant understood that defendant was "raping" her, meaning that she could feel "[h]is penis . . . touching [her] vagina." She felt "[h]is lips touch[] [her] neck and [her] breast, and his hands touched [her] breast," and his fingers penetrated her vagina. She further testified that defendant "put [his penis] back in," and "whispered in [her] ear and asked [her] if it hurt." She did not know whether defendant ejaculated. When defendant went to the bathroom, the complainant went to her bedroom, locked the door, and called a friend, who advised her to wake her mother and tell her what had happened, but she was afraid to leave her room, she "didn't want to go out there if [defendant] was out there." The complainant heard defendant walk down the stairs to the basement, she remained in her room and went to sleep.

Complainant's mother woke her the next morning, she decided to type a note describing the assault to her mother on an iPod Touch, she did this because she "thought if [she] told [her mother] out loud[, she] couldn't get the whole story out because [she would] be crying." Her

mother read the note, looked at her, asked whether she was lying and then left the room and called her stepfather, and then the police. Complainant was taken to a hospital for a "rape kit," and described the assault to nurses and police officers, she told them that she felt sore in her vaginal area the day after the assault. Complainant tried to "hurt" herself between the time the assault took place and the trial. The hospital report indicated injuries to complainant's vaginal area. The DNA samples collected from the rape kit revealed the vaginal swabs were negative for seminal fluid and DNA. The forensic biologist did find that DNA recovered from the right neck swab matched the DNA types from defendant's known sample. Additionally, the swab of the victim's right breast also revealed a mixture of DNA of both the victim and defendant's DNA, of which, defendant's DNA was characterized as the "major donor."

Defendant was interviewed by police and offered different accounts of what had occurred. Initially he denied any knowledge of what had occurred, then later wrote a statement claiming that he observed complainant asleep on the couch and ". . . making very weird noises." Defendant denied any sexual contact with complainant, however he changed his statement to police claiming that complainant was coming on to him by ". . . pulling up her shirt and stuff . . . she is moving towards me and puts her head on me . . . ." Defendant claimed that his initial statement did not include any references to complainant's advances in an attempt to protect her.

Defendant did not testify at trial. Following the close of the prosecutor's case, defendant made a motion for directed verdict on the grounds that there was insufficient evidence to establish the elements of criminal sexual conduct. Defendant also argued that there was insufficient evidence to prove that he was a member of the household. The trial court denied both motions and the jury made its findings as noted above. This appeal then ensued.

On appeal, the prosecution argues that the trial court erroneously failed to consider two instances of criminal sexual penetration and injuries to the complainant there from, resulting in a lower sentencing guidelines range.

"The proper interpretation and application of the legislative sentencing guidelines are questions of law, which this Court reviews de novo." *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008). The trial court's scoring is reviewed for clear error, and is not clearly erroneous if the record contains "*any* evidence in support of the decision." *People v Lockett*, 295 Mich App 165, 182; 814 NW2d 295 (2012). The scoring of six variables was contested at the sentencing hearing, of which the prosecution appeals three. A sentencing court must, absent substantial and compelling reasons, impose a minimum sentence, not to exceed two-thirds of the statutory maximum, within the statutory guidelines on defendants convicted of enumerated[1] felonies. MCL 769.34(2), (2)(b); MCR 6.425(D); *People v McCuller*, 479 Mich 672, 684-685; 739 NW2d 563 (2007); *People v Harper*, 479 Mich 599, 617; 739 NW2d 523 (2007). "A trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence," *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008) (citing *People v Drohan*, 475 Mich 140, 142-143; 715 NW2d 778 (2006)), and may rely

[1] MCL 777.11 *et seq.*

on reasonable inferences from the record, *People v Earl*, 297 Mich App 104, 109; 822 NW2d 271 (2012).

