

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HARRY ELSWORTH BURNHAM,

Defendant-Appellant.

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UNPUBLISHED  
November 14, 2013

No. 311379  
Oakland Circuit Court  
LC No. 2011-236422-FC

Before: SAWYER, P.J., and O'CONNELL and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (victim under 13 years of age).<sup>1</sup> He was sentenced as a third habitual offender, MCL 769.11, to 7 to 30 years' imprisonment. We affirm defendant's convictions, but remand for resentencing in light of the trial court's erroneous scoring of offense variable (OV) 11.

I. SUFFICIENCY OF THE EVIDENCE

Defendant argues that there was insufficient evidence to support his two CSC II convictions. We disagree. In "determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). "The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

At trial, the female victim testified that defendant, a family friend who lived in the neighborhood, penetrated her vagina with his penis. Her younger brother testified that defendant performed fellatio on him. It was uncontroverted that both were under 13 years of age at the

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<sup>1</sup> The jury acquitted defendant of both counts of CSC I, but convicted him of two counts of the lesser offense of CSC II.

time of the alleged penetration. Given that a CSC victim's uncorroborated testimony is sufficient evidence to support a CSC conviction, Drew and Alex's respective testimonies were sufficient evidence to support defendant's CSC II convictions. MCL 750.520h ("The testimony of a victim need not be corroborated in prosecutions under sections 520b to 520g."); *People v Szalma*, 487 Mich 708, 724; 790 NW2d 662 (2010).

## II. OV 11

Defendant next argues that the trial court erred in assessing 50 points under OV 11. We agree.<sup>2</sup> "Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

OV 11 is properly scored at 50 points where a defendant engaged in "[t]wo or more criminal sexual penetrations." MCL 777.41(1)(a). However, a trial court may only score "sexual penetrations of the victim by the offender arising out of the sentencing offense." MCL 777.41(2)(a). A sexual penetration "aris[es] out of the sentencing offense" when it occurs "at the same place, under the same set of circumstances, and during the same course of conduct" as the sentencing offense. *People v Mutchie*, 251 Mich App 273, 277; 650 NW2d 733 (2002), aff'd 468 Mich 50 (2003).<sup>3</sup>

It appears that the trial court scored 50 points under OV 11 on the basis that defendant sexually penetrated the girl once and the boy once; however, these penetrations occurred at different times, in different locations, and with different victims. The trial court should have assessed defendant 25 points, instead of 50 points, under OV 11. If defendant was assessed 25 points under OV 11, defendant's recommended minimum sentence range would be reduced to 36 to 106 1/2 months' imprisonment. MCL 777.64; MCL 777.21(3)(b).

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<sup>2</sup> We reject the prosecution's argument that this error is unpreserved. Defendant moved for resentencing in the trial court and, although defendant argued that OV 11 was improperly scored for reasons other than those raised on appeal, MCL 769.34(10) requires resentencing when the sentence is based on inaccurate information. Additionally, an error in scoring that results in a different guidelines range generally requires resentencing. *People v Jackson*, 487 Mich 783, 793-794; 790 NW2d 340 (2010); *People v Francisco*, 474 Mich 82, 92; 711 NW2d 44 (2006).

<sup>3</sup> Although the Michigan Supreme Court determined that the *Mutchie* Court's OV 11 analysis was dictum, *People v Mutchie*, 468 Mich 50, 51-52; 658 NW2d 154 (2003), this Court has found it persuasive, *People v McLaughlin*, 258 Mich App 635, 674 n 16; 672 NW2d 860 (2003).

Defendant's convictions are affirmed, but the sentences are vacated and the matter is remanded for resentencing on accurate information.<sup>4</sup> We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Peter D. O'Connell

/s/ Kirsten Frank Kelly

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<sup>4</sup> On remand, the prosecution may argue whether rescoring of OV 13 (continuing pattern of criminal behavior) is necessary.