

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY ALAN MAXON,

Defendant-Appellant.

UNPUBLISHED

April 21, 2009

No. 282688

Lapeer Circuit Court

LC No. 00-007103-FH

Before: Markey, P.J., and Fitzgerald and Gleicher, JJ.

PER CURIAM.

A jury convicted defendant of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(b)(ii) (victim between the ages of thirteen and sixteen and related to defendant), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (victim under thirteen years of age). This Court affirmed defendant's convictions.¹ On October 8, 2005, the trial court denied defendant's motion for relief from judgment, and this Court subsequently denied defendant's delayed application for leave to appeal.² The Supreme Court granted defendant's application for leave to appeal and remanded to the trial court for resentencing on the ground that the trial court erred by failing to sentence defendant under the legislative sentencing guidelines.³ On remand, the trial court resentenced defendant to concurrent prison terms of 17 to 35 years for each of the first-degree CSC convictions, and six to 15 years for the second-degree CSC conviction, with credit for 86 months and 13 days.⁴ Defendant appeals as of right, challenging the trial court's scoring of 50 points for Offense Variable (OV) 11, MCL 777.41. We vacate defendant's first-degree CSC sentences and remand for resentencing.

¹ *People v Maxon*, unpublished opinion per curiam of the Court of Appeals, issued November 12, 2002 (Docket No. 235532).

² *People v Maxon*, unpublished order of the Court of Appeals, entered July 26, 2006 (Docket No. 267481).

³ *People v Maxon*, 477 Mich 1016, 1017; 726 NW2d 420 (2007).

⁴ The amended judgment of sentence reflected sentence credit for 72 months and 325 days served. The trial court subsequently issued a second amended judgment of sentence granting sentence credit in the amount of 84 months and 13 days.

Defendant's three first-degree CSC convictions arise out of events that occurred on June 13, 2000, August 21, 2000, and another date "sometime between June 13 and August 21, 2000." The victim testified that defendant forced her to have sexual intercourse on June 13, 2000, and that the sexual activity lasted for about seven minutes. The victim also testified that defendant forced her to have sexual intercourse on August 21, 2000, and that the sexual activity lasted between five and seven minutes. She further testified that defendant penetrated her anally sometime between June 13 and August 21, 2000, but provided no testimony regarding the duration of the activity.

At the resentencing hearing, defendant challenged the scoring of 50 points for OV 11 in the presentence information report. Defendant argued that OV 11 was improperly scored because only one sexual penetration arose out of each sentencing offense, thus warranting a score of 0 points. The prosecutor argued that sexual intercourse involves multiple thrusts of the penis and that each thrust should be considered and counted as a separate act of sexual penetration for purposes of scoring OV 11.⁵ The trial court agreed with the prosecutor, stating that "the victim was subjected to dozens, if not hundreds, or additional sexual penetrations that arose from the penetration that formed the basis of the conviction." We review this case concerning the proper interpretation and application of the statutory sentencing guidelines de novo. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

MCL 777.41 provides:

(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 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.

⁵ The prosecutor argued that "it is common knowledge that in a "normal sexual relationship," with the female "on the bottom," that lasts for "five" or "seven" minutes, a man moves his penis in and out of a woman's vagina.

A score of 50 points for OV 11 correlates with two or more criminal sexual penetrations having occurred during the incident underlying the sentence. *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004). However, MCL 777.41(2)(c) prevents the court from scoring points for the one penetration that forms the basis of first- or third-degree criminal sexual conduct offense. *People v Johnson*, 474 Mich 96, 102 n 2; 712 NW2d 703 (2006). “Accordingly, the evidence must establish at least three sexual penetrations during the incident to support scoring OV 11 at fifty points.” *Matuszak, supra* at 61.

