

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

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
June 18, 2013

v

WILLIAM RUSSELL GERMAN,  
  
Defendant-Appellant.

No. 309038  
Jackson Circuit Court  
LC No. 11-004551-FH

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Before: OWENS, P.J., and GLEICHER and STEPHENS, JJ.

PER CURIAM.

Defendant William Russell German appeals as of right his conviction for second-degree criminal sexual conduct, MCL 750.520c(1)(c) (sexual contact during the commission of another felony). Defendant was sentenced to 6 to 15 years' imprisonment for his conviction. We affirm.

Defendant's conviction stems from an incident where he enticed the victim, a 15-year-old girl, to expose her breasts. Defendant took a photograph of the victim's breasts on his cellular telephone and then forced the victim, against her will, to touch his penis. Defendant then masturbated in front of the victim. After a bench trial, the trial court convicted defendant of second-degree criminal sexual conduct (CSC II), for sexual contact occurring during the commission of another felony. The "other felony" for purposes of CSC II was producing child sexually abusive material for taking the photograph. In sentencing defendant, the trial court found, under offense variable (OV) 12, that defendant committed three uncharged contemporaneous felonious criminal acts against a person because he: (1) produced child sexually abusive material in contravention of MCL 750.145c(2); (2) used a computer to commit a crime in contravention of MCL 752.796(1); and he possessed child sexually abusive material in violation of MCL 750.145c(4). Thus, pursuant to MCL 777.42(1)(a), the trial court scored 25 points under OV 12.

On appeal, defendant challenges the trial court's scoring of OV 12 on multiple grounds. First, he contends that the trial court could not have found that he committed three contemporaneous felonious criminal acts against a person because, although he committed three separate offenses, as scored, he only committed one act. Defendant also challenges the trial court's scoring decision by arguing that the trial court erred when it found that his cellular telephone was a "computer" as defined by MCL 752.792(3) for purposes of finding that he used a computer to commit a crime.

Resolution of defendant's first issue requires us to interpret the term "contemporaneous felonious criminal act" found in MCL 777.42(1) to determine whether the Legislature intended for a sentencing court to score for each individual criminal offense, including those arising from the same act, or whether the Legislature only intended a sentencing court to score points for an individual act. This is an issue of law that we review de novo. *People v Light*, 290 Mich App 717, 721; 803 NW2d 720 (2010). When this Court interprets a statute, its primary goal

is to give effect to the intent of the Legislature. If the language of the statute is unambiguous, judicial construction is not permitted because the Legislature is presumed to have intended the meaning it plainly expressed. Judicial construction is appropriate, however, if reasonable minds can differ concerning the meaning of a statute. Where ambiguity exists, this Court seeks to effectuate the Legislature's intent by applying a reasonable construction based on the purpose of the statute and the object sought to be accomplished. The court must look to the object of the statute, the harm it is designed to remedy, and apply a reasonable construction that best accomplishes the purpose of the statute. In construing a statute, the statutory provisions must be read in the context of the entire statute in order to produce a harmonious whole; courts must avoid a construction that would render statutory language nugatory. [*Id.* at 722 (quotation marks and citations omitted).]

In the case at bar, MCL 777.42(1) directs the trial court to score points for contemporaneous felonious criminal acts involving crimes against a person, property, or otherwise. The term "contemporaneous" is defined by statute, but the term "felonious criminal act" is not. Where a term is not defined by statute, a reviewing court may look to dictionary definitions. *People v Laidler*, 491 Mich 339, 347; 817 NW2d 517 (2012). If "a statute employs technical terms of art, it [is] proper to explain them by reference to the art or science to which they [are] appropriate." *People v Ball*, 297 Mich App 121, 123; 823 NW2d 150 (2012), quoting *People v Blunt*, 282 Mich App 81, 83; 761 NW2d 427 (2009) (quotation marks and citations omitted; alterations in *Ball*). Black's Law Dictionary (rev 4th ed) defines "criminal act" as "[a] term which is equivalent to crime . . . or as importing a possible question of the legal guilt of the deed. The intentional violation of statute designed to protect human life is [a] criminal act." We find that this definition supports the view that a criminal act is equivalent to crime or a violation of the law, and not necessarily an action. For instance, the definition equates a criminal act to crime, and multiple crimes can result from the same act. See *People v Garland*, 286 Mich App 1, 4-6; 777 NW2d 732 (2009); *People v Loper*, \_\_ Mich App \_\_; \_\_ NW2d \_\_ (2013) (Docket No. 308026, issued February 14, 2013), slip op at 7-8.

Further, this interpretation of "criminal act" comports with our Supreme Court's treatment of OV 12 in *People v Bonilla-Machado*, 489 Mich 412, 428; 803 NW2d 217 (2011), wherein the Court noted that the plain language of OV 12 directs the trial court to consider *crimes* for purposes of scoring the offense variable. Specifically, our Supreme Court explained, albeit in the context of evaluating OV 13, that "[t]he plain language of MCL 777.42 indicates the Legislature's express intent to allow sentencing courts to consider *crimes* within all the offense categories when scoring OV 12." *Id.* at 428-429 (emphasis added; emphasis in original omitted). Furthermore, our Supreme Court has recognized the ability of the Legislature to define a "criminal act" to mean an offense, as well as the Legislature's ability to enact multiple

punishments for the same action. See, e.g., *People v Denio*, 454 Mich 691, 709; 564 NW2d 13 (1997).

