

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK RICHARD RUTHERFORD,

Defendant-Appellant.

UNPUBLISHED
January 19, 2012

No. 301001
Genesee Circuit Court
LC No. 08-023429-FH

Before: JANSEN, P.J., and WILDER and K.F. KELLY, JJ.

PER CURIAM.

On March 2, 2009, a jury convicted defendant of three counts of second-degree criminal sexual conduct (“CSC”), MCL 750.520c(1) (multiple variables—victim between 13 and 16 years of age, coercion by use of position of authority).¹ Specifically, the jury determined that defendant sexually touched 13-year-old T.H. (one count) and 14-year-old S.W. (two counts), during an overnight church outing that he was helping to chaperone. He was acquitted of an additional charge involving S.W. and of a separate charge of fourth-degree CSC, MCL 750.520d(1)(b) (position of authority), involving another victim, 17-year-old A.M.

On March 30, 2009, defendant was sentenced to concurrent prison terms of 52 to 180 months for each conviction. Defendant appealed his convictions and sentence. This Court upheld defendant’s convictions but remanded for resentencing on the ground that the trial court erred in scoring 15 points for OV 10 on the basis that defendant had engaged in predatory conduct. *People v Rutherford*, unpublished opinion per curiam of the Court of Appeals, issued June 15, 2010 (Docket No 291694). On resentencing, the trial court again found defendant engaged in predatory conduct and rescored 15 points under OV 10. Defendant appeals as of right. We affirm.

¹ This was defendant’s second trial. His first trial ended in a mistrial after the jury was unable to reach a verdict.

I. BASIC FACTS

A. TRIAL AND SENTENCING

On May 25, 2008, the Valley Church of Christ held a sleep out for their youth group at the home of Rhonda and Keith Laurin. The party was attended by approximately 15 middle school and high school students. Approximately ten of the students spent the night at the home. Two large tents were set up in the Laurins' yard. The tents were intended for socializing; there were sofas and rooms inside the home for the children to sleep. Sleeping was not allowed in the tents except in same sex groups, and co-ed groups were not allowed to socialize in the tents unless a chaperone was present.

Defendant attended the party as a chaperone. Defendant had been a member of the church and a friend of the Laurins for six or seven years. He had acted as a chaperone during previous sleep outs at the Laurins' home.

A.M. attended the party with her boyfriend. Sometime after dinner, A.M. was standing on the Laurins' deck with her boyfriend, when defendant got himself a drink from the cooler behind her and grabbed her butt. A.M. was not sure whether the touching might have been an accident, and did not say anything.

At approximately 2:00 a.m., some of the children left to toilet-paper T.H.'s parents' house. Defendant went along as the chaperone and drove one of the two cars. The group returned to the Laurins' house at approximately 4:00 a.m. T.H. testified that at some time before or after toilet-papering her parents' home, the group sat on the Laurins' deck. T.H. wanted to lie down on a glider to rest, but other children were sitting there, so defendant told her she could put her feet on his knees. Defendant moved his chair closer to the glider, and T.H. put her feet up. She was wearing pajama shorts, socks, and a sweatshirt, and had a blanket over her legs. Defendant reached under the blanket and began rubbing her feet and lower legs. T.H. did not know what to think. Eventually, T.H. sat up and put her feet on the ground, and defendant walked away. Later, T.H. climbed a tree with her friend and noticed that defendant had returned to the deck. Defendant stared at her the entire time she sat in the tree. She felt it was weird.

Sometime after that, it began to rain, so several children and defendant went into the smaller tent to lie down. T.H. was lying on her stomach, with her head near defendant and her arms crossed under her head. Defendant took a blade of grass and tickled T.H.'s ear. She looked up and saw him smiling and told him to stop. Defendant slid his hand under the neckline of her sweatshirt, near the hood, and began rubbing her back. T.H. told him to stop but defendant laughed. Defendant then reached around her back and under her arm, and began to touch her breast. T.H. told him to stop and he did, and she zipped up her sleeping bag and rolled over to her side. She then got up and went inside the house. T.H. felt that the touching was wrong, but she did not tell anyone because she was scared.

