

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL WESLEY BROWN,

Defendant-Appellant.

UNPUBLISHED

March 15, 2005

No. 251712

Midland Circuit Court

LC No. 99-009315-FC

Before: Murray, P.J., and Markey and O’Connell, JJ.

PER CURIAM.

Defendant was convicted, after a jury trial, of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(b), and one count of second-degree CSC (CSC II), MCL 750.520c(1)(b). He was sentenced to concurrent prison terms of ten-and-one-half to twenty-five years each for the CSC I convictions, and seven-and-one-half to fifteen years for the CSC II conviction. Defendant appealed by right. This Court affirmed defendant’s convictions, but vacated his sentences and remanded for a hearing on the scoring of 50 points for Offense Variable (OV) 7 (use of terrorism, sadism or brutality), MCL 777.37.¹ On remand, the trial court reaffirmed its prior scoring of 50 points for OV 7 and the initial sentencing decision. Defendant now appeals by leave granted. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

“A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score.” *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002); see also *People v Leversee*, 243 Mich App 337, 349; 622 NW2d 325 (2000). When there is any evidence supporting the trial court’s scoring decision it is not clearly erroneous and will be upheld. *People v Witherspoon*, 257 Mich App 329, 335; 670 NW2d 434 (2003).

¹ *People v Brown*, unpublished opinion per curiam of the Court of Appeals, issued January 3, 2003 (Docket No. 227953).

The instructions for OV 7 stated at the time of defendant's conviction:²

(1) Offense variable 7 is aggravated physical abuse. Score offense variable 7 by determining that of the following apply and by assigning the number of points attributable to the one that has the higher number of points:

(a) A victim was treated with terrorism, sadism, torture, or excessive brutality. 50 points

(b) No victim was treated with terrorism, sadism, torture, or excessive brutality. 0 points

(2) As used in this section:

(a) "Terrorism" means conduct designed to substantially increase the fear and anxiety a victim suffers during the offense.

(b) "Sadism" means conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification. [MCL 777.37 (emphasis added).]

Defendant's actions do not fit within the definition of sadism above. While the aggressive nature of the attack could certainly be taken as designed "for the offender's gratification," the facts do not support a finding that the complainant was subjected to "extreme or prolonged pain or humiliation" in this relatively brief assault which lasted ten minutes. Still, the defendant's continued forceful physical restraint of his struggling young daughter while he threatened her with violence and forced her to perform fellatio on him provides factual support for the trial court's decision. The court's finding that the aggressiveness of the encounter was "conduct designed to substantially increase the fear and anxiety a victim suffers during the offense" is not clearly erroneous. *Witherspoon, supra* at 335.

We affirm.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Peter D. O'Connell

² On April 22, 2002, after defendant was convicted, MCL 777.37 was amended in 2002 PA 137 to exclude "terrorism" as a factor in OV 7 but to retain the previous terrorism definition in the body of the offense variable.