

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
June 4, 2015

v

WILLIAM FRANK SIKORSKI, JR.,
Defendant-Appellant.

No. 320867
Roscommon Circuit Court
LC No. 12-006736-FC

Before: GLEICHER, P.J., and K. F. KELLY and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of one count of first-degree criminal sexual conduct (CSC I) in violation of MCL 750.520b(1)(c) (sexual penetration during the commission of another felony); one count of CSC I in violation of MCL 750.520b(1)(d)(ii) (defendant aided or abetted by one or more other persons and force or coercion used to accomplish the sexual penetration); and one count of domestic violence, third offense, in violation of MCL 750.81(4). He was sentenced as a fourth-offense habitual offender, MCL 769.12(1)(a), to concurrent terms of 40 to 60 years in prison for each of the CSC I convictions and 46 to 180 months in prison for the domestic violence conviction. We affirm in part, and vacate defendant’s conviction on count 2, CSC I in violation of MCL 750.520b(1)(d)(ii), remanding to the trial court to correct the PSI and the judgment of sentence consistent with this opinion.

Defendant first argues on appeal that his CSC I conviction under MCL 750.520b(1)(c) should be reversed because the prosecution failed to present sufficient evidence.¹ “We review de novo a challenge on appeal to the sufficiency of the evidence.” *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). “In determining whether the prosecutor has presented

¹ Defendant refers to “the charged offenses” in relation to his sufficiency argument but addresses only the CSC convictions in his appeal brief. We conclude that to the extent he challenges the sufficiency of the evidence for his domestic violence conviction, that claim is abandoned. See *People v Huffman*, 266 Mich App 354, 371; 702 NW2d 621 (2005) (concluding that an issue is abandoned where a defendant only presents a cursory argument without any supporting authority).

sufficient evidence to sustain a conviction, an appellate court is required to take the evidence in the light most favorable to the prosecutor” to ascertain “whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt.” *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010) (quotation marks and citations omitted). “All conflicts in the evidence must be resolved in favor of the prosecution and [this Court] will not interfere with the jury’s determinations regarding the weight of the evidence and the credibility of the witnesses.” *People v Unger*, 278 Mich App 210, 222; 749 NW2d 272 (2008).

The elements of CSC I, MCL 750.520b(1)(c) are (1) the defendant sexually penetrated another person and (2) the sexual penetration “occur[ed] under circumstances involving the commission of any other felony.” *Id.* The elements of the underlying domestic-assault felony in this case are (1) an individual assaults or assaults and batters, (2) an individual with whom he or she has or has had a dating relationship or is or was a resident of his or her household, and (3) the individual has 2 or more previous convictions for [domestic violence]. MCL 750.81(2) and (4).

The evidence presented at trial established that after watching a videotape that depicted two men and one woman engaging in sexual acts, defendant indicated that he wanted to vaginally penetrate the complainant while their friend, JS, penetrated her anally. When the complainant, who was defendant’s girlfriend at that time, stated that she did not want to participate in such acts, defendant sexually assaulted her by vaginally penetrating her with his penis, while at the same time forcing JS to sexually penetrate the complainant orally with his penis. Defendant accomplished the sexual assault while hitting the victim in the face more than once and by choking her twice. In addition, testimony established that defendant had three prior domestic-assault convictions, one in 2005 (involving his stepmother), one in 2007 (involving his then-wife), and one in 2009 (involving his then-wife). On these facts, we conclude that a rational trier of fact could find the defendant guilty beyond a reasonable doubt of CSC I, MCL 750.520b(1)(c). *Tennyson*, 487 Mich at 735.

Defendant also argues that there is insufficient evidence to support his CSC I convictions because there was no forensic evidence or medical testimony to establish that a sexual assault even occurred. This claim is without merit. It is well-established that the complainant’s trial “testimony can, by itself, be sufficient to support a conviction of CSC.” *People v Szalma*, 487 Mich 708, 724; 790 NW2d 662 (2010), citing MCL 750.520h (“The testimony of a victim need not be corroborated in prosecutions under [MCL 750.520b to 520(g)].”).

Defendant argues at length that the evidence was not sufficient to prove the elements of each crime because the complainant and JS were not credible. “The credibility of witnesses and the weight accorded to evidence are questions for the jury, and any conflict in the evidence must be resolved in the prosecutor’s favor.” *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009). With regard to the complainant, the jurors reviewed the evidence and clearly believed her testimony. Any discrepancies in the surrounding facts and how it affected her credibility were properly left to the jury to decide. *Id.* Defendant challenges JS’s credibility on the basis that JS received a favorable plea deal in exchange for his testimony and made statements to the police that contradicted his trial testimony. But JS acknowledged his plea agreement during his testimony and explained that the contradictory statements made in 2013 were the result of intimidation. The jury was free to judge his credibility in light of these facts and to afford it the weight it determined was appropriate. *Id.* Defendant has not pointed to any exceptional

circumstances that would take the issue of witness credibility from the jury. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998).

Defendant next argues that his convictions for both CSC I, MCL 750.520b(1)(c) and domestic violence, third offense, MCL 750.81(4), violate the Double Jeopardy Clauses of the United States and Michigan Constitutions such that his domestic violence conviction must be reversed. US Const, Am V; Const 1963, art 1, § 15. Defendant did not raise this issue in the trial court and it is not preserved for our review. *People v Barber*, 255 Mich App 288, 291; 659 NW2d 674 (2003). We review “for plain error unpreserved claims that a defendant’s double jeopardy rights have been violated.” *People v Matuszak*, 263 Mich App 42, 47; 687 NW2d 342 (2004). “[T]o avoid forfeiture of this issue, [the] defendant must show plain error that affected his substantial rights,” *id.*, “that is, the error affected the outcome of the [] proceedings,” *People v McGee*, 280 Mich App 680, 682; 761 NW2d 743 (2008).

The purpose of the double-jeopardy protection at issue is to prevent the defendant from enduring more punishment than the Legislature intended. *People v Calloway*, 469 Mich 448, 450-451; 671 NW2d 733 (2003). In *People v Smith*, 478 Mich 292, 315; 733 NW2d 351 (2007), our Supreme Court held that the “same elements” test set forth by the United States Supreme Court in *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932), is “the appropriate test to determine whether multiple punishments are barred by Const 1963, art 1, § 15.” The same-elements test set forth in *Blockburger*, 284 US at 307, “focuses on the statutory elements of the offense . . . [and] if each offense requires proof of elements that the other does not, the *Blockburger* test is satisfied and no double jeopardy violation is involved.” *People v Baker*, 288 Mich App 378, 382; 792 NW2d 420 (2010). “[C]onvictions of two criminal offenses arising from the same act are prohibited only when the greater offense necessarily includes all elements of the lesser offense. Accordingly, conviction of both offenses is precluded only where it is impossible to commit the greater offense without first having committed the lesser offense.” *People v Ream*, 481 Mich 223, 229; 750 NW2d 536 (2008).

As applied to this case, the Legislature has not expressed its intention to authorize multiple punishments for violations of CSC I (sexual penetration occurred during the commission of another felony), MCL 750.520b(1)(c), and domestic violence, third offense, MCL 750.81(4). *Smith*, 478 Mich at 316. “Nowhere in the CSC chapter, MCL 750.520 *et seq.*, does the Legislature clearly express its intention to impose multiple punishments.” *People v Garland*, 286 Mich App 1, 5; 777 NW2d 732 (2009). Thus, we apply the *Blockburger* test to determine whether defendant’s conviction for both offenses violate double jeopardy.

CSC I, MCL 750.520b(1)(c), contains an element not included in the domestic violence, third offense statute, namely sexual penetration. Similarly, domestic violence, third offense, MCL 750.81(4), contains an element not necessarily included in CSC I, namely an existing or prior domestic relationship. CSC I, MCL 750.520b(1)(c), can be committed without also committing domestic violence because the offense of CSC I, MCL 750.520b(1)(c), occurs when “[s]exual penetration occurs under circumstances involving the commission of *any other* felony.” (Emphasis added.) In other words, the greater offense of CSC I can be committed without first committing the offense of domestic violence, third offense. Accordingly, defendant’s convictions and sentences for CSC I, MCL 750.520b(1)(c), and domestic violence, third offense,

MCL 750.81(4), do not violate the multiple-punishment strand of the Double Jeopardy Clause. *Smith*, 478 Mich at 316.

Although not raised by defendant in the trial court or on appeal, we conclude that defendant's convictions based on both CSC I subsections violate the double jeopardy protections of the United States and Michigan Constitutions.² “[T]he gravamen of first-degree criminal sexual conduct is sexual penetration accomplished under any of the enumerated circumstances [MCL 750.520b(1)(a) through (h)].” *People v Dowdy*, 148 Mich App 517, 521; 384 NW2d 820 (1986). In *People v Johnson*, 406 Mich 320, 330-331; 279 NW2d 534 (1979), our Supreme Court concluded that the defendant could not be charged with and convicted of multiple counts of CSC I under MCL 750.520b on the basis of a single act of penetration because each of the enumerated factors in the CSC I statute were “alternative ways of proving [CSC I],” rather than separate offenses. (Quotation marks and citation omitted). Cf. *Dowdy*, 148 Mich App at 521-522 (holding that the “defendant’s sentences for five [separate] acts of penetration [were] not for the ‘same offense’ and therefore no double jeopardy violation [was] shown[.]”).

