

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BERNARD THOMPSON,

Defendant-Appellant.

UNPUBLISHED

December 14, 2004

No. 246814

Wayne Circuit Court

LC No. 02-005794

Before: Markey, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction on three counts of first-degree criminal sexual conduct, MCL 750.520b. We affirm.

On appeal, defendant challenges his concurrent eighteen to thirty year sentences, asserting that they were based on the erroneous scoring of Offense Variable 11, MCL 777.41. A sentencing court has discretion in determining the number of points to be scored for a guidelines variable, provided that evidence of record adequately supports a given score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Scoring decisions for which there is any evidence in support will be affirmed on appeal. *Id.* Proper construction of the statutory language is a question of law that is reviewed de novo. *People v Spanke*, 254 Mich App 642, 645; 658 NW2d 504 (2003).

Complainant testified about five penetrations that apparently took place over the course of a week. Defendant was scored fifty points for two or more criminal sexual penetrations. The statute provides:

(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. [MCL 777.41].

OV 13 concerns continuing pattern of criminal behavior. Defendant was scored fifty points: the offense was part of a pattern of felonious criminal activity involving 3 or more sexual penetrations against a person or persons less than 13 years of age. MCL 777.43(1)(a).

In *People v Mutchie*, 251 Mich App 273, 276; 650 NW2d 733 (2002), this Court construed the phrase “arising out of” to mean that the other sexual penetrations must result or spring from the sentencing offense. There must be a connection between the injury and the underlying matter. *Id.* Where the penetrations took place at the same place, under the same set of circumstances, and during the same course of conduct, the penetrations unambiguously fall within the scope of OV 11. *Id.*, 277. The Court expressly did not consider whether more distant acts of penetration would satisfy the arising under requirement. *Id.* at 278 n 2.

In affirming this Court’s decision, the Supreme Court found that the analysis of OV 11 offered by this Court was dictum. *People v Mutchie*, 468 Mich 50; 658 NW2d 154 (2003). In *People v McLaughlin*, 258 Mich App 635; 672 NW2d 860 (2003), this Court found the analysis in *Mutchie* to be persuasive, even though it was dicta. *McLaughlin* involved three serial penetrations.

Defendant failed to raise this objection to the scoring of OV 11 before the sentencing court, and this issue was not properly preserved. *People v McGuffey*, 251 Mich App 155; 649 NW2d 801 (2002). However, pursuant to MCL 769.34(10), a sentence that is outside the appropriate guidelines range is appealable regardless of whether the issue was raised at sentencing. *People v Kimble*, 470 Mich 305, 310; 684 NW2d 669 (2004). Where a scoring error constitutes plain error, it may be reviewed even though it was not raised below. *Id.* at 312.

Trial counsel’s failure to challenge guidelines scoring may also be reviewed in the context of an ineffective assistance of counsel claim. *People v Wilson*, 252 Mich App 390, 393; 652 NW2d 488 (2002). To establish an ineffective assistance of counsel claim, defendant first must show that counsel’s performance was below an objective standard of reasonableness under prevailing professional norms. The defendant must overcome a strong presumption that counsel’s actions constituted sound trial strategy. Second, the defendant must show that there is a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

Here, a change in guidelines scoring would have affected the sentencing grid, making defendant’s minimum sentence outside the range. However, there is no clear evidence that the court erred in its guidelines scoring. Whether another penetration arose out of the sentencing offense is open to interpretation, and the trial court could have properly found that the subsequent acts all arose out of the initial penetration. Defendant has failed to establish plain error or that he was actually prejudiced by the actions of trial counsel.

Affirmed.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens