

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
November 19, 2013

v

SKYLER MICHAEL HARTUNG,
Defendant-Appellant.

No. 311239
Saginaw Circuit Court
LC No. 11-035405-FH;
11-035425-FH;
11-035416-FJ

Before: MURRAY, P.J., and DONOFRIO and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals from his convictions, following a jury trial, of two counts of resisting and obstructing a police officer, MCL 750.81d(1), five counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (victim under 13), and one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (victim under 13). Defendant was sentenced to serve concurrent prison terms of 13 to 25 years for each CSC I conviction, three to 15 years for the CSC II conviction, and 33 days for each resisting and obstructing arrest convictions. Defendant received 33 days' credit for time served. Defendant appeals as of right. We affirm defendant's convictions but remand for resentencing.

I. BACKGROUND

A. WALKER HEARING

Before trial, a *Walker*¹ hearing was held to determine whether defendant's statements during a May 2010 interview were voluntary. In May 2010, defendant was interviewed by police when he made several incriminating statements. Defendant initially denied any sexual contact with the victims but at the end of the interview admitted guilt. Throughout the interview, defendant was repeatedly told he was not under arrest, and regardless of what was said in the

¹ In *People v Walker*, 374 Mich 331, 338; 132 NW2d 87 (1965), our Supreme Court determined that voluntariness of a statement is a preliminary question of law to be determined on a separate record.

interview, defendant would not be going to jail that day. Defendant acknowledged at the end of the interview that he understood that he had not been under arrest and was free to go at the end of the interview.

When police went to arrest defendant one week later, he did not comply with officers. Defendant attempted to re-enter a building and did not stop when commanded to do so by police. The arresting officers used physical force to stop defendant and force him to the ground, where defendant continued to disregard police commands. More physical force was used and eventually defendant complied. At the end of the hearing, the trial court determined the statements were made voluntarily.

B. TRIAL

At trial, AH testified that defendant began sexually molesting her when she was five years old. This included instances of sexual intercourse, as well as oral-genital and digital-anal penetration. AH was also permitted to testify about similar acts that occurred in a different county. Although AH's recall of specific details, like dates and times, at trial was poor, she was sure the first incident of sexual intercourse occurred when she was five years old.

BH, AH's older sister, testified that defendant also began sexually molesting her when she was five years old, and provided details of various acts of sexual penetration and touching, including those that occurred in a different county. Another child, ZB, testified that defendant touched ZB's penis while in defendant's bedroom. ZB said he asked defendant to stop, but defendant continued touching ZB's penis. One of defendant's brothers testified that he walked into defendant's bedroom and saw ZB zipping up his pants, although ZB could not recall anyone coming into defendant's bedroom during the incident.

Evidence was presented that defendant was mildly mentally retarded and had an IQ of 65. However, the interviewing officers both indicated that during the interview defendant appeared to follow the conversation and understand what was going on. The defense expert witness testified that if defendant committed the crimes, he was legally insane at the time. The prosecution's expert witness disagreed. After hearing all the evidence and being instructed, the jury returned a guilty verdict on five counts of CSC I, one count of CSC II, and two counts of resisting or obstructing arrest. This appeal followed.

II. ANALYSIS

First, defendant argues that there was insufficient evidence to support the jury's verdicts, because there was no physical evidence, the victims were not credible, there was no evidence concerning injury, and defendant's mental retardation interfered with his ability to form intent to resist or obstruct arrest.

This Court reviews de novo sufficiency of the evidence issues, *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010), examining the evidence in a light most favorable to the prosecution, and determines whether a rational trier of fact could have found that every essential element was proven beyond a reasonable doubt. *Id.* at 196. The prosecutor has the burden to produce evidence that demonstrates guilt beyond a reasonable doubt. *People v Harverson*, 291 Mich App 171, 175; 804 NW2d 757 (2010).