At issue in this case is whether each thrust of defendant’s penis during a single act of sexual intercourse can be treated as a separate penetration for purposes of scoring OV 11.⁶ MCL 777.41 does not define “sexual penetration.” However, OV 11 is scored only when the sentencing offense involves criminal sexual conduct. For CSC offenses, “sexual penetration” is statutorily defined as “sexual intercourse . . . or any other intrusion, however slight, of any part of a person’s body . . .” MCL 750.520a(r). Thus, where the sentencing offense involves sexual intercourse, each incident of sexual intercourse is a single sexual penetration for purposes of scoring OV 11. See *People v Johnson*, 474 Mich 96; 712 NW2d 703 (2006).⁷

This case is readily distinguished from *People v Belcourt*, unpublished opinion per curiam of the Court of Appeals, issued February 20, 2007 (Docket No. 265275), a case on which the trial court relied in scoring 50 points for OV 11. In that case, the prosecutor charged defendant with one count of first-degree CSC and alleged a timeframe of January 2000. Only one sexual penetration was required to form the basis of the first-degree CSC conviction, but the victim testified that during the assaults involving penetration, defendant would insert two fingers “or one a couple of times” in her vagina and move “in and out” for five to ten minutes. The Court concluded that the victim’s express testimony that the defendant moved his finger “in and out” for five to ten minutes supported a finding that defendant’s finger reentered the victim’s vagina two or more times during the underlying incident.⁸ *Id.* at slip op p 12.

⁶ The prosecutor’s argument below did not pertain to defendant’s first-degree CSC conviction involving anal penetration because “There was no testimony regarding how long this act lasted or whether the Defendant could “function as a normal man” when this penetration occurred.” The prosecutor also noted that “the scoring [for this count] is irrelevant when the Defendant’s sentences run concurrently. In other words, even if [this count] were scored lower than [the other two first-degree CSC convictions], the Defendant will still have to serve the entire length of the sentence imposed for [those counts].” We are unable to determine from the record the number of points that the trial court scored for OV 11 for the first-degree CSC conviction involving anal penetration, but note that OV 11 should be scored at 0 points for this count as well.

⁷ In *Johnson*, the defendant forced the victim to have sexual intercourse on two separate dates in November 2001. *Id.* at 101-102. This Court noted that “there is no evidence that the penetrations resulted or sprang from each other or that there is more than an incidental connection between the *two penetrations*.” *Id.* at 102 (emphasis added). *Johnson* clearly identified each act of sexual intercourse as a single sexual penetration for purposes of scoring OV 11.

⁸ Unpublished cases of this Court are not binding precedent, so they should not be relied upon to
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In contrast, the victim in the present case testified that defendant engaged in sexual intercourse on one occasion for “about seven minutes” and on another occasion for “five to seven minutes.” The victim did not testify that defendant withdrew his penis and then reinserted it on either occasion, nor did she testify that defendant moved his penis “in and out” on either occasion. Under these circumstances, the trial court erred by finding that each thrust of the penis is a new penetration and by concluding that the act of sexual intercourse creates “dozens, if not hundreds of additional sexual penetrations.”

This case is also distinguished from *Matuszak*, *supra*, a case on which the trial also relied. In *Matuszak*, the defendant threw the 13-year-old victim to the ground and partially inserted his penis into her vagina once, and he then threw her onto the trunk of the car where he inserted his finger into her vagina, partially inserted his penis into her vagina twice, and fully inserted his penis into her vagina once. *Id.* at 46. This Court held that the evidence established five instances of sexual penetration during the assault, four involving penile penetration and one involving digital penetration. In contrast, in the present case the victim testified that defendant engaged in prolonged sexual intercourse, not separate and distinct intrusions as in *Matuszak*.

The evidence establishes that defendant penetrated the victim one time during each of the incidents underlying the first-degree CSC convictions involving sexual intercourse. Consequently, OV 11 should not have been scored at 50 points. If OV 11 is correctly scored at 0, defendant’s total OV score for these two offenses decreases from 95 to 45 points, and his properly scored guidelines range is reduced from a minimum sentencing range of 126 to 210 months to a minimum sentencing range of 81 to 135 months. Because the scoring error alters the appropriate guidelines range, resentencing is required. *People v Francisco*, 474 Mich 82, 89-91; 711 NW2d 44 (2006).⁹

We vacate defendant’s first-degree CSC sentences and remand for resentencing. Jurisdiction is not retained.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Elizabeth L. Gleicher

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support a legal position. At best, they may be persuasive.

⁹ We need not address defendant’s argument that he is entitled to additional sentence credit because defendant concedes that the trial court entered an amended judgment of sentence awarding defendant the additional sentence credit he sought.