S.W. also attended the party. She testified that, during the early morning hours, she left the smaller tent where most of the children were socializing, and laid down on an air mattress in the larger tent, which was empty. A boy came into the larger tent and lay down next to S.W., on

the other side of the mattress. Defendant then came in and lay down between S.W. and the boy, facing S.W.'s back. Defendant reached under her blanket, put his hand under her sweatshirt and t-shirt, rubbed her back and stomach, and touched her breast over her bra. He then touched her inner thigh and her vaginal area, over her clothes. S.W. told defendant to stop, but he did not, so she left the tent.

S.W. went inside the house for a while, but did not say anything to anyone because she was conflicted and afraid. A few minutes later, S.W. returned to the larger tent, found it empty, and again lay on the mattress. Defendant again entered the tent and lay next to her, again facing her back. He touched her butt, stomach, and back. S.W. got up to leave and defendant looked at her and smiled.

S.W. went into the smaller tent for a while, but it was crowded and uncomfortable, so she returned to the larger tent for a third time and again found it empty. She lay down on the mattress and defendant again came in and lay down next to her, facing her back. This time, defendant rubbed and grabbed her butt over her clothes and put his hand down the back of her pants, to the top of her butt. Defendant then rubbed her stomach under her clothes, and put his hand down the front of her pants to the top of her pubic area. S.W. got up, went inside, and ate breakfast.

Defendant maintained his innocence throughout the proceedings.

As mentioned above, the jury found defendant guilty of one count of CSC against T.H. and two counts of CSC against S.W. He was acquitted of an additional charge involving S.W. and of a separate charge involving A.M. During sentencing, the issue of scoring OV 10 was raised. Defense counsel argued that scoring 15 points for OV 10 was improper because defendant's conduct was not "predatory." The trial court disagreed:

Well, the Court believes that the points are appropriately scored by the defendant's behavior as by the testimony in this case of really both [T.H.] and [S.W.] being they encountered the defendant on more than one occasion during the evening. And again as pointed out by Ms. Phillips, him being the adult, the sole adult of the wee hours of the morning when these things happened in the tent.

B. DEFENDANT'S FIRST APPEAL

Defendant appealed from his convictions and sentences, raising a number of legal issues. We affirmed defendant's convictions, but remanded for resentencing, finding that the trial court erred in scoring OV 10:

Defendant also challenges the trial court's 15-point score for OV 10. Fifteen points are appropriate where predatory conduct was involved. MCL 777.40(1)(a). The trial court reasoned that a 15-point score was appropriate because defendant had encountered the complainants on more than one occasion throughout the evening of the event. The court also observed that defendant was the sole adult who was present during the early morning hours when the sexual contact occurred. MCL 777.40(3)(a) defines "predatory conduct" as "preoffense conduct directed at a victim for the primary purpose of victimization." Thus, for

conduct to be scored as predatory conduct, the defendant must have engaged in the conduct before the offense, the conduct must be directed at the victim of the offense, and the conduct must be undertaken for the primary purpose of victimization. *People v. Cannon*, 481 Mich. 152, 161-162, 749 N.W.2d 257 (2008).

Although the record supports the trial court's finding that there were other encounters between defendant and SW before the sexual contact occurred, the trial court did not explain how those encounters involved conduct that was undertaken for the primary purpose of victimization. Further, we do not believe it is proper to rely on conduct that was directed at AM and TH to find that predatory conduct was involved in the offense against SW. Neither AM nor TH were victims of the offense committed against SW, which served as the sentencing offense. The trial court also noted that defendant was the only adult who was present during the early morning hours when the sexual contact occurred. However, defendant's status does not involve preoffense conduct and, therefore, that factor alone would not support a 15-point score for OV 10. Instead, defendant's status as an adult chaperone at the group event would seem to be more relevant to whether ten points could be scored for OV 10 on the basis that defendant exploited SW because of his authority status or because of SW's youth. MCL 777.40(1)(b). Thus, we conclude that the trial court erred in scoring 15 points for OV 10.

C. SENTENCING ON REMAND

Defendant was resentenced on October 18, 2010. At that time, the prosecution argued that OV 10 should still be scored at 15 points, despite this Court's holding. The prosecutor argued:

[T]his man who positions himself in the position of authority to be present to take care of these kids while they are having their Memorial Day campout finds his way at the precise moment when these girls are on a precise location where he can victimize them. Putting himself in a place where he has advantage. Where [he] has opportunity. That is [the] pre-offense conduct. The offense has not happened yet. They had not been touched in that inappropriate manner that is cognizable by the CSC statute. But he was putting himself in a position where he can victimize, not once, not twice, but multiple times. That is exactly that type of pre-offense conduct.

