

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
June 10, 2014

v

GARTH LOUIS O'DELL,
Defendant-Appellant.

No. 315609
Bay Circuit Court
LC No. 10-010832-FH

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

PER CURIAM.

Defendant appeals by leave granted from the trial court's judgment of conviction and sentence revoking defendant's probation and sentencing him to 38 to 60 months' imprisonment for assault with intent to commit second-degree criminal sexual conduct in violation of MCL 750.520g(2) (multiple variables). We remand for resentencing.

The record in this case, which defendant does not contest, shows that defendant touched a minor between the ages of 13 and 16 in a sexual manner on multiple occasions while wrestling with the minor. Before wrestling, defendant and the minor would play a videogame, in which defendant's character would kiss and want to have sex with the minor's character. Defendant pleaded nolo contendere to one count of assault with intent to commit second-degree criminal sexual conduct, MCL 750.520g(2), for which the trial court originally sentenced him to serve 365 days' imprisonment, with credit for 46 days, and 5 years of probation. Less than one year later, defendant was charged with six counts of violating the conditions of his parole. He pleaded guilty to four of those counts, and the other two were dismissed. At the sentencing hearing, the trial court determined that although OV 7 had not been scored previously, it was appropriate to score it at 50 points because defendant's conduct while playing the videogame with the minor was sadistic and designed to substantially increase the victim's fear and anxiety during the offense. See MCL 777.37(1)(a). On appeal, defendant argues that this was error. We agree.

We review a trial court's factual determinations at sentencing for clear error, and they must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). We review de novo whether the facts are sufficient to support a particular score for an offense variable. *Id.*

OV 7 provides for the scoring of 50 points where “[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.” MCL 777.37(1)(a). Sadism is defined as “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(3). Here, however, there is no evidence to support the trial court’s finding that the victim was subjected to extreme or prolonged pain or humiliation as a result of playing the videogame. At most, the evidence showed that defendant’s actions made the victim nervous, which does not rise to the level of sadism. Cf. *People v Blunt*, 282 Mich App 81, 83, 89; 761 NW2d 427 (2009) (finding that the defendant’s act of throwing heated cooking oil in the victim’s face was sadistic in that it inferred that the defendant attacked the victim for the purpose of producing suffering and subjected the victim to extreme pain); *People v James*, 267 Mich App 675, 680; 705 NW2d 724 (2005) (finding no error in the trial court’s scoring of 50 points under OV 7 for sadistic behavior where the record indicated that the defendant repeatedly stomped the victim’s face and chest while the victim was unconscious and deprived the victim of oxygen for four to six minutes). Therefore, the trial court erroneously concluded that defendant’s conduct was sadistic.

The trial court also erroneously concluded that defendant’s use of the videogame was “designed to substantially increase the fear and anxiety [the] victim suffered during the offense.” MCL 777.37(1)(a). To determine whether the defendant’s conduct was designed to substantially increase fear, “[t]he relevant inquiries are (1) whether the defendant engaged in conduct beyond the minimum required to commit the offense; and, if so, (2) whether the conduct was intended to make a victim’s fear or anxiety greater by a considerable amount.” *Hardy*, 494 Mich at 443-444. In *Hardy*, this Court held that 50 points were properly assessed under OV 7 where a carjacker “took the extra step of racking the shotgun . . . to make his victim fear that a violent death was imminent, not just possible.” *Id.* at 445. As discussed, however, here there is nothing in the record to support a finding that defendant used the videogame as a means of increasing the victim’s fear or anxiety. To the contrary, it is equally, if not more probable that defendant used the videogame to groom the victim for future sexual acts and reduce the victim’s fear and anxiety suffered during the sexual assault. Further, that the victim may have felt nervous while playing the videogame is irrelevant to the present inquiry, which only considers defendant’s intent. MCL 777.37(1)(a); *Hardy*, 494 Mich at 443-444.

The erroneous addition of 50 points under OV 7 increased defendant’s total OV points from 60 to 110, which altered the appropriate guidelines range, and appears to have been influential in the trial court’s decision to depart upward from the minimum guidelines range when it was required to impose an intermediate sanction pursuant to MCL 769.34(4)(a). Therefore, we reverse and remand for resentencing. See MCL 769.34(10).

Reversed and remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Donald S. Owens
/s/ Cynthia Diane Stephens