"The sentencing court has discretion in determining the number of points to be scored provided that there is evidence on the record that adequately supports a particular score, and thus this Court reviews the scoring to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score." *People v Waclawski*, 286 Mich App 634, 680; 780 NW2d 321 (2009). "Resentencing is an appropriate remedy where a defendant's sentence is based on an inaccurate calculation of the sentencing guidelines range and, therefore, does not conform to the law." *People v Carrigan*, 297 Mich App 513, 516; 824 NW2d 283 (2012) (internal citations omitted).

OV 3

Offense variable (OV) 3, concerning physical injury to the victim, MCL 777.33, was scored at zero points. The prosecution argued that the proper score was five points, corresponding to "[b]odily injury not requiring medical treatment," MCL 777.33(1)(e), based on Nicole Rich's[2] report noting "several tears and rips and abrasions to [the complainant's] vaginal area," and the complainant's testimony that she was sore after the assault. Defendant argued for a score of zero points, because injuries to the complainant's vaginal area could not be considered in scoring OV 3 because "for [defendant] to have caused internal injuries in the vagina, the jury would have had to find penetration," and the jury found defendant not guilty on the two counts of first-degree criminal sexual conduct involving penetration. The trial court scored zero points for OV 3, noting that it could not "impose points . . . inconsistent with the jury's finding."

MCL 777.33 provides:

> (1) Offense variable 3 is physical injury to a victim. Score offense variable 3 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> * * *
>
> (e) Bodily injury not requiring medical treatment occurred to a victim[:] 5 points
>
> (f) No physical injury occurred to a victim[:] 0 points

The sentencing court must "award the highest number of points possible under OV 3." MCL 777.33(1); *People v Houston*, 473 Mich 399, 407; 702 NW2d 530 (2005). This Court found that a score of five points for OV 3 was "erroneous when there was no record evidence to support the score." *People v Endres (On Remand)*, 269 Mich App 414, 418; 711 NW2d 398 (2006). That is not the case here, where there was evidence in the record that the complainant

[2] Nicole Rich was an emergency room nurse and the sexual assault nurse examiner employed by the Detroit Medical Center and the Wayne County Sexual Assault Forensic Examiner's Program.

underwent an invasive examination and reported vaginal soreness resulting from the assault. Rich testified that her examination revealed microscopic tears and abrasions to the complainant's vaginal area that she opined would not have been present three days after the examination, owing to the speed with which that area heals. The trial court must exercise its discretion to determine the number of points to be scored for this variable, bearing in mind that a scoring decision for which there is record evidence will be upheld. *Houston*, 473 Mich at 407; *Waclawski*, 286 Mich App at 680.

OV 11

OV 11, concerning total criminal sexual penetrations, MCL 777.41, was scored at zero points. The prosecution argued that the proper score was 50 points, corresponding to two or more criminal sexual penetrations, based on the complainant's testimony that defendant penetrated her with his penis and his fingers. Defendant argued that, because the jury found him not guilty on each penetration-related count, the trial court could not score either instance of alleged penetration, and the proper score was zero points. The trial court accepted defendant's argument, saying that it did "not believe [it had] the discretion to impose the 50 points." Addressing defendant later in the hearing, the trial court said that the favorable verdicts on the two counts of first-degree criminal sexual conduct "affected the [sentencing] guidelines greatly," and that defendant was "not subject to being penalized for those crimes."

MCL 777.41 provides:

> (1) Offense variable 11 is criminal sexual penetration. Score offense variable 11 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) Two or more criminal sexual penetrations occurred[:] 50 points
>
> (b) One criminal sexual penetration occurred[:] 25 points
>
> (c) No criminal sexual penetration occurred[:] 0 points
>
> (2) All of the following apply to scoring offense variable 11:
>
> (a) Score all sexual penetrations of the victim by the offender arising out of the sentencing offense.
>
> (b) Multiple sexual penetrations of the victim by the offender extending beyond the sentencing offense may be scored in offense variables 12 or 13.
>
> (c) Do not score points for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense.