Generally, circumstantial evidence and the reasonable inferences that can be drawn from that evidence can amount to sufficient evidence. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). What inferences can be drawn from the evidence, and the weight given to those inferences, is a question left to the jury. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). The jury is also responsible for determining questions of credibility and intent, *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009); *People v Lueth*, 253 Mich App 670, 682-683; 660 NW2d 322 (2002), a role with which we do not interfere. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992), amended on other grounds 441 Mich 1201 (1992).

To prove CSC I under the theory charged here, the prosecutor had to prove that defendant engaged in: (1) sexual penetration, (2) with another person, (3) who was under 13 years of age. MCL 750.520b(1)(a). Sexual penetration is “sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body, but emission of semen is not required.” MCL 750.520a(r). To prove CSC II, also as charged here, the prosecutor had to prove that defendant engaged in: (1) sexual contact, (2) with another person, (3) who was under 13 years of age. MCL 750.520c(1)(a). Sexual contact:

includes the intentional touching of the victim’s or actor’s intimate parts or the intentional touching of the clothing covering the immediate area of the victim’s or actor’s intimate parts, if the intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification [or] done for a sexual purpose [MCL 750.520a(q).]

Intimate parts are defined as “the primary genital area, groin, inner thigh, buttock, or breast” MCL 750.520a(e).

Finally, to prove resisting and obstructing a police officer, the prosecutor had to prove: “(1) the defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered a police officer, and (2) the defendant knew or had reason to know that the person that the defendant . . . resisted, obstructed, opposed, or endangered was a police officer performing his or her duties.” *People v Corr*, 287 Mich App 499, 503; 788 NW2d 860 (2010); see also MCL 750.81d(1). MCL 750.81d(7)(a) defines “obstruct” as “the use or threatened use of physical interference or force or a knowing failure to comply with a lawful command.”

Although defendant argues that lack of physical evidence supports a conclusion that there was insufficient evidence to support the verdicts, defendant does not cite any authority to indicate physical evidence is necessary for a conviction. *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001) (A party cannot leave this Court to “discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.” [Quotation marks and citation omitted.]). In fact, Michigan statutory law and caselaw establish that the testimony of a victim in a CSC case does not have to be corroborated by other evidence. MCL 750.520h; *People v Phelps*, 288 Mich App 123, 133; 791 NW2d 732 (2010).

In any event, there was sufficient evidence to support the CSC convictions. AH and BH testified about four separate occasions where defendant had sexual intercourse with them. AH further testified about two additional penetrations, and BH indicated defendant also committed another act of penetration with her. Thus, there existed evidence of at least five incidents of sexual penetration between defendant and AH and BH. In addition, testimony supported a finding that defendant had sexually touched ZB. The victims' testimony also established they were under 13 years old when the incidents occurred. Based on the victim's testimony alone, there was sufficient evidence to support the jury's verdict. In addition, defendant's statements to police corroborated this evidence. As to defendant's suggestion that the victims were not credible, the jury is responsible for determining credibility and what weight evidence should be given. *Hardiman*, 466 Mich at 428; *Harrison*, 283 Mich App at 378.

The prosecution also presented sufficient evidence to support the resisting or obstructing convictions. Defendant argues that his mental retardation and desire to call his mother were not an intent to resist arrest. However, defendant does not cite any caselaw that indicates mild mental retardation is a barrier to forming intent. *Kevorkian*, 248 Mich App at 389. Intent can be established with minimal circumstantial evidence and can be inferred from all evidence presented because of the difficulty associated with proving state of mind. *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008). Again, there was testimony that defendant knew the officers were in fact officers and that after he was told he was under arrest, defendant attempted to return to the building and would not comply with their commands. Although defendant's mild mental retardation was some evidence to be considered in his ability to form intent, it was ultimately up to the jury to determine defendant's intent. *Hardiman*, 466 Mich at 428; *Harrison*, 283 Mich App at 378; *Lueth*, 253 Mich App at 682-683.