In light of the forgoing, we conclude that the Legislature's use of the term "felonious criminal act" in OV 12 signifies the Legislature's intent for the trial court to consider and score separate violations of the law and not, as defendant contends, only consider separate actions. Further, in interpreting a statute, we must avoid an interpretation that would render nugatory or surplusage any part of the statute. *People v Couzens*, 480 Mich 240, 249; 747 NW2d 849 (2008). To interpret the phrase "contemporaneous felonious criminal act" in the manner suggested by defendant would be to ignore the word "criminal" and the significance the word has when defining an "act" under the statute. The term "criminal act" has special meaning, and can refer to crime or legal guilt, not necessarily a single action taken by a defendant.

Although we reject defendant's argument, we nevertheless find that the trial court erred in scoring OV 12. In *Light*, 290 Mich App at 725-726, we explained that in order to score a contemporaneous felonious criminal act under OV 12, the act must be separate from the sentencing offense. Here, defendant's sentencing offense, CSC II, was based on sexual contact during the commission of a felony, with the underlying felony being producing child sexually abusive material. Thus, under *Light*, the trial court erred when it scored defendant's conduct related to producing child sexually abusive material because that offense was subsumed into the sentencing offense. *Id.* at 726.

Nevertheless, defendant is not entitled to resentencing because the record demonstrates that defendant committed two additional contemporaneous felonious criminal acts involving crimes against a person not identified by the trial court which could be scored under OV 12. First, the record reveals that defendant committed the offense of accosting a minor for immoral purposes. MCL 750.145a provides that:

A person who accosts, entices, or solicits a child less than 16 years of age, regardless of whether the person knows the individual is a child or knows the actual age of the child, or an individual whom he or she believes is a child less than 16 years of age with the intent to induce or force that child or individual to commit an immoral act, to submit to an act of sexual intercourse or an act of gross indecency, or to any other act of depravity or delinquency, or who encourages a child less than 16 years of age, regardless of whether the person knows the individual is a child or knows the actual age of the child, or an individual whom he or she believes is a child less than 16 years of age to engage in any of those acts is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than \$4,000.00, or both.

Here, defendant's conduct fulfills the statutory requirements of the offense because he enticed a 15-year-old girl to commit an immoral act, i.e., exposing her breasts, and accosting a minor for immoral purposes is a crime against a person. MCL 777.16g. Therefore, this conduct may be scored under OV 12. Additionally, the record reveals that defendant committed another offense against a person—aggravated indecent exposure—that may be scored under OV 12. Aggravated indecent exposure is a crime against a person, MCL 777.16q, and a person commits the offense when he "knowingly make[s] any open or indecent exposure of his or her person or of the

person of another,” and at the same time ““was fondling his or her genitals, pubic area, [or] buttocks . . . .”” *People v Franklin*, 298 Mich App 539, 546; 828 NW2d 61 (2012), quoting MCL 750.335a(1), (2)(b). Here, the record reveals that defendant committed the offense of aggravated indecent exposure because he exposed his penis to the victim and subsequently masturbated. MCL 750.335a(2)(b).

In light of the fact that there were two additional crimes against a person that the trial court could have considered, we decline to remand for resentencing and affirm the trial court’s scoring decision, albeit under alternative reasoning. See *People v Bauder*, 269 Mich App 174, 187; 712 NW2d 506 (2005) (“This Court will not reverse a trial court decision when the lower court reaches the correct result even if for a wrong reason.”).

Lastly, defendant argues that the trial court erred by scoring the offense of using a computer to commit a crime under OV 12 because he alleges that his cellular telephone was not a “computer” under the statutory definition of the term in MCL 752.792(3). Defendant did not preserve this issue; thus, our review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). On this limited record, and based on the broad definition of “computer” in MCL 752.792(3), it appears clear that the trial court did not err in concluding that defendant’s cellular telephone met the statutory definition of “computer.” Nevertheless, we need not decide this issue because, even if defendant was correct in arguing that his cellular telephone was not a computer and thus, he could not have used a computer to commit a crime, reversal is not warranted. There is evidence of three crimes against a person, i.e., aggravated indecent exposure, accosting a minor for immoral purposes, and possessing child sexually abusive material, to support the trial court’s scoring of OV 12. Therefore, even assuming that defendant was correct, we would find that there was sufficient evidence to support the trial court’s scoring decision under OV 12. See *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009) quoting *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006) (“[a] trial court’s scoring decision ‘for which there is any evidence in support will be upheld.’”).

Affirmed.

/s/ Donald S. Owens  
/s/ Elizabeth L. Gleicher  
/s/ Cynthia Diane Stephens