The proscription, in MCL 777.41(2)(c), on scoring instances of penetration "that form[] the basis of a [first-degree] criminal sexual conduct offense," "is ambiguous because it could be interpreted as excluding other penetrations that also form the basis of a CSC charge, or as only excluding the one penetration that is the basis of the sentencing offense." *People v Cox*, 268

Mich App 440, 456; 709 NW2d 152 (2005). "[T]he proper interpretation of OV 11 requires the trial court to exclude the one penetration forming the basis of the offense when the sentencing offense itself is [first-degree CSC] or [third-degree CSC]." *Id.*

Because both first-degree CSC and third-degree CSC are based on penetration, "each criminal sexual penetration that forms the basis of its own sentencing offense cannot be scored for purposes of that particular sentencing offense." *People v Johnson*, 474 Mich 96, 102 n 2; 712 NW2d 703 (2006). "[C]onstruing MCL 777.41(2)(c) as excluding all sexual penetrations that form the basis of a first-degree or third-degree CSC offense would be unreasonable because it would, in effect, render any score for sexual penetrations nugatory." *People v Mutchie*, 251 Mich App 273, 279; 650 NW2d 733 (2002), aff'd 468 Mich 50 (2003). "When construing a statute, the court must presume that every word has some meaning and avoid any construction that would render any part of the statute surplusage or nugatory." *Id.*

Because the only sentencing offense in this case was second-degree CSC and the trial court was required to score the highest possible points, MCL 777.41(1); *Johnson*, 474 Mich at 99, the trial court had the legal authority to consider evidence of the two alleged criminal sexual penetrations in scoring OV 11. The complainant testified that defendant penetrated her with his penis and with his fingers, and Rich testified that the complainant reported both of those acts to her during an examination. The complainant reported the same conduct to her mother and to Officer David Parrinello the next day, albeit in less detail. Rich observed microscopic injuries to defendant's vaginal area that, based on her experience, were less than three days old. While Rich found no injuries to the complainant's hymen, she said that it was possible to see sexual penetration without injury to the hymen, especially after puberty, when the hymen "will expand and accommodate."

Defendant's denial of the penetrations was a rare consistency in the three versions of events he recounted in oral and written statements to Detective Sabaddin: first, he had "no idea what was going on," then he proposed that the complainant "had fallen asleep and possibly was dreaming about him and then woke up and thought maybe it really happened," and then he remembered that she had made physical advances toward him, "putting her hand on [his] chest and proceed[ing] to work her way down." Thus, there exists a question of fact as to whether defendant penetrated complainant. Despite its assertions to the contrary, the trial court was not precluded from accessing points for OV 11. The trial court must exercise its discretion to determine the number of points to be scored for this variable, bearing in mind that a scoring decision for which there is record evidence will be upheld. *Waclawski*, 286 Mich App at 680.

OV 13

OV 13, concerning a continuing pattern of criminal behavior, MCL 777.43, was scored at 10 points. The prosecution initially argued in its sentencing memorandum for a score of 10 points, to account for two felonies committed in Arizona, in addition to the sentencing offense. After the trial court scored OV's 3 and 11, refusing to consider the two criminal sexual penetrations of which the jury found defendant not guilty, the prosecutor said that "if the Court is to include all crimes, even those that [did not result] in a conviction, the Court could theoretically score the penetrations . . . giving 25 points for OV 13." The court "decline[d] to do so," and scored 10 points for OV 13, adding that it believed the "same constraint [was] imposed" on it.

Defendant's guidelines range was 29 to 57 months, and the trial court sentenced him to 57 months to 15 years' imprisonment.

MCL 777.43 provides:

> (1) Offense variable 13 is continuing pattern of criminal behavior. Score offense variable 13 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> * * *
>
> (c) The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person[:] 25 points
>
> (d) The offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property[:] 10 points
>
> * * *
>
> (2) All of the following apply to scoring offense variable 13:
>
> (a) For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.
>
> * * *
>
> (c) Except for offenses related to membership in an organized criminal group or that are gang-related, do not score conduct scored in offense variable 11 or 12.