Next, defendant argues that the trial court made several errors that denied defendant his due process and fair trial rights. First, defendant argues the trial court erred by instructing the jury on flight when no evidence that defendant attempted to flee any of the CSC crimes was presented. Claims of instructional error are reviewed de novo. *People v Hartuniewicz*, 294 Mich App 237, 242; 816 NW2d 442 (2011). However, a trial court's decision whether a particular instruction is applicable to the facts of a case is reviewed for an abuse of discretion. *Id.* An abuse of discretion occurs when the decision falls beyond the range of principled results. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010).

When this Court reviews claims of instructional error, the jury instructions are considered as a whole to determine if the court "omitted an element of the offense, misinformed the jury on the law, or otherwise presented erroneous instructions." *Hartuniewicz*, 294 Mich App at 242. The trial court must give a requested instruction when there has been evidence presented that supports a theory or defense of the case. *People v Rodriguez*, 463 Mich 466, 472; 620 NW2d 13 (2000). It has been well established "that evidence of flight is admissible." *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Evidence of flight is admissible as it is probative and "may indicate consciousness of guilt, although evidence of flight by itself is insufficient to sustain a conviction." *Id.* Furthermore, resisting arrest and running from the police are actions that have been associated with the term "flight." *Id.* Here, the trial court's instruction adequately discussed these concepts, and the testimony supported the instruction. The trial court did not err.

Second, defendant argues that the trial court erred in admitting his statements to the police during the interview because defendant's statements were not voluntary. This Court reviews a trial court's determination on a motion to suppress de novo. *People v Steele*, 292 Mich App 308, 313; 806 NW2d 753 (2011). "Although this Court engages in a de novo review of the entire record, it will not disturb a trial court's factual findings unless those findings are clearly erroneous." *Id.* If, after review, this Court is left "with a definite and firm conviction" a mistake was made, then the factual finding is clearly erroneous. *Id.* However, a trial court's determination on constitutional issues is reviewed de novo. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

The Fifth Amendment of the United States Constitution guarantees that no person "shall be compelled in any criminal case to be a witness against himself[.]" US Const, Am V. In *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), the Court established the guidelines to protect an individual from self-incrimination. Before custodial interrogation may occur, an individual must be warned that "he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.* at 444. *Miranda* warnings are only necessary preceding custodial interrogation, which is police-initiated questioning after an individual has been taken into custody or otherwise deprived of freedom. *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). Simply because a person has become the "focus" of an investigation does not require *Miranda* warnings, absent custody. *People v Hill*, 429 Mich 382, 391; 415 NW2d 193 (1987).

As just noted, one of the key determinations is whether the accused was in custody at the time of interrogation. To determine whether an individual is in custody, the key inquiry is "whether there is restraint on freedom of movement in any significant way such as of the degree associated with a formal arrest." *People v Roberts*, 292 Mich App 492, 504; 808 NW2d 290 (2011). The custody determination is made based on the totality of the circumstances and whether a reasonable person in the accused's place would feel free to leave. *Id.* at 504-505.

Although defendant cites *Miranda* as support for his position, *Miranda* was not violated in this case. Defendant was told three times throughout the interview that he was not under arrest. At the end of the interview, defendant acknowledged that he was not under arrest, that he knew the car door was unlocked, and that at the end of the interview he was going to be able to leave. Also, defendant asked to leave twice, but resumed speaking to the officers instead of leaving. No evidence supported a conclusion that defendant was in custody at the time he made these statements.

