

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GALEN LEE ARNETT,

Defendant-Appellant.

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UNPUBLISHED

May 15, 2014

No. 313339

St. Joseph Circuit Court

LC No. 11-017185-FC

Before: FITZGERALD, P.J., and SAAD and WHITBECK, JJ.

PER CURIAM.

Defendant, Galen Lee Arnett, appeals as on leave granted his sentence, following his plea of *nolo contendere* and conviction of one count of second-degree criminal sexual conduct (CSC II).<sup>1</sup> The trial court sentenced Arnett to serve 7 years, 2 months' to 15 years' imprisonment. Because the trial court improperly scored offense variable (OV) 13, we vacate Arnett's sentence and remand for resentencing.

**I. FACTS**

On October 3, 2011, Arnette pleaded *nolo contendere* to one count of CSC II. The prosecutor established the factual basis for the plea with an affidavit of probable cause. According to the affidavit, Arnett sexually assaulted the 9-year-old complainant multiple times between April 1, 2010, and November 24, 2010. The complainant told a police officer and a Children's Protective Services investigator that Arnett touched her breasts and vaginal area with his hands and mouth on top of and underneath her clothes. The complainant's statement detailed several sexual penetrations.

At Arnett's sentencing hearing, the trial court assessed 15 points for OV 8, reasoning that the affidavit of probable cause and presentence investigation report suggested that the sexual contact "occurred behind closed doors outside the presence of everyone else . . . ." The trial court also assessed Arnett 50 points under OV 13, which concerns patterns of criminal conduct. The trial court reasoned that the affidavit and presentence report contained information

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<sup>1</sup> MCL 750.520c(1)(a) (sexual contact with a person under 13 years of age).

establishing a pattern of criminal sexual penetrations against the complainant. The trial court ultimately assessed Arnett 90 points and sentenced him as stated above.

## II. SENTENCING

### A. STANDARD OF REVIEW

This Court reviews for clear error the trial court's factual determinations regarding scoring at a sentencing hearing.<sup>2</sup> A preponderance of the evidence must support the trial court's determinations.<sup>3</sup> The trial court's findings are clearly erroneous if, after we have reviewed the entire record, we are definitely and firmly convinced that it made a mistake.<sup>4</sup> This Court reviews de novo the proper interpretation and application of the scoring guidelines.<sup>5</sup>

### B. OV 8

#### 1. LEGAL STANDARDS

The trial court appropriately assesses 15 points for OV 8 if “[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.”<sup>6</sup> Asportation occurs when the defendant moves a complainant with or without force.<sup>7</sup>

#### 2. APPLYING THE STANDARDS

Arnett contends that the trial court erred when it assessed 15 points for OV 8 because there is no evidence that he moved or isolated the complainant. We disagree.

We conclude that there was sufficient evidence from which the trial court could infer that Arnett moved the complainant. This Court has concluded that sufficient evidence of asportation exists when “[t]he victims were moved, even if voluntarily, to the defendant's home where the criminal acts occurred.”<sup>8</sup>

Here, the complainant told interviewers that the assaults occurred when she and her sister slept over at Arnett's house. In a letter attached to his presentence investigation report, Arnett wrote that sometimes he and his wife invited the complainant over, and that he would take her on

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<sup>2</sup> *People v Hardy*, 494 Mich 430, 439; 835 NW2d 340 (2013).

<sup>3</sup> *Id.*

<sup>4</sup> *People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001).

<sup>5</sup> *Hardy*, 494 Mich at 438.

<sup>6</sup> MCL 777.38(1)(a).

<sup>7</sup> *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003).

<sup>8</sup> *Id.* at 648.

recreational outings that her parents did not take her on. Thus, there was sufficient evidence in the record from which the trial court could conclude that Arnett lured the complainant to his home, even if the complainant came voluntarily.

We also conclude that the bedroom in Arnett’s home was a place of greater danger. Taking actions to remove the complainant from observation creates a situation of greater danger because it makes it less likely that someone will interrupt the defendant while committing the crime.<sup>9</sup>

Here, the complainant reported that the assaults took place in Arnett’s home, behind a closed door, and that Arnett yelled at his wife to stay out of the room on one occasion. Thus, Arnett took steps to isolate the complainant and made it less likely that someone would interrupt him while he committed the crime. We agree with the trial court’s determination that the bedroom was a place of greater danger because the criminal conduct took place behind closed doors and outside the view of anyone else.

Thus, we conclude that the trial court did not err when it assessed 15 points for OV 8.

### C. OV 13

#### 1. LEGAL STANDARDS

The trial court properly scores OV 13 if there was a “continuing pattern of criminal behavior.”<sup>10</sup> MCL 777.43(1) provides that the trial court must

[s]core 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:

(a) The offense was a 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 ..... 50 points

\* \* \*

(c) The offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person ..... 25 points

The trial court must consider offenses that did not result in a conviction when assessing OV 13.<sup>11</sup> But MCL 777.439(d) provides that the trial court may “[s]core 50 points only if the sentencing offense is first degree criminal sexual conduct.”

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<sup>9</sup> *Id.*; *People v Steele*, 283 Mich App 472, 490-491; 769 NW2d 256 (2009).

<sup>10</sup> MCL 777.43.

## 2. APPLYING THE STANDARDS

Arnett contends that the trial court erred when it assessed 50 points under OV 13 because CSC I was not the sentencing offense. We agree.

Under OV 13, the trial court may consider offenses that were dismissed, as long as a preponderance of the evidence supports that the offense occurred.<sup>12</sup> However, MCL 777.439(d) expressly provides that the trial court may assess 50 points “only if the *sentencing offense* is first degree criminal sexual conduct.”<sup>13</sup>

Here, Arnett’s sentencing offense was *second-degree* criminal sexual conduct. Thus, the trial court erred when it assessed Arnett 50 points under OV 13. Even counting the several charges of first-degree criminal sexual conduct that were supported by the complainant’s statement but dismissed, the most that the trial court should have assessed under OV 13 was 25 points because Arnett’s sentencing offense was not first-degree criminal sexual conduct.

### D. RESENTENCING IS REQUIRED

If a mistaken score affected the defendant’s recommended minimum sentence, the defendant is entitled to resentencing.<sup>14</sup> Here, reducing Arnett’s score by 25 points—from 90 to 65 points—reduces his minimum sentence range from 43 to 86 months’ to 36 to 71 months’ imprisonment.<sup>15</sup> Therefore, we must remand for resentencing.

## III. CONCLUSION

We conclude that the trial court properly assessed Arnett 15 points for OV 8, but improperly assessed him 50 points for OV 13. Because the change affects his minimum sentencing range, we must remand for resentencing.

We vacate Arnett’s sentence and remand for resentencing. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ Henry William Saad

/s/ William C. Whitbeck

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<sup>11</sup> MCL 777.43(2)(a).

<sup>12</sup> *People v Nix*, 301 Mich App 195, 205; 836 NW2d 224 (2013).

<sup>13</sup> Emphasis added.

<sup>14</sup> *People v Jackson*, 487 Mich 783, 793-794; 790 NW2d 340 (2010).

<sup>15</sup> See MCL 777.16y; MCL 777.64.