As discussed above, the trial court should have considered the two criminal sexual penetrations in scoring OV 11. Had it done so, those penetrations could not have been scored for OV 13. MCL 777.43(2)(c). With respect to OV 13, the trial court reached the right result for the wrong reason; the language of subsection (2)(c), not the jury verdict, tied the court's hands. "[W]hen scoring OV 13, the trial court cannot consider any conduct that was or *should have been* scored under [OV 12]," and, by analogy, OV 11. *People v Bemer*, 286 Mich App 26, 35; 777 NW2d 464 (2009), (emphasis in original). For this reason, the prosecution's assertion that the trial court could have scored the two criminal sexual penetrations for OV 13 instead of OV 11 lacks merit.

CONSTITUTIONAL ARGUMENTS

Having found record evidence which could support a scoring of OV 3 and OV 11, we next turn to defendant's contention that the scoring of either of these offense variables in the manner consistent with the position of the prosecutor violates defendant's right to a trial by jury.

We begin our discussion of defendant's claim on appeal by noting that he does not argue the factual basis for the lack of scoring the afore-mentioned offense variables. Rather, defendant

argues that the trial court exercised its discretion and scored those variables consistent with the jury verdict. Further, defendant argues, the trial court was compelled by the ruling in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), to score the prior record variables and offense variables solely on the basis of the jury verdict. Defendant also argues that if merely a preponderance of the evidence was required to provide a basis for increasing the scores for OVs 3 and 11, defendant was entitled to an evidentiary hearing in order to challenge the testimony of the sexual assault nurse examiner regarding the complainant's claimed injuries. Thus, defendant argues, this Court should affirm defendant's sentence, or, alternatively, remand to the trial court for an evidentiary hearing.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime [was] committed." US Const, Am VI; see also Const 1963, art 1, § 14. As noted, rather than individually address the three offense variables with which the prosecution takes issue on appeal, defendant points to *Blakely* which, he argues, "requires that the scoring of the prior record and offense variables be based solely upon the jury verdict" in order to preserve defendant's Sixth Amendment right to a jury trial. *Blakely* holds that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum" must be decided by a jury. *Blakely*, 542 US at 301.

Of particular concern in this case is that the trial court was seemingly unaware that it had the discretion to score the offense variables by engaging in judicial fact-finding. Rather, the clear implication from the record is that the trial court was of the opinion that it was specifically precluded from assigning any points in OV 3 and OV 11 as that would constitute a repudiation of the jury verdict. Defendant contends on appeal that any scoring of OV 3 and OV 11 would conflict with the dictates set forth in *Blakely*. However, our Supreme Court has made clear its rejection of the applicability of *Blakely* to Michigan's sentencing scheme, beginning with our Supreme Court's decision in *People* v *Claypool*, 470 Mich 715, 730 n.14; 684 NW2d 278 (2004) wherein our Supreme Court stated:

> The Chief Justice argues that the United States Supreme Court's recent decision in [*Blakely*] affects this case. We disagree. *Blakely* concerned the Washington state determinate sentencing system, which allowed a trial judge to elevate the maximum sentence permitted by law on the basis of facts not found by the jury but by the judge. Thus, the trial judge in that case was required to set a fixed sentence imposed within a range determined by guidelines and was able to increase the maximum sentence on the basis of judicial fact-finding. This offended the Sixth Amendment, the United States Supreme Court concluded, because the facts that led to the sentence were not found by the jury. [Internal citations omitted.]