Even though *Miranda* is not applicable, to be admissible defendant's statements are still required to be deemed voluntary. *People v Switzer*, 135 Mich App 779, 784; 355 NW2d 670 (1984) ("It is clear that confessions made involuntarily to the police may never be used against a criminal defendant, not only because the police broke the law, but more importantly because an involuntary confession is always of questionable trustworthiness."). The voluntariness of a confession is based on the totality of the circumstances, and there are many factors to be considered. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). When considering the totality of the circumstance, a defendant's IQ is only one factor. *People v Cheatham*, 453 Mich 1, 36; 551 NW2d 355 (1996). "Low mental ability in and of itself is insufficient to

establish that a defendant did not understand his rights.” *Id.* Furthermore, determining that someone is mentally retarded involves more than an IQ score. *Id.*

The trial court determined that defendant’s statement was voluntary, a finding that was not clearly erroneous. Although defendant has a low IQ and some functional impairments, evidence was presented that defendant understood the difference between right and wrong. There was also evidence that defendant understood the role of police and that he was being investigated. Defendant also admitted that although he felt like he had to talk with police, defendant knew he did not have to, and that he was not under arrest. Based on the totality of the circumstances, we do not have a definite and firm belief that a mistake was made. *Steele*, 292 Mich App at 313. Therefore, we will not overturn the trial court’s finding that the statement was voluntary.

Finally, defendant argues that his “due process right” was violated when the trial court admitted other acts evidence under MCL 768.27b. This Court reviews a trial court’s decision whether to admit evidence for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). Again, an abuse of discretion occurs when the decision falls beyond the range of principled results. *Feezel*, 486 Mich at 192. But this Court reviews whether evidence is admissible under a statute de novo because it involves a question of statutory interpretation. *People v Smith*, 282 Mich App 191, 198; 772 NW2d 428 (2009).

Generally, other acts evidence is not admissible for the purpose of demonstrating that the defendant acted in conformity therewith, but it may be used for other purposes, such as demonstrating intent, scheme, or plan. MRE 404(b)(1); *People v Mardlin*, 487 Mich 609, 614-615; 790 NW2d 607 (2010). However, MCL 768.27a provides that it is admissible in certain CSC cases, as it states in pertinent part that “in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant.” “‘Listed offense[s]’ include[e] violations of MCL 750.520b (CSC I) and MCL 750.520c (CSC II).” *People v Mann*, 288 Mich App 114, 117 n 6; 792 NW2d 53 (2010).

However, evidence sought to be introduced under MCL 768.27a is still subject to MRE 403. *People v Watkins*, 491 Mich 450, 481; 818 NW2d 296 (2012). MRE 403 indicates that relevant evidence will be excluded if the probative value is substantially outweighed by the prejudicial effect. MRE 403; *People v Ortiz*, 249 Mich App 297, 305-306; 642 NW2d 417 (2001). Therefore, in order to allow admission of a defendant’s previous sexual offenses under MCL 768.27a, the trial court must still conduct an MRE 403 balancing test. *Watkins*, 491 Mich at 486-487. But when conducting the 403 balancing test, the trial court “must weigh the propensity inference in favor of the evidence’s probative value rather than its prejudicial effect.” *Id.* at 487. Stated differently, evidence of a defendant’s previous sexual offenses is not unfairly prejudicial merely because it allows for an inference of propensity. *Id.*

Here, the trial court allowed admission of the evidence but did not discuss this decision or conduct an MRE 403 balancing test. Its failure to do so constituted error. *Id.* at 489. However, in light of the evidence and the charges, the error was harmless.

The other acts evidence was highly relevant because of the similarity in nature of the other acts and the fact that these acts involved the same victims, albeit in a different physical location. Furthermore, any prejudice was solely due to the propensity inference which, in reviewing admission under the statute, is not by itself a sufficient reason for exclusion.

Lastly, defendant argues the trial court made several errors in scoring multiple offense variables (OV), which invalidated defendant's sentence. We agree that the trial court erred in scoring OV 7 and OV 9, and that other clerical errors in the judgment of sentence² and PSIR³ require correction on remand.

