

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERRY LOUIS DAVID,

Defendant-Appellant.

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UNPUBLISHED

March 2, 2006

No. 257332

Kent Circuit Court

LC No. 04-001615-FC

Before: Cooper, P.J., and Jansen and Markey, JJ.

PER CURIAM.

After a jury trial, defendant appeals by right his sentences for two counts of criminal sexual conduct in the first degree (CSC I), MCL 750.520b(1)(a). He was sentenced as a second habitual offender, MCL 769.10, to concurrent terms of 20 to 40 years in prison for the CSC I offenses. Defendant also was convicted of two counts of criminal sexual conduct in the second degree, MCL 750.520c(1)(a), and received concurrent sentences of 8 to 22-1/2 years in prison for those offenses.<sup>1</sup> We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first challenges the trial court's scoring of Offense Variable (OV) 5, MCL 777.35, psychological injury to a member of the victim's family, at 15 points. The prosecution acknowledges that pursuant to MCL 777.22, OV 5 should not have been scored for the CSC offenses. The trial court plainly erred in scoring OV 5 at 15 points.

An erroneous score which, when corrected, would not result in a different recommended sentencing range does not require resentencing. *People v Houston*, 261 Mich App 463, 473; 683 NW2d 192 (2004), aff'd 473 Mich 399; 702 NW2d 530 (2005). Defendant's total OV score was 95 points. A reduction of this score to reflect the correct scoring of zero points for OV 5 results in a total OV score of 80 points. This score still falls within the same Offense Level V for this Class A offense, which has a range of 80 to 99 points. MCL 777.62. Consequently, unless defendant can demonstrate an additional scoring error, he is not entitled to resentencing.

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<sup>1</sup> Defendant was acquitted of a third charge of CSC I.

Defendant next argues that the trial court erred when it scored OV 11, MCL 777.41, criminal sexual penetration, at 50 points instead of 25 points. According to MCL 777.41,

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 language of OV 11 provides that 50 points should be scored if there are two or more criminal sexual penetrations, excluding the one penetration that forms the basis of the CSC I offense. *People v McLaughlin*, 258 Mich App 635, 676; 672 NW2d 860 (2003).<sup>2</sup> Defendant does not challenge the scoring of OV 11 for the charged penetration that resulted in his separate CSC I conviction. However, he maintains that the trial court could not include the CSC I charge for which he was acquitted in the scoring of OV 11. We have held that, during sentencing, the trial court need not find that a factor has been proven beyond a reasonable doubt in order to support a scoring decision. Instead, the trial court need only determine that the factor has been proven by a preponderance of the evidence. *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991), citing *People v Ewing*, 435 Mich 443; 458 NW2d 880 (1990). The fact that a person was not found beyond a reasonable doubt to have committed conduct does not mean that he cannot be found by a preponderance of the evidence standard applicable in sentencing determinations to have committed the same conduct. *Id.*

The record reflects that defendant's two minor daughters were the complainants in this case. One child testified that defendant engaged in more than one episode of digital/vaginal penetration with her. The other child testified that defendant performed oral sex on her more

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<sup>2</sup> Leave remains pending in our Supreme Court regarding whether the scoring of 25 points for OV 11 is proper when the second penetration was included in a separate charge. *People v Johnson*, 473 Mich 862 (2005). However, at this time, *McLaughlin, supra*, remains controlling.

than once,<sup>3</sup> that defendant more than once engaged in acts of digital/vaginal penetration with her, and that defendant also placed his penis in her vagina. This evidence of multiple penetrations amply supports the trial court's decision to score OV 11 at fifty points.

Affirmed.

/s/ Jessica R. Cooper  
/s/ Kathleen Jansen  
/s/ Jane E. Markey

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<sup>3</sup> Pursuant to MCL 750.520a(o), "sexual penetration" includes cunnilingus, which by definition does not require actual penetration. *People v Lemons*, 454 Mich 234, 255; 562 NW2d 447 (1997).