Defendant was charged under two subsections—MCL 750.520b(1)(c) (*actor* engaged in sexual penetration and the penetration occurred during the commission of another felony) and MCL 750.520b(1)(d)(ii) (*actor* sexually penetrates [the complainant] while aided or abetted by another person and *actor* uses force or coercion (emphasis added)). But, the evidence established that defendant (the “actor”) sexually penetrated the complainant only one time. That defendant’s single sexual penetration “happen[ed] to be accompanied by more than one of the aggravating circumstances enumerated in the [CSC I] statute may well ease the burden upon the prosecution in attaining a conviction . . . but it may give rise to only one criminal charge for purposes of trial, conviction and sentencing.” *Johnson*, 406 Mich at 331. Accordingly, defendant’s convictions for both CSC I convictions violates double jeopardy protections and his conviction on count 2 is vacated. Because we vacate defendant’s conviction under MCL 750.520b(1)(d)(ii), it is unnecessary to address his challenge to the sufficiency of the evidence under this subsection.

Defendant next argues that the trial court should have excluded evidence of his prior bad acts because it was unfairly prejudicial. We review unpreserved challenges to the admission of evidence for plain error to determine whether it affected the defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). When considering an unpreserved evidentiary error, we will reverse only when the defendant is actually innocent or the error “seriously affected the fairness, integrity, or public reputation of judicial proceedings . . .” *Id.* at 764.

² This Court may review issues not properly raised or addressed by a party “if a miscarriage of justice will result from a failure to pass on them, or if the question is one of law and all the facts necessary for its resolution have been presented, or where necessary for a proper determination of the case.” *People v Smart*, 304 Mich App 244, 252; 850 NW2d 579 (2014) (quotation marks and citation omitted).

Under MCL 768.27b(1), “in a criminal action in which the defendant is accused of an offense involving domestic violence[:.]”

evidence of the defendant’s commission of other acts of domestic violence is admissible for any purpose for which it is relevant, if not otherwise excluded under Michigan rule of evidence 403.

Thus, prior-bad-acts evidence of domestic violence can be admitted at trial because “a full and complete picture of a defendant’s history . . . tend[s] to shed light on the likelihood that a given crime was committed.” *People v Cameron*, 291 Mich App 599, 610; 806 NW2d 371 (2011). Further, “[t]he language of MCL 768.27b clearly indicates that trial courts have discretion to admit relevant evidence of other domestic assaults to prove any issue, even the character of the accused, if the evidence meets the standard of MRE 403.” *Id.* at 609 (quotation marks and citation omitted).

Defendant’s prior domestic violence convictions in 2005, 2007, and 2009 constituted acts of domestic violence as defined by MCL 768.27b(5)(a)(i) against either a “family or household member” as defined by MCL 768.27b(5)(b)(i) and (ii). Thus, the only questions are whether the evidence was relevant (MRE 401) and, if so, whether it was unfairly prejudicial under MRE 403, which excludes relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Evidence is unfairly prejudicial when “[the danger exists] that marginally probative evidence will be given undue or preemptive weight by the jury.” *Cameron*, 291 Mich App at 611 (citation omitted).

Evidence of defendant’s prior convictions was relevant under MRE 401, because defendant was charged with domestic violence, third offense, MCL 750.81(4), which required the prosecution to prove that defendant assaulted or battered someone with whom he had a dating relationship on at least two prior occasions. We also conclude that any prejudicial effect of admitting defendant’s prior convictions did not substantially outweigh the probative value of the evidence given the brevity of the evidence and the fact that it was not inflammatory, nor did it interfere with the jury’s ability to weigh the evidence. See, *People v Railer*, 288 Mich App 213, 219; 792 NW2d 776 (2010). Because the unobjected-to admission of the prior bad acts evidence was not plain error, admission of the evidence did not affect defendant’s substantial rights. *Carines*, 460 Mich at 763-764. Moreover, because the evidence was properly admitted, defendant’s argument that its admission violated his due process rights also fails. See *People v Hana*, 447 Mich 325, 350; 524 NW2d 682 (1994) (“[A]n important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence[.]”). (Quotation marks and citations omitted).

