

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HARRY JACOB WALTON,

Defendant-Appellant.

UNPUBLISHED

April 20, 2010

No. 289212

Oakland Circuit Court

LC No. 2001-178581-FC

Before: M.J. KELLY, P.J., and TALBOT and WILDER, JJ.

PER CURIAM.

Defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(f) (force or coercion) and was sentenced as a second habitual offender, MCL 769.10. Following a remand from this Court, defendant appeals as of right, his resentencing to 39 to 60 years' imprisonment of his criminal sexual conduct convictions.¹ We affirm.

Defendant asserts that the trial court erred in the assessment of points for offense variables (OV) 7, 8, 10, 11 and 13 in scoring the sentencing guidelines. As discussed by this Court in *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005):

This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score. However, this issue also entails a question of statutory interpretation, which is reviewed de novo. [(Internal citations omitted).]

With regard to OV 7, "aggravated physical abuse," 50 points should be assessed if a defendant treated the victim "with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety suffered during the offense." MCL 777.37(1)(a). A victim need not be conscious and aware of the abuse for it to rise to the level of extreme

¹ *People v Walton*, unpublished opinion per curiam of the Court of Appeals, issued June 3, 2008 (Docket No. 276161).

brutality. *People v Kegler*, 268 Mich App 187, 191; 706 NW2d 744 (2005).

We find that the trial court did not err in assessing defendant 50 points for OV 7. Defendant hit the victim with an object, resulting in her loss of consciousness. He physically pushed her out of his vehicle. While the victim remained unconscious, defendant sexually assaulted her. During the sexual assault, despite indications from the victim that she would cooperate because she was fearful that defendant would kill her, defendant strangled the victim leaving marks on her neck and causing her to again lose consciousness. Defendant also pulled the victim by her hair, causing her to lose a golf ball sized clump of hair from her scalp. Based on this evidence, the trial court did not err in finding defendant acted with excessive brutality.

OV 8 concerns “victim asportation and captivity.” MCL 777.38. A defendant may be assessed 15 points if the “victim was asported to another place of greater danger or to a situation of greater danger.” MCL 777.38(1)(a). Force is not a prerequisite to demonstrate asportation. *People v Apgar*, 264 Mich App 321, 330; 690 NW2d 312 (2004). In *Apgar*, this Court upheld an assessment of 15 points under OV 8 when the defendant transported the victim without force to an unfamiliar house where he and two other men sexually assaulted her. *Id.*

The record demonstrates that although the victim entered the car willingly, defendant drove the victim to an isolated and unfamiliar area with the intent of sexually assaulting her. As in *Apgar*, defendant transported the victim to a place of greater danger. It is irrelevant that the victim originally went willingly with defendant when he used the control of his vehicle to transport the victim to a destination to which she did not consent. Therefore, we concur with the trial court’s assessment of 15 points for OV 8.

Under OV 10, involving the “exploitation of [a] vulnerable victim,” 15 points may be assessed if “predatory conduct was involved.” MCL 777.40(1)(a). Predatory conduct requires behavior, which occurred before the commission of the offense that was “directed at the victim for the primary purpose of victimization.” MCL 777.40(2)(a); *People v Cannon*, 481 Mich 152, 160; 749 NW2d 257 (2008). In *Cannon*, the Michigan Supreme Court likened the predatory conduct directed at a victim to that of “a lion that sees antelope, determines which is the weakest, and stalks it until the opportunity arises to attack it engages in conduct directed at a victim.” *Id.*

Before assaulting the victim, defendant befriended her at the Post Bar and gained her trust. He then lied to her regarding the availability of her car in order to render her vulnerable and manipulate her acceptance of a ride with him. Once in defendant’s vehicle, defendant used the opportunity to drive the victim to an isolated, unfamiliar area and sexually assault her. Because such behavior constitutes, by definition, predatory conduct, the trial court did not abuse its discretion in assessing defendant 15 points on this offense variable.

OV 11 concerns “criminal sexual penetration.” MCL 777.41. A defendant must be assessed 50 points when “two or more criminal sexual penetrations occurred.” MCL 777.41(1)(a). In calculating the points under OV 11, “all sexual penetrations of the victim by the offender arising out of the sentencing offense” must be included except for “the 1 penetration which forms the basis of a first- or third-degree criminal sexual conduct offense.” MCL 777.41(2)(a) and (c); *People v Cox*, 268 Mich App 440, 455; 709 NW2d 152 (2005). Any sexual penetrations of the victim by the offender “extending beyond the sentencing offense may be scored in offense variables 12 or 13.” MCL 777.41(2)(b). When there are multiple convictions

for first-degree criminal sexual conduct, a penetration that forms the basis of one conviction may be counted for purposes of OV 11 for another conviction. *Cox*, 268 Mich App at 456. Moreover, a court may consider penetrations that occurred during the offense but did not form the basis for any charges or convictions. *People v Wilkens*, 267 Mich App 728, 743; 705 NW2d 728 (2005). Penetrations that occurred on different dates and in different places do not arise out of the same sentencing offense and should not be counted under OV 11, but should be considered under OV 12 or OV 13. *People v Johnson*, 474 Mich 96, 102 n 3; 712 NW2d 703 (2006).

