

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON RYAN NORTON,

Defendant-Appellant.

UNPUBLISHED

March 27, 2007

No. 268223

Oakland Circuit Court

LC No. 05-200219-FH

Before: Zahra, P.J., and Bandstra and Owens, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted his sentence of four years, three months (51 months) to 15 years in prison imposed on his plea-based conviction of criminal sexual conduct in the third degree, the victim being at least 13 years of age but under 16 years of age, MCL 750.520d(1)(a). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant pleaded guilty of engaging in sexual intercourse with complainant in return for an agreement that the trial court would sentence him to a minimum term at the low end of the sentencing guidelines. *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993). The guidelines, as scored by the trial court, recommended a minimum term range of 51 to 85 months. Defendant objected to the trial court's scoring of Offense Variable (OV) 10, MCL 777.40, exploitation of a vulnerable victim, at ten points based on complainant's youth, noting that although complainant was in fact 14 years old at the time the incident occurred, she had represented that she was 17 years old, and was a willing participant in the encounter. The trial court denied defendant's challenge, asserting that when a victim is 14 years old, there is "exploitation per se."

In calculating the sentencing guidelines the trial court has discretion to determine the number of points to be scored, provided that evidence in the record supports a particular score. A scoring decision for which there is any evidence in the record will be upheld. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Under OV 10, a trial court must assess ten points if the defendant "exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." MCL 777.40(1)(b). However, "[t]he mere existence of 1 or more factors described in subsection (1) does not automatically equate with victim vulnerability." MCL 777.40(2). The term "exploit" is defined to mean, "to manipulate a victim

for selfish or unethical purposes,” MCL 777.40(3)(b), and the term “vulnerability” is defined to mean, “the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation.” MCL 777.40(3)(c).

Defendant argues that the trial court abused its discretion by scoring OV 10 at ten points because no evidence showed that he exploited complainant based on her age. Defendant emphasizes that no evidence regarding complainant’s appearance, etc., supported a conclusion that his acceptance of her representation that she was 17 years old was objectively unreasonable, and that, contrary to the trial court’s conclusion, a victim’s youth, in and of itself, “does not automatically equate with victim vulnerability.” MCL 777.40(2). Defendant contends that because scoring OV 10 at zero points would result in a minimum term range of 36 to 60 months, and that because his plea agreement called for a minimum term at the low end of the guidelines, he is entitled to resentencing.

We disagree and affirm defendant’s sentence. It is undisputed that complainant was 14 years old and that defendant was 22 years old at the time the incident occurred. In *People v Johnson*, 474 Mich 96, 103; 712 NW2d 703 (2006), a case in which the defendant was 20 years old and the victim was 15 years old, our Supreme Court held that OV 10 was properly scored at ten points because a court could determine that the defendant exploited the complainant’s youth. *Johnson, supra*, supports the trial court’s scoring of OV 10 at ten points in this case.

Other evidence supported the trial court’s scoring decision as well. Defendant admitted that he had met complainant through a friend, that he and complainant had been in contact over the Internet for several days, and that he had sent her a web cam photo of his penis. Defendant and another man picked up complainant at her home and took her to the location where the incident of unprotected sexual intercourse occurred. This evidence supported the trial court’s scoring of OV 10 at ten points. *Hornsby, supra*.

The trial court did not abuse its discretion by scoring OV 10 at ten points, and defendant is not entitled to resentencing.

Affirmed.

/s/ Brian K. Zahra
/s/ Richard A. Bandstra
/s/ Donald S. Owens