Defendant next argues that the trial court abused its discretion by limiting trial counsel’s cross-examination of the complainant regarding statements she purportedly made to Karen Cross that conflicted with her trial testimony. We review for an abuse of discretion a preserved challenge to the admission of evidence. *People v Orr*, 275 Mich App 587, 588; 739 NW2d 385 (2007).

The purported statement defendant argues should have been allowed was hearsay which did not, contrary to defendant's argument otherwise, meet the requirements of MRE 801(d)(1)(A). While the complainant's alleged statement to Cross was inconsistent with her trial testimony, there is no evidence that the alleged statement was "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition" as required by MRE 801(d)(1)(A). Thus the purported statement would not have been admissible as non-hearsay under MRE 801(d)(1)(A) and the trial court did not abuse its discretion by limiting the testimony.³

Next, defendant argues that he was denied the effective assistance of counsel because trial counsel failed to call certain witnesses who purportedly would have testified that the complainant told them defendant did not sexually assault her. In conjunction with this argument, defendant argues that the trial court should have granted his motion for a new trial on the basis of this claim. Whether a defendant received effective assistance of counsel is a mixed question of fact and law because the "trial court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Matuszak*, 263 Mich App at 48. A trial court's factual findings are reviewed for clear error and constitutional questions are reviewed de novo. *Unger*, 278 Mich App at 242.

"[B]ecause the trial court did not hold an evidentiary hearing, [*People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973),] our review is limited to the facts on the record." *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). We review a trial court's decision on a motion for new trial for an abuse of discretion. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999).

To establish a claim of ineffective assistance of counsel, "a defendant must establish that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012), quoting *Strickland v Washington*, 466 US 668, 688; 104 S Ct 2052; 80 L Ed 2d 674 (1984) (quotation marks omitted). The defendant must establish both prongs of this test to prevail on his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 5-6; 594 NW2d 57 (1999). In addition, "to persuade a reviewing court that counsel was ineffective, a defendant must also overcome the presumption that the challenged action was trial strategy. . . ." *Id.* It is strongly presumed that defense counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Vaughn*, 491 Mich at 670 (quotation marks and citation omitted).

While defendant requested an evidentiary hearing in the trial court in conjunction with his motion for a new trial, he did not provide factual support for his claim. Defendant did not, for example, provide the trial court with affidavits from the purported witnesses supporting his

³ We recognize that while the trial court properly limited the cross-examination, the complainant answered the questions anyway, indicating that her testimony at trial was the same as her statement to Cross.

assertion that the complainant told each of them that defendant did not sexually assault her. Without such evidence, defendant cannot establish that the purported testimony would have discredited the complainant's testimony such that he was deprived of a substantial defense. Thus, defendant did not meet his burden of establishing the factual predicate of his claim and did not establish both deficient performance and prejudice. *Hoag*, 460 Mich at 6; *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Moreover, evidence was presented at trial that at least one of the witnesses defendant asserts should have been called by defense counsel intimidated JS to change his statement to the police. Under these facts, defendant cannot overcome the presumption that trial counsel's decision to forego calling the purported witnesses was a matter of sound trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Because defendant fails to present a ground that would support reversal on appeal (here ineffective assistance of counsel), we conclude that the trial court did not abuse its discretion by denying his motion for a new trial. *Jones*, 236 Mich App at 404.

With regard to the sentences imposed, defendant argues that his constitutional rights to a jury trial under the Sixth and Fourteenth Amendments, and to have the prosecution prove its case beyond a reasonable doubt, were violated because the trial court engaged in impermissible judicial fact-finding when scoring certain offense variables. We review these questions of constitutional law de novo. *People v Herron*, 303 Mich App 392, 399; 845 NW2d 533 (2013).

In support of his argument, defendant relies principally on *Alleyne v United States*, ___ US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013), in which the United States Supreme Court held that facts that increase a mandatory minimum sentence "must be submitted to the jury" and "found beyond a reasonable doubt." *Id.* at ___; 133 S Ct at 2163. In *Herron*, 303 Mich App at 399-405, this Court discussed at length the evolution of the United States Supreme Court decisions culminating in *Alleyne* and held that *Alleyne* does not apply to Michigan's sentencing scheme. In *People v Lockridge*, 304 Mich App 278, 284; 849 NW2d 388 (2014), this Court addressed the same argument and concluded that it was bound by *Herron* and that *Alleyne* thus did not impact sentencing in Michigan.⁴ Accordingly, defendant's arguments must be rejected because we are bound by *Herron* and *Lockridge*. MCR 7.215(J)(1).

