

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
September 20, 2012

v

JONATHAN CRAIG JOHNSTON,  
  
Defendant-Appellant.

Nos. 302477 & 302480  
Ogemaw Circuit Court  
LC No. 09-003297-FC;  
09-003298-FC

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Before: SHAPIRO, P.J., and GLEICHER and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant Jonathan Craig Johnston pleaded guilty to reduced charges of second and third-degree criminal sexual conduct (CSC) for the ongoing sexual abuse of his 20-year-old, mentally-disabled stepdaughter.<sup>1</sup> The circuit court sentenced defendant to concurrent terms of 78 to 180 months' imprisonment. Because defendant's sentences are supported by a preponderance of the record evidence and are within the appropriate minimum sentencing guidelines range, we affirm. The prosecution concedes, however, that the circuit court erroneously failed to strike certain challenged information from defendant's presentence information report (PSIR). We therefore remand for the ministerial correction of the PSIR.

Between June 30 and August 4, 2009, defendant repeatedly sexually assaulted his stepdaughter. His wife was ill and hospitalized for an extended period, leaving defendant as the victim's sole caretaker. Defendant subjected the victim to sexual touching, coerced her to perform fellatio on him, digitally penetrated her vagina, masturbated in front of her, and subjected her to voyeurism.

The prosecution originally charged defendant with three counts of CSC-I in separate files. Defendant entered guilty pleas to reduced charges of CSC-III and CSC-II in two files, and the prosecution dismissed the third charged offense. At the plea hearing, defendant admitted that he had sexual contact and engaged in sexual penetration with the victim "between June 30<sup>th</sup> of

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<sup>1</sup> Defendant's convictions are based on MCL 750.520c(1)(h), sexual contact with a mentally-disabled victim and defendant used his position of authority to coerce the victim, and MCL 750.520d(1)(c), sexual penetration of a victim whom defendant knew to be mentally incapable.

'09 and 8/4 of '09.” Defendant admitted that the victim was his stepdaughter and was “slightly” mentally disabled. Defendant asserted that the victim performed fellatio on him and that he touched her breasts. The court proceeded to sentence defendant as described above.

### I. SCORING OF OFFENSE VARIABLE 11

Defendant first challenges the circuit court’s assessment of 25 points for offense variable (OV) 11. We review a circuit court’s scoring decision “to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score.” *People v Johnson*, 293 Mich App 79, 84; 808 NW2d 815 (2011) (quotation marks and citation omitted). “Scoring decisions for which there is any evidence in support will be upheld.” *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). A court’s scoring decision must be supported by a preponderance of the evidence. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008), citing *People v Drohan*, 475 Mich 140, 142-143; 715 NW2d 778 (2006). Evidence need not be admissible at trial to be considered at sentencing. *People v Uphaus*, 278 Mich App 174, 183-184; 748 NW2d 899 (2008). The court may consider a defendant’s PSIR, for example, even though it includes hearsay statements and information about uncharged offenses. *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993); *People v Potrafka*, 140 Mich App 749, 751; 366 NW2d 35 (1985).

MCL 777.41 governs the scoring of OV 11 as follows:

(1) Offense variable 11 is criminal sexual penetration. Score offense variable 11 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

- (a) Two or more criminal sexual penetrations occurred..... 50 points
- (b) One criminal sexual penetration occurred..... 25 points
- (c) No criminal sexual penetration occurred..... 0 points

(2) All of the following apply to scoring offense variable 11:

(a) Score all sexual penetrations of the victim by the offender arising out of the sentencing offense.

(b) Multiple sexual penetrations of the victim by the offender extending beyond the sentencing offense may be scored in offense variables 12 or 13.

(c) Do not score points for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense.

The probation officer that prepared defendant’s PSIR recommended scoring 25 points for OV 11. In the narrative portion of the report, the agent described the offense “based on a police report” written during the investigation. That police report is not part of the lower court record and neither party presented it on appeal. The PSIR description indicates that the abuse began on

June 30, 2009, when defendant took the victim to dinner, discussed sex with her, and then transported her to a wooded area where he fondled her breasts. The PSIR also specifically identifies July 3, 2009, as a day on which defendant fondled the victim. The PSIR then vaguely describes “that things progressed through the month of July” and that defendant coerced the victim to perform fellatio on three occasions. On July 31, 2009, according to the PSIR, defendant coerced the victim to perform fellatio for the last time. On that date, the victim also accused defendant of digitally penetrating her vagina. The probation officer designated the offense date for the CSC-III offense as July 31, 2009. During the sexual assault that occurred on that date, “[o]ne criminal sexual penetration occurred” (the digital-vaginal penetration) beyond “the 1 penetration that form[ed] the basis” of the charge (the act of fellatio).<sup>2</sup>

Defendant complains that the probation officer, the prosecution, and the circuit court improperly and arbitrarily selected July 31, 2009 as the offense date to artificially inflate his total OV score. The felony information did not designate a singular offense date for any of the three charges. Rather, the information indicates that the offense occurred “on or about” June 30 through August 4, 2009. Defendant waived his right to a preliminary examination and pleaded guilty to one incident of penetration occurring sometime between June 30 and August 4, 2009. Therefore, the only reference to the July 31, 2009 incident involving two penetrations is in the PSIR, which took the information from the police report.