Defense counsel stated that she believed this Court had spoken directly to that issue on appeal and found OV 10 was scored properly at ten points, and there was no reason not to follow that holding. The trial court, however, again scored OV 10 at 15 points, stating:

[O]n OV 10, I'm not certain I agree [with the Court of Appeals]. It seems that [the prosecutor] and I have a little bit different view of the facts perhaps than the Court of Appeals. But certainly on the weekend [of] the overnight camp out [] the defendant and his wife initially were involved as the so-called supervisors or

chaperones, if you will, and had access to and ability to move about in the tents and then on the back porch because no one else was outside. The other persons were in the house. And access accordingly to whichever girl would be moving [to] whichever tent or on the porch or back and forth as the children did, some might go in and out to get some food or drinks and some socializing activities. And I just have a different view of the conduct. And it [was] certainly before the offenses as [the prosecutor] points out, pre-offense conduct. It's directed actually--it's a little more analogized in my view to the fox and the henhouse where it doesn't really matter which hen you get but you're looking for one. And in this case, certainly at least two hens were contacted and that resulted in [] jury convictions. In this particular case, three counts of criminal sexual conduct in the second degree. And positioning yourself so that you can have access to these young women when they are vulnerable, unable to resist because they have no allies, no parents, no other adult available to assist them. It's dark. It's in a strange place. It's not at their own home. The Court believes [this] is pre-offense conduct and it is directed at the victims and it is undertaken for the primary purpose of victimization.

And I accordingly believe that OV 10 should be [15] points. So I'm going to increase it to [15] points.

Defendant now appeals as of right.

II. ANALYSIS

Defendant claims that the trial court used the same rationale to resentence him as it did in his original sentencing, despite this Court's holding on his first appeal that the trial court had erred by scoring 15 points for OV 10. He claims the trial court was bound by this Court's prior ruling and failed to abide by it. We disagree.

We review the application and interpretation of sentencing guidelines de novo. *People v Bonilla-Machado*, 489 Mich 412, 419; 803 NW2d 217 (2011) (citing *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004)). With respect to scoring under each variable of the guidelines, "[a] sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Therefore, errors in scoring are reviewed for an abuse of discretion. *Id.* "Scoring decisions for which there is any evidence in support will be upheld." *Id.* (quoting *People v Elliott*, 215 Mich App 259; 544 NW2d 748 (1996)).

Offense variable 10 deals with exploitation of a vulnerable victim. MCL 777.40(1). Fifteen points are scored for predatory conduct, while ten points are scored for exploitation of a victim's physical or mental disability, youth or agedness, a domestic relationship, or when an offender abuses his authority status. MCL 777.40(1)(a)-(c). "Predatory conduct" is defined as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a).

There is a three-part test to determine whether a defendant has engaged in predatory conduct:

(1) Did the offender engage in conduct before the commission of the offense?

(2) Was this conduct directed at one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation?

(3) Was victimization the offender's primary purpose for engaging in the preoffense conduct?

If the court can answer all these questions affirmatively, then it may properly assess 15 points for OV 10 because the offender engaged in predatory conduct under MCL 777.40. [*People v Cannon*, 481 Mich 152, 161-162; 749 NW2d 257 (2008).]

Predatory conduct can also include "grooming," which "refers to less intrusive and less highly sexualized forms of sexual touching, done for the purpose of desensitizing the victim to future sexual contact." *People v Steele*, 283 Mich App 472, 491-492; 769 NW2d 256 (2009). However, "[i]n drafting OV 10, the Legislature did not intend that 15 points be assessed for preoffense conduct involving nothing more than run-of-the-mill planning to effect a crime or subsequent escape without detection." *Cannon*, 481 Mich at 162.