Defendant next asserts that he is entitled to resentencing on the basis that numerous offense variables (OVs) were incorrectly scored. Our Supreme Court has stated the standard of review governing sentencing issues as follows:

Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law is a question of statutory interpretation, which an appellate court reviews de novo. [*People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013)].

⁴ However, two members of the panel expressed disagreement with the holding in *Herron*, see *Lockridge*, 304 Mich App at 285-317, and leave to appeal has been granted in *People v Lockridge*, 496 Mich 852 (2014).

Regarding defendant's first challenge, we find that defendant was properly assessed 10 points for OV 4 (psychological injury to the victim), MCL 777.34(1)(a). Ten points are to be assessed where "serious psychological injury requiring professional treatment occurred to a victim." *Id.* A complainant's "expression of fearfulness is enough to satisfy the statute[‘s]" requirement that the victim suffer serious psychological injury. *People v Earl*, 297 Mich App 104, 109; 822 NW2d 271 (2012). Here, the complainant testified at trial that she was "scared to death" of defendant and in her victim impact statement she indicated that she is "afraid all the time wondering what would happen to [her] if he gets out" and that "he will try to hurt [her] or kill [her]." In addition, the complainant was sexually penetrated in her own home against her will by two men, one of whom was her long-term boyfriend, under circumstances in which she was repeatedly hit and choked. Taking these facts into consideration, we conclude that the complainant's expression of fearfulness is sufficient to infer that she suffered serious psychological injury requiring professional treatment. *Id.*

We reject defendant's argument that by holding that an expression of fearfulness satisfies the requirement of OV 4 that the complainant suffer serious psychological injury, courts have violated the separation of powers doctrine because they are judicially legislating by reading provisions into the statute. The judiciary has not improperly concluded that a normal fear has replaced the legislative mandate that 10 points be scored for "serious psychological injury." Instead, this Court has examined the facts of each case to determine whether the acts resulted in serious psychological injury. See *People v Apgar*, 264 Mich App 321, 324, 329; 690 NW2d 312 (2004) (although this Court concluded that OV 4 was properly scored 10 points because "the victim testified that she was fearful during the encounter[.]" the facts regarding the encounter were more extreme than those stated in relation to the guidelines scoring and supported an inferential finding of "serious psychological injury."). Similarly, as discussed earlier, the record in this case clearly supports an inferential finding that the complainant suffered severe psychological injury when defendant sexually assaulted her.

Defendant incorrectly argues that MCL 777.34(1) requires that professional treatment be sought for 10 points to be assessed under OV 4. MCL 777.34(2) specifically provides that "the fact that treatment has not been sought is not conclusive." Defendant is correct that when a criminal statute is ambiguous, the rule of lenity provides that it should be construed in favor of the defendant and against the imposition of a harsher punishment. *People v Bergevin*, 406 Mich 307, 311-312; 279 NW2d 528 (1979). However, we conclude that the statute is clear and unambiguous in that it specifically provides that seeking psychological treatment is not necessary to support an assessment of 10 points for OV 4. MCL 777.34(2). Thus, the rule of lenity does not apply to OV 4.

We also conclude that defendant was properly assessed 50 points for OV 7 (aggravated physical abuse) because his conduct was designed to substantially increase the fear and anxiety the complainant suffered during the offense. MCL 777.37(1)(a). Evidence at trial established that defendant choked the complainant and threatened to kill her while sexually assaulting her and subjected her to the fear and humiliation of a multiple offender situation. By doing so, defendant engaged in conduct beyond the minimum necessary to commit CSC I and it is more probable than not that his conduct was intended to make the victim's fear or anxiety increase by a considerable amount. *Hardy*, 494 Mich at 443. Defendant argues that OV 7 is ambiguous and that by assessing 50 points for the facts in this case, the rule of lenity is violated. We disagree.

OV 7 unambiguously provides that 50 points should be assessed for “conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.” MCL 777.37(1)(a). Since defendant’s actions clearly increased the complainant’s fear, the rule of lenity is not violated.