Contrary to defendant’s challenge, we discern no error in relying on July 31, 2009 as the offense date. Our review uncovered no caselaw, statute or corrections department directive precluding the court, prosecution or probation officer from selecting a specific offense date from a cited range. The offense date for purposes of OV 11 must be supported by a preponderance of the evidence, just as any other scoring decision. July 31 is the only date pinpointed in the PSIR on which any sexual penetration occurred. And, on that date, defendant coerced the victim into two separate acts of sexual penetration. This evidence was adequate to support the circuit court’s scoring decision.

We further note that defendant’s score of 25 points for OV 11 is consistent with controlling caselaw. In *People v Johnson*, 474 Mich 96, 101; 712 NW2d 703 (2006), our Supreme Court defined MCL 777.41(2)(a)’s requirement that the sexual penetrations underlying an OV 11 score must “aris[e] out of the sentencing offense” as follows:

Something that “aris[es] out of,” or springs from or results from something else, has a connective relationship, a cause and effect relationship, of more than an incidental sort with the event out of which it has arisen. For present purposes, this requires that there be such a relationship between the penetrations at issue and the sentencing offenses.

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<sup>2</sup> The court also scored OV 13 (continuing pattern of criminal behavior) at 25 points because the victim described almost daily incidents of sexual touching or penetration throughout the month of July 2009, constituting three or more crimes against a person within a five-year period that did not result in a conviction. MCL 777.43.

Relying on *People v Mutchie*, 251 Mich App 273, 276; 650 NW2d 733 (2002), the Court noted that the required connective relationship would exist if the “sexual penetrations perpetrated by defendant against the victim occurred at the same place, under the same set of circumstances, and during the same course of conduct.” *Johnson*, 474 Mich at 100 (quotation marks omitted).

The two acts of sexual penetration used to score OV 11 occurred on one date, during a single course of conduct, and in a single location. Based on the evidence presented at sentencing, the circuit court acted within its discretion to assess 25 points for OV 11.

## II. SENTENCE FOR CSC-II CONVICTION

Defendant complains for the first time on appeal that the circuit court improperly imposed an upwardly departing sentence for his CSC-II conviction. Defendant asserts that the legislative minimum sentencing guidelines range for a defendant convicted of a class C offense with variable scores placing him in the C-IV cell of the sentencing grid is 29 to 57 months’ imprisonment. As the circuit court failed to cite substantial and compelling reasons to depart from that range and imposed a 78-month minimum sentence, defendant argues that we must remand for resentencing.

Defendant fails to recognize that this exact issue was decided to the contrary in *People v Mack*, 265 Mich App 122, 127-128; 695 NW2d 342 (2005). A jury convicted the defendant in *Mack* of a class B and a class D felony. *Id.* at 127. The circuit court relied only on the PSIR and sentencing grid applicable to the higher class felony and imposed identical concurrent sentences of 15 to 30 years’ imprisonment. *Id.* at 124, 127-128. Relying on the plain language of MCL 771.14(2), this Court affirmed. Specifically, MCL 771.12(2)(e)(i) only requires the PSIR to include separate grid assessments for convicted offenses when the sentences are to be served consecutively. If the sentences are to be served concurrently, as in this case and in *Mack*, MCL 771.14(2)(e)(ii) provides that the PSIR must include the sentencing grid and recommended minimum sentencing guideline range for the highest class felony alone. *Mack*, 265 Mich App at 127.

The circuit court acted consistently with MCL 771.14(2) and *Mack* and we must therefore affirm defendant’s minimum sentence of 78 months’ imprisonment for his CSC-II conviction.

## III. CORRECTION OF PSIR

Defendant also challenges the circuit court’s failure to correct certain erroneous information in his PSIR. At sentencing, defendant informed the court that the PSIR incorrectly stated that he had been convicted of a marijuana-related offense in Genesee County in 1976. The probation officer confirmed that the marijuana charge did not “show up on his LIEN.” The circuit court indicated that it would not consider that conviction in sentencing defendant and the probation officer asserted that he had not used the conviction in scoring defendant’s guideline variables. However, the court did not correct that information in the PSIR.

The prosecution concedes on appeal that the 1976 marijuana-related conviction should have been stricken from the PSIR. MCR 6.425(E)(2)(a) provides, “If any information in the presentence report is challenged, [and] the court . . . determines that it will not take the challenged information into account in sentencing, it must direct the probation officer to . . .

correct or delete the challenged information in the report, whichever is appropriate[.]” Accordingly, we remand to the circuit court for the ministerial correction of defendant’s PSIR by striking the 1976 marijuana-related conviction. See MCR 6.435(A); MCR 7.216(A)(7).

Affirmed, but remanded for the ministerial correction of defendant’s PSIR. We do not retain jurisdiction.

/s/ Douglas B. Shapiro  
/s/ Elizabeth L. Gleicher  
/s/ Amy Ronayne Krause