Defendant was convicted of two counts of first-degree criminal sexual conduct. During the course of defendant's sexual assault of the victim, he penetrated her four times, three times vaginally and one time orally. Therefore, with regard to each first-degree criminal sexual conduct conviction, there were three penetrations – two that were not charged and one that formed the basis for the other criminal conviction – that could be used by the trial court to assess points under OV 11. As a result, we find that the trial court did not abuse its discretion in assessing defendant 50 points under OV 11.

Based on the caselaw, it is unclear whether all three penetrations available to be counted under OV 11 must be counted for purposes of OV 11 or whether two penetrations can be counted for OV 11 and the third penetration can be used for the scoring of OV 13. The statutory language “[s]core all sexual penetrations arising out of the sentencing offense” implies that all the penetrations must be counted under OV 11. MCL 777.41(2)(a) (emphasis added). In addition, this Court held in *People v Bemer*, 286 Mich App 26, 34; 777 NW2d 464 (2009), that conduct subject to scoring under OV 12 must be considered there before it is considered under OV 13. The language of OV 12, MCL 777.42, varies greatly from the language in OV 11, MCL 777.41. Unlike OV 11, MCL 777.42 does not indicate that offenses “extending beyond” the offenses considered for OV 12 may be counted in OV 13. MCL 777.41(2)(c); MCL 777.42. In fact, MCL 777.42 contains no reference to OV 13. However, in regard to OV 13, MCL 777.43(2)(c) states, “[e]xcept for offenses related to membership in an organized criminal group, do not score conduct scored in offense variable 11 or 12.” Based on the language of MCL 777.41(2)(a), we find that all three penetrations available to be scored in OV 11 should be scored there and may not be saved for the scoring of OV 13.

OV 13 concerns a “continuing pattern of criminal behavior.” MCL 777.43. A defendant should be assessed 25 points if his or her conviction was part of a pattern of felonious criminal activity involving three or more crimes against a person, MCL 777.43(1)(c), and zero points if no pattern of felonious criminal activity existed, MCL 777.43(1)(e). All crimes occurring within the last five years should be counted “regardless of whether the offense resulted in a conviction.” MCL 777.43(2)(a); *People v Francisco*, 474 Mich 82, 85-86; 711 NW2d 44 (2006). Conduct that was considered under OV 11 or OV 12 may not be assessed under OV 13. MCL 777.43(2)(c).

As discussed in conjunction with the scoring of the other offense variables, this case involves four sexual penetrations. Only one penetration not scored under OV 11 is available to be scored under OV 13. The presentence investigation report indicates that defendant committed another sexual assault eight days before the incident involving this victim. That additional crime plus one penetration for the sentencing offense is insufficient to find that defendant committed the three criminal acts required within the last five years to assess him 25 points under OV 13.

Because we find that only two penetrations can be considered for purposes of OV 13, the trial court erred in scoring this variable and should have assessed no points rather than the 25 assigned.

Even though we find that the trial court erred in scoring defendant 25 points for OV 13, defendant's sentencing guidelines range is not altered. Defendant should have been assessed 150 total points instead of 175 points for the offense variables. However, any error was harmless because defendant's sentencing guidelines range continues to be 225 to 468 months. An error in scoring the sentencing guidelines that does not affect the total offense variable score enough to change the applicable sentencing guidelines range constitutes harmless error. *People v Davis*, 468 Mich 77, 83; 658 NW2d 800 (2003). Therefore, although we find that the trial court erred in assessing defendant 175 total points on the offense variables, defendant's sentences are affirmed because his sentencing guidelines range does not change.

Defendant next contends that his convictions should be reversed because he was not properly arraigned on the charges for which he was convicted because the information did not properly charge him with first-degree criminal sexual conduct. This issue is not properly before this Court. The scope of a second appeal as of right is limited by the scope of the remand. *People v Jones*, 394 Mich 434, 435-436; 231 NW2d 649 (1975). This Court remanded the case to the trial court for the sole purpose of resentencing defendant.² Although the trial court permitted defendant and the prosecutor to address the arraignment at resentencing, the issue was beyond the scope of the remand. As a result, we need not consider the issue.

Affirmed.

/s/ Michael J. Kelly
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder

² *People v Walton*, unpublished opinion per curiam of the Court of Appeals, issued June 3, 2008 (Docket No. 276161).