Here, defendant was a chaperone at a church campout. He was also the only adult present in the early morning hours when the offenses occurred. This established his authority over the victims, and also put them in a position in which it would be difficult for them to seek help. Therefore, with respect to whether this scoring variable is applicable here, we find defendant exploited his victims' vulnerability and OV 10 applies. Additionally, this behavior easily fits into the ten-point category under OV 10 for abusing his position of authority and taking advantage of his victims' youth, as this Court suggested on defendant's first appeal. *Rutherford*, unpub op at 7. However, the question remains whether it is appropriate to score, instead of 10 points for abuse of authority, 15 points for predatory conduct.

First, it must be determined whether the law of the case doctrine applies here, because this is the second appeal in this case on the issue of scoring OV 10. "The law of the case doctrine provides that 'an appellate court's determination of law will not be differently decided on a subsequent appeal in the same case if the facts remain materially the same.'" *People v Hermiz*, 235 Mich App 248, 254; 597 NW2d 218 (1999), aff'd 462 Mich 71 (2000) (citing *People v Kozyra*, 219 Mich App 422, 433; 556 NW2d 512 (1996)). The appellate court's decision also binds lower courts. *Id.* The doctrine recognizes the need for finality in litigation. *People v Russell*, 149 Mich App 110, 113; 385 NW2d 613 (1985). It also acknowledges that an appellate court lacks jurisdiction to alter its prior decisions except upon rehearing. *People v Ham-Ying*, 178 Mich App 601, 606; 444 NW2d 529 (1989) (citing *Johnson v White*, 430 Mich 47, 53; 420 NW2d 87 (1988)). The rule generally applies regardless of the correctness of the prior decision. *Id.* However, subsequent law announced by a higher appellate court supersedes that set forth by an intermediate appellate court, and under those circumstances, the law of the

case doctrine does not apply. *People v Riley*, 468 Mich 135, 142 n 5; 659 NW2d 611 (2003) (citing *Johnson*, 430 Mich at 53).

This Court, in its opinion addressing defendant's first appeal, pointed out three problems with respect to the trial court's scoring of OV 10: (1) the trial court did not explain how the previous encounters between SW (the scoring-offense victim) and defendant were used for the purpose of victimization, (2) the trial court improperly used encounters between defendant and the other victims to score the offense against SW, and (3) the trial court improperly used defendant's status as the sole adult present to score points for predatory conduct, finding that this factor pointed only toward abuse of authority and, therefore, could not be scored as high. *Rutherford*, unpub op at 7.

On remand, the trial court's justification for rescoring 15 points included the following factors: (1) defendant purposely positioned himself as an authority figure by becoming a chaperone at the church campout, (2) defendant had access to the campers and could see their whereabouts, (3) no other adults were present at the time the conduct occurred, and (4) the victims were in a strange place and it was dark out.

While we would normally conclude that the trial court's actions violated the "law of the case" concept in light of our prior ruling, we believe that our Supreme Court in *People v Huston*, 489 Mich 451; 802 NW2d 261 (2011) supersedes our prior opinion. In *Huston*, our Supreme Court clarified its holding in *Cannon*, the case this Court appears to have relied upon in defendant's prior appeal when it held that it was inappropriate to use defendant's conduct with respect to other victims in scoring the offense against SW. *Rutherford*, unpub op at 7. *Huston* held that there is no requirement that preoffense conduct be directed at the eventual victim in order to qualify as predatory; only that it must be directed at a victim prior to the offense. *Huston*, 489 Mich at 459; see also MCL 777.40(3)(a). It appears that, under *Huston*, this Court relied on *Cannon*'s erroneous statement of the law in defendant's prior appeal when it held that it was inappropriate to consider defendant's conduct with respect to other victims when scoring OV 10.

Defendant engaged in conduct with T.H. prior to the offense involving S.W., which can be considered "grooming" for purposes of his later assault. He rubbed T.H.'s feet – non-sexual conduct aimed at desensitizing T.H. Defendant also followed S.W. into the tent on two separate occasions, knowing the tent was otherwise empty. Just as the defendant in *Huston*, we believe defendant's conduct indicated that he was lying in wait and watching to see who was most vulnerable for the primary purpose of victimization. The trial court provided an adequate basis to justify a 15-point assessment under OV 10 and we see no reason to disturb defendant's sentence.

We affirm.

/s/ Kathleen Jansen
/s/ Kurtis T. Wilder
/s/ Kirsten Frank Kelly