Next, in *People v Drohan*, 475 Mich 140, 160; 715 NW2d 778 (2006), JUSTICE MARKMAN, writing for the majority held:

> Under Michigan's sentencing scheme, the maximum sentence that a trial court may impose on the basis of the jury's verdict is the statutory maximum. MCL 769.8(1). In other words, every defendant, as here, who commits third-degree criminal sexual conduct knows that he or she is risking 15 years in prison, assuming that he or she is not an habitual offender. MCL 750.520d(2). *As long*

as the defendant receives a sentence within that statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict. Accordingly, we reaffirm our statement in *Claypool*, and affirm defendant's sentence. (Emphasis added.)

Then, in *People v McCuller*, 479 Mich at 690, following remand from the United States Supreme Court to give further consideration of our Supreme Court's rejection of the applicability of *Blakely* in light of *Cunningham* v *California*, 549 US 270; 127 S Ct 856; 166 L Ed 2d 856 (2007), our Supreme Court held:

> Thus, a sentencing court does not violate Blakely principles by engaging in judicial fact-finding to score the OVs to calculate the recommended minimum sentence range, even when the scoring of the OVs places the defendant in a straddle cell or a cell requiring a prison term instead of an intermediate sanction cell. The sentencing court's factual findings do not elevate the defendant's maximum sentence, but merely determine the defendant's recommended minimum sentence range, which may consequently qualify the defendant for an intermediate sanction.

McCuller, 479 Mich at 683 reaffirmed its prior rejection of *Blakely* to Michigan's sentencing scheme by quoting from *Drohan* as follows:

> In *Drohan*, this Court explained that Michigan has an indeterminate sentencing scheme. 'The maximum sentence is not determined by the trial court, but rather is set by law.' Michigan's sentencing guidelines create a range within which the sentencing court must set the *minimum* sentence, but the sentencing court may not impose a sentence greater than the statutory maximum. *Id.* 'Thus, the trial court's power to impose a sentence is always derived from the jury's verdict, because the 'maximum-minimum' sentence will always fall within the range authorized by the jury's verdict.' Therefore, Michigan's indeterminate sentencing scheme is valid under *Blakely*.

Thus it is clear that our Supreme Court has consistently held that *Blakely* is not applicable to Michigan's sentencing scheme. In *Drohan*, 475 Mich at 164, our Supreme Court held that, "[u]nder Michigan's sentencing scheme, the maximum sentence that a trial court may impose on the basis of the jury's verdict is the statutory maximum." *Drohan*, 475 Mich at 164. "[A] fact that supports a specific sentence within the range authorized by the jury's finding that the defendant is guilty of a particular offense is a sentencing factor that does not implicate the Sixth Amendment." *Id.* at 150-151 (quoting *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000)). "As long as the defendant receives a sentence within that statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict." *Id.* at 164. Defendant's conviction of second-degree CSC automatically set his maximum penalty at 15 years' imprisonment, MCL 750.520c(2)(a), and according to the dictates our Supreme Court set forth in *Claypool*, *Drohan* and *McCuller* an increased sentence below that ceiling is not a violation of defendant's right to a jury trial under

either the United States and Michigan Constitutions. Thus, we reject defendant's constitutional arguments that any scoring of OV 3 and 11 would constitute a violation of *Blakely*.

Hence, in this case, defendant's conviction of second-degree CSC automatically set his maximum penalty at 15 year' imprisonment. MCL 750.520c(2)(a). Provided that defendant's sentence is below 15 years, it is possible for the sentencing court to engage in judicial fact finding to score OV 3 and 11. However, the trial court was of the opinion that it was specifically precluded from scoring OV 3 or 11 based on the verdict of the jury. As a result of this conclusion, the trial court did not consider evidence, some of which has been set forth in this opinion, relative to the proper scoring of OV 3 and 11. We therefore vacate defendant's sentence and remand this matter to the trial court for resentencing in accordance with the dictates of this opinion.

We vacate defendant's sentence and remand for resentencing. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Kirsten Frank Kelly
/s/ Elizabeth L. Gleicher