Legal questions, like the interpretation and application of the sentencing guidelines, are reviewed de novo. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008). This Court will affirm the defendant's sentence within the guidelines absent an error in scoring. MCL 769.34(10); *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003). Furthermore, a trial court's "factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

The trial court must read the sentencing guidelines as a whole when determining how many points to score for each offense variable. *People v Bonilla-Machado*, 489 Mich 412, 422; 803 NW2d 217 (2011). When interpreting the statutes, the best indicator of legislative intent is the words used, which "should be interpreted on the basis of their ordinary meaning and the context within which they are used[.]" *Id.* at 421-422.

Defendant first argues that the trial court erred in using facts other than what the jury determined in scoring defendant's guidelines. Defendant cites *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), and its progeny to support his position that the trial court cannot act as a fact finder. However, defendant does not acknowledge that *Apprendi* and its progeny apply to judicial fact finding when applying a sentence beyond a statutory maximum.

² The judgment of sentence (from file 11-035416-FJ) indicates that defendant was convicted on counts one through five of CSC I by the jury and then indicates that defendant was convicted on count 10 of CSC I by the court, for a total of six CSC I convictions. However, an order of acquittal issued June 26, 2012, indicates defendant was acquitted by the jury of count 10, CSC I. The information charged defendant with six counts of CSC I (counts one through six) and two counts of CSC II (counts seven and eight). At trial, the prosecutor dismissed counts seven and eight. Defendant was found guilty of counts one through five and acquitted of count six. Therefore, defendant was found guilty of only five counts of CSC I and acquitted of one. Furthermore, at sentencing the trial court indicated there were only four counts of CSC I, which appears to be a misstatement. On remand the judgment of sentence should be corrected to indicate only five convictions of CSC I.

³ The PSIR provides that OV 5 was scored 5 points. However, the sentencing information sheet does not have a score of OV 5, but does show 10 points were scored for OV 4.

People v Drohan, 475 Mich 140, 157; 715 NW2d 778 (2006). But *Apprendi* and its progeny do not apply to sentences that do not exceed statutory maximums. *Id.* at 164.⁴

As to defendant's first scoring challenge, MCL 777.33(1)(e) indicates that scoring five points under OV 3 is proper when "[b]odily injury not requiring medical treatment occur[s] to a victim." Bodily injury has been held to encompass "anything that the victim would, under the circumstances, perceive as some unwanted physically damaging consequence." *People v McDonald*, 293 Mich App 292, 298; 811 NW2d 507 (2011). This can include unwanted pregnancy and infections that are the result of CSC. *Id.* Pain can also be an indication of physical injury, but there must be record evidence of pain. See *People v Endres*, 269 Mich App 414, 417-418; 711 NW2d 398 (2006) ("While the prosecutor's file notes indicated that the victim experienced rectal pain . . . that information was not placed on the record.").

Here, the PSIR indicates that the five points were justified on the grounds that AH testified during the preliminary examination that she experienced pain during sexual intercourse. At sentencing, the prosecutor stated that AH and BH's parents were prepared to testify that the girls "had actually repeatedly been to the doctor and been treated for various infections, primarily yeast infections, . . . [which] were the result of [the abuse]." However, no evidence of the doctor visits or infections was placed on the record, nor did the parents actually testify about the doctor appointments, etc. Nonetheless, AH's preliminary exam testimony sufficiently meets the preponderance of the evidence standard necessary to support the finding that five points were justified. *Hardy*, 494 Mich at 438.

OV 7, however, should have been scored zero points. MCL 777.37(1)(a) indicates that OV 7 is to be scored at 50 points when "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." Fifty points is therefore justified if a victim is treated in one of four ways: with (1) sadism, (2) torture, (3) excessive brutality, or (4) conduct designed to substantially increase fear and anxiety. *Hardy*, 494 Mich at 439-440. Here, the parties agree that sadism, torture, and excessive brutality are inapplicable to the facts. Instead both focus on whether defendant committed "conduct designed to substantially increase fear and anxiety" of the victims. We do not agree with plaintiff's contention that defendant's act in secluding the victims before he engaged in sexual contact with them justifies the scoring decision. Rather, our Supreme Court has recognized that "all crimes against a person involve the infliction of a certain amount of fear and anxiety." *Hardy*, 494 Mich at 442 (quotations and citation omitted). Therefore, the proper inquiry is to determine the baseline of fear and anxiety for the charged offense and then resolve whether the defendant designed his conduct to *substantially* increase the fear and anxiety. *Id.* at 442-443.