Defendant was also properly assessed 5 points for OV 10 (exploitation of vulnerable victim) because he exploited the complainant by his difference in size or strength or both. MCL 777.40(1)(c). For purposes of OV 10, “vulnerability” is defined as “the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation.” MCL 777.40(3)(c). Defendant admits that he was bigger and/or stronger than the complainant. Moreover, the complainant testified that she was dizzy from the alcohol she drank that night, and defendant and the complainant were involved in a boyfriend-girlfriend relationship at the time of the offenses and were living together. See *People v Dillard*, 303 Mich App 372, 380-381; 845 NW2d 518 (2013) (holding that the trial court did not clearly err by assessing 10 points for OV 10 where “[t]he victim was clearly vulnerable in light of defendant’s greater strength, her intoxication, and the domestic relationship between the two, including the fact that she and defendant had a child together”). The evidence thus supported a scoring of 5 points for OV 10.

Defendant was not, however, properly assessed 25 points for OV 11 (criminal sexual penetration). OV 11 provides that 25 points should be assessed when “[o]ne criminal sexual penetration occurred.” MCL 777.41(1)(b). In scoring OV 11, “all sexual penetrations of the victim by the offender arising out of the sentencing offense” must be scored. MCL 777.41(2)(a). However, for purposes of CSC I, no points should be scored for the one penetration that forms the basis of the CSC offense. MCL 777.41(2)(c). The evidence established that defendant sexually penetrated the complainant one time. Thus, the trial court erred by scoring 25 points for OV 11 because MCL 777.41(2)(c) mandates that no points be scored for the one penetration that forms the basis of the CSC I offense. Because there was no other penetration *by the offender* than that which formed the basis of his CSC I conviction under MCL 750.520b(1)(c), the appropriate score for OV 11 was 0 points.

Defendant was properly assessed 25 points for OV 13 (continuing pattern of criminal behavior) because “[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person.” MCL 777.43(1)(c). In assessing 25 points for OV 13, the trial court counted: (1) the 2014 sexual penetration conviction based on MCL 750.520b(1)(c) (sexual penetration during the commission of another felony), (2) the 2014 domestic violence, third offense conviction, and (3) the 2009 domestic violence conviction. MCL 777.43(2)(a) provides that “[f]or determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense shall be counted[.]” The three charged crimes forming the basis for the point assessment all occurred within a five year period. The trial court properly assessed 25 points for OV 13.

Contrary to defendant’s assertion, the language of MCL 777.43(1)(c) does not limit a trial court’s ability to count multiple convictions arising from the same incident when assessing points under OV 13. *People v Gibbs*, 299 Mich App 473, 487-488; 830 NW2d 821 (2013). Because the statute unambiguously allows the use of all crimes within a 5-year period, including the sentencing offense, defendant’s rule of lenity argument fails. There is no language in the statute that prohibits the sentencing court’s use of each crime committed during the criminal

transaction for which he is currently being sentenced, as well as prior convictions, to assess points under OV 13. To hold otherwise would inappropriately read limiting language into the statute. *In re Wayne Co Prosecutor*, 232 Mich App 482, 486; 591 NW2d 359 (1998).

Finally, defendant's score of 10 points for OV 14 (offender's role) was correct because he was a leader in a multiple offender situation. MCL 777.44(1)(a). Defendant acted first by vaginally penetrating the complainant, beating and choking her, and then directed, ordered, and threatened JS to have the complainant perform oral sex on him while defendant continued to vaginally penetrate the complainant. Cf. *People v Rhodes*, 305 Mich App 85, 90; 849 NW2d 417 (2014) (holding that the trial court erred by assessing 25 points for OV 14 where "the evidence d[id] not show that defendant acted first, gave any directions or orders to [the other offender], displayed any greater amount of initiative beyond employing a more dangerous instrumentality of harm, played a precipitating role in [the other offender]'s participation in the criminal transaction, or was otherwise a primary causal or coordinating agent").

The trial court sentenced defendant to 40 to 60 years in prison under the belief that the statutory guidelines set forth a minimum range of 225 to 750 months. When the statutory sentencing guidelines are correctly scored, the actual minimum range remains the same because subtracting the 25 points assessed for OV 11 does not alter the offense level VI category in which defendant's score falls. The guidelines range remains exactly the same, and where a scoring error does not alter the guidelines range, a defendant is not entitled to resentencing. *People v Sims*, 489 Mich 970; 798 NW2d 796 (2011) *mod on reconsideration* 490 Mich 857; 802 NW2d 64 (2011).

Defendant's conviction on count 2, CSC I, MCL 750.520b(1)(d)(ii), is vacated and the remaining convictions and sentences are affirmed. We remand to the trial court for correction of the PSI and the judgment of sentence. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Kirsten Frank Kelly
/s/ Deborah A. Servitto