STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 23, 2020
v	No. 346582 Cheboygan Circuit Court
JOHNNY ALLEN LANNING II, Defendant-Appellant.	LC No. 17-005510-FC

Before: SAWYER, P.J., and LETICA and REDFORD, JJ.

PER CURIAM.

Defendant pleaded guilty to third-degree criminal sexual conduct (CSC-III), MCL 750.520d(1)(a) (victim between 13 and 16). Defendant was sentenced to 8½ to 15 years' imprisonment. We granted defendant's delayed application for leave to appeal.[1]

Defendant admitted that he engaged in sexual intercourse with the 15-year-old victim, who purportedly had developmental issues and functioned on the level of an 8-year-old child. As a result of defendant's sexual assault, the victim became pregnant and gave birth to a child.

The trial court sentenced defendant, within the sentencing guidelines range of 78 to 130 months, to a minimum sentence of 102 months in prison. Defendant raises various challenges to his sentence. We affirm.

[1] *People v Lanning*, unpublished order of the Court of Appeals, entered January 9, 2019 (Docket No. 346582).

I. ANALYSIS

A. OFFENSE VARIABLE SCORING

Defendant argues that the trial court erred by assessing 10 points for both offense variables (OVs) 13 and 19. We disagree.

"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." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made." *People v McDade*, 301 Mich App 343, 356; 836 NW2d 266 (2013). "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." *Hardy*, 494 Mich at 438.

In reviewing questions of statutory interpretation, we first look to the plain and unambiguous text of the statute to ascertain the Legislature's intent. *People v Kern*, 288 Mich App 513, 516; 794 NW2d 362 (2010). When a statute is ambiguous, we look outside of the text to ascertain legislative intent. *Id*. "A statutory provision is ambiguous if it irreconcilably conflicts with another provision or is equally susceptible to more than one meaning." *Id*. at 517.

1. OV 13

"[OV 13] is continuing pattern of criminal behavior." MCL 777.43(1). A score of 10 points for OV 13 is appropriate when "[t]he offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property or a violation of section 7401(2)(a)(*i*) to (*iii*) or section 7403(2)(a)(*i*) to (*iii*) of the public health code, 1978 PA 368, MCL 333.7401 and 333.7403." MCL 777.43(1)(d). "For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a). Reviewing the statute's plain language, our Supreme Court held that, in assessing points under OV 13, "only those crimes committed during a five-year period that encompasses the sentencing offense can be considered." *People v Francisco*, 474 Mich 82, 86; 711 NW2d 44 (2006). We likewise recognize that the statute's plain language authorizes a court to consider a charge dismissed as the result of a plea agreement when scoring OV 13 if "there is a preponderance of the evidence supporting that the offense took place." *People v Nix*, 301 Mich App 195, 205; 836 NW2d 224 (2013).

Defendant's presentence investigation report (PSIR) reveals the following felony criminal history:

> 2010 a second-degree home invasion conviction as the result of plea bargain wherein the prosecution dismissed additional charges of second-degree home invasion, conspiracy to commit second-degree home invasion, and receiving and concealing stolen property valued at $1,000.00 but less than $20,000.00
>
> 2011 an absconding conviction

2014 a third-degree CSC conviction (the sentencing offense)

2016 two convictions for taking a motor vehicle without permission in Walla Walla, Washington

Defendant argues that his 2016 out-of-state felony convictions cannot be used to score OV 13 because they occurred after, not before, the sentencing offense. Absent these convictions, defendant asserts that he does not have a sufficient number of qualifying offenses to support scoring 10 points under OV 13.

We reject defendant's interpretation of the statutory language at issue. As we have already explained, the plain statutory language states that the five-year period must include the instant offense. MCL 777.43(2)(a). Our Supreme Court read the pertinent statutory language in precisely this manner. *Francisco*, 474 Mich at 86. Accordingly, the trial court properly considered defendant's subsequent convictions when it determined that defendant engaged in a pattern of felonious conduct involving three crimes against a person or property in a five-year period that encompassed the sentencing offense.[2] *Id.*

[2] Even if we were to read the statute the manner defendant suggests, we note that the trial court could properly conclude that the charges (second-degree home invasion and receiving and concealing) dismissed as part of defendant's 2010 plea bargain potentially provide an independent basis for scoring 10 points under OV 13. MCL 777.43(2)(a); *Nix*, 301 Mich App at 205. Notably, defendant never disputed that he committed the dismissed felonies that were reflected in his PSIR.

We also note that the sentencing court assessed zero points for OV 3. Should the court encounter a like case in the future, we note that in *People v Cathey*, 261 Mich App 506, 512-517; 681 NW2d 661 (2004), we held that when a defendant's criminal sexual assault causes a victim's pregnancy, that condition constitutes a "bodily injury" for purposes of scoring OV 3, MCL 777.33. See MCR 7.215(C)(2) ("A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis."). Consistent with *Cathey*, 261 Mich App at 517, the sentencing court must assess the highest number of points, either 5 or 10 points, after determining whether the victim required medical treatment as a result of the pregnancy.

Likewise, the sentencing court assessed 0 points under OV 4 (serious psychological injury to the victim that may require professional treatment). MCL 777.34(1)(a) and (2). Again, the unobjected-to PSIR reflects that the victim told law enforcement that she had just recently stopped having nightmares and told the probation agent that defendant was one of the people that she had trusted the most, that she was "mad" because she had to drop out of school due to her pregnancy, and that, while defendant had not ruined her life, he had certainly changed it "forever." Thus, despite the victim's intention to move forward with her life, a 10-point score was supportable. See and compare *People v Armstrong*, 305 Mich App 230, 247-248; 851 NW2d 856 (2014).

Similarly, the trial court assessed zero points under OV 12, MCL 777.42, despite the victim's unobjected-to statements in the PSIR evincing that assessing 5 points was required because defendant had committed a contemporaneous felonious act involving a crime against a

2. OV 19

Defendant also argues that the trial court improperly assessed 10 points for OV 19. A score of 10 points for OV 19 is appropriate when "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice[.]" MCL 777.49(c). "[T]he plain and ordinary meaning of 'interfere with the administration of justice' for purposes of OV 19 is to oppose so as to hamper, hinder, or obstruct the act or process of administering judgment of individuals or causes by judicial process." *People v Hershey*, 303 Mich App 330, 343; 844 NW2d 127 (2013). Additionally, as provided by the statute, the phrase "interfered with or attempted to interfere with the administration of justice" is broad, and it includes "more than just the actual judicial process and can include conduct that occurs before criminal charges are filed, acts that constitute obstruction of justice, and acts that do not necessarily rise to the level of a chargeable offense." *Id*. (quotation marks, brackets, and citation omitted). Examples of conduct that constitute an interference or attempted interference with administration of justice are "providing a false name to the police, threatening or intimidating a victim or witness, telling a victim or witness not to disclose the defendant's conduct, fleeing from police contrary to an order to freeze, [or] *attempting to deceive the police during an investigation*[.]" *Id*. at 344 (emphasis added).

In this case, defendant fled the state despite knowing that law enforcement wanted to speak with him about this matter. Defendant agreed to contact the investigating officer when he returned to Michigan; however, he did not do so. Further, defendant denied possessing a cell phone and provided the officer with the name of a contact person, whom he described as "a friend/co-worker" along with that person's telephone number so that the officer could reach defendant. But, when contacted by the police, that individual denied working with defendant as described and further denied that he had agreed to function as a point of contact for defendant. Law enforcement was otherwise unsuccessful at contacting defendant. Because defendant fled the jurisdiction, took overt measures to avoid speaking to law enforcement, and otherwise misled law enforcement by providing an invalid contact number, the trial court properly assessed 10 points for OV 19.

II. REASONABLENESS OF SENTENCE

Defendant argues that his sentence violates the principle of proportionality. However, he recognizes that his minimum sentence is within the guidelines range. Under these circumstances, we must affirm defendant's sentence. MCL 769.34(10) ("If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not

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person. MCL 777.42(1)(d). In particular, the 15-year-old victim described the 24-year-old defendant as rubbing and grabbing at her breasts before he penetrated her. Such conduct constitutes the commission of a fourth-degree CSC, MCL 750.520e(1)(a), or, in light of the victim's developmental disability and familial relationship to defendant, potentially, a second-degree CSC, MCL 750.520c(1)(h)(*i*). In either case, the trial court should have assessed 5 points for OV 12, not 0 points.

While the trial court's assessment of 0 points under OVs 3, 4, and 12 is not raised in the instant appeal, if there were a future resentencing, we note that it is possible that defendant's OV score, OV Level, and sentencing cell could increase.

remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence."); *People v Schrauben*, 314 Mich App 181, 196; 886 NW2d 173 (2016) ("[W]hen a trial court does not depart from the recommended minimum sentencing range, the minimum sentence must be affirmed unless there was an error in scoring or the trial court relied on inaccurate information.").

III. COURT COSTS

Finally, defendant argues that the court costs imposed under MCL 769.1k(1)(b)(*iii*) constituted an unconstitutional tax. We disagree.

In *People v Cameron*, 319 Mich App 215, 228; 900 NW2d 658 (2017), we concluded that the court costs imposed under MCL 769.1k(1)(b)(*iii*) "should be considered a tax, not a fee." However, we further held that the statute authorizing court-costs "is not unconstitutional." *Id.* at 218. Because we are bound by *Cameron*, MCR 7.215(J)(1), we uphold the court costs imposed under MCL 769.1k(1)(b)(*iii*).

Affirmed.

/s/ David H. Sawyer
/s/ Anica Letica
/s/ James Robert Redford