As charged in the instant case, the minimum conduct for CSC I is the penetration of a victim under 13 while the minimum conduct for CSC II is the sexual touching of a victim under 13. The victims testified that defendant penetrated them, on separate occasions in different

⁴ Defendant has not raised any issue about judicial fact finding relative to any statutory minimum. See *Alleyne v United States*, ___ US ___, 133 S Ct 2151; 186 L Ed 2d 314 (2013).

locations, and that defendant touched them in a sexual manner. However, there was no evidence that defendant engaged in any conduct other than the penetration or touching necessary to support the convictions. The acts were committed in a secluded location; however, this does not support a finding that defendant deliberately chose these locations in order to substantially increase any of the victims' fear or anxiety. Moreover, as discussed below, the scoring of OV 8 and OV 9 already takes this action into consideration. Thus, the trial court erred when it scored OV 7 at 50 points.

The trial court also erred in scoring OV 9 at 10 points. MCL 777.39 indicates OV 9 is properly scored 10 points when “[t]here were 2 to 9 victims who were placed in danger of physical injury or death, or 4 to 19 victims who were placed in danger of property loss.” When considering whether there were other victims, the trial court should only consider those people who were placed in danger of physical injury or loss of life. *People v Sargent*, 481 Mich 346, 350; 750 NW2d 161 (2008). Furthermore, “only people placed in danger of injury or loss of life when the sentencing offense was committed (or, at most, during the same criminal transaction) should be considered.” *Id.* Here, the evidence does not support a score of 10 points as the only evidence of another person being near while one of the sexual assaults was going on was KP (who was not a victim but a minor at the time). However, she was in a separate room, and no evidence suggested defendant entered that room. The rest of the testimony demonstrated that defendant would seclude himself and his victim during each act. Although there were multiple victims, each was a victim of a separate criminal transaction. *Id.* Therefore, two or more victims were not in danger during the sentencing offense or same criminal transaction, and the points were not justified.

There were no errors in the scoring of OV 4, 8, 10, or 13. Evidence was presented through the victims' impact statements that the victims suffered psychological injury from the sexual conduct, such as anger and fear, including statements from one victim that she “[felt] like [she] was in a horror movie” and a statement from another victim that she was engaging in self-mutilation and was depressed and suicidal. These statements justify the scoring of OV 4. MCL 777.34(1)(a). As to OV 8, defendant's actions in removing the victims to a place of greater seclusion justifies the score of 15 points. MCL 777.38(1)(a); *People v Steele*, 283 Mich App 472, 491; 769 NW2d 256 (2009). Defendant's actions in isolating the much younger victims also support the finding that defendant engaged in preoffense predatory conduct, and, thus, support the 15 point score for OV 10. MCL 777.40(1)(a); *People v Johnson*, 298 Mich App 128, 133; 826 NW2d 170 (2012); *People v Waclawski*, 286 Mich App 634, 685; 780 NW2d 321 (2009). Finally, the concurrent charged and uncharged offenses support the 25 point score for OV 13. MCL 777.43(2)(a); *People v Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001).

However, based on the trial court's errors in scoring OV 7 and 9, remand for resentencing is necessary. *People v Jackson*, 487 Mich 783, 793-794; 790 NW2d 340 (2010).

Defendant's convictions are affirmed. Remanded for resentencing and correction of the

clerical errors in accordance with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ Pat M. Donofrio

/s/ Mark T. Boonstra