STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CRYSTAL L. SHELTON-RANDOLPH,

Defendant-Appellant.

UNPUBLISHED
February 16, 2023

No. 360679
Genesee Circuit Court
LC No. 14-035996-FC

Before: GLEICHER, C.J., and K. F. KELLY and LETICA, JJ.

PER CURIAM.

Defendant appeals by leave granted[1] the trial court's judgment of sentence requiring her to register as a tier I sex offender. Finding no errors warranting reversal, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

This case arises from the death of defendant's two-year-old son on November 22, 2013. At approximately 4:30 p.m., paramedics were dispatched to defendant's apartment where defendant's son was observed lying naked on a towel on the floor. Defendant was kneeling over the child performing CPR. Once inside the ambulance, paramedics noticed bleeding around the child's rectum, small bruises on the left side of his body up to his temple and left arm, and three to five "fresh scratches" across his forehead. Defendant told paramedics that the child was in the bath, started choking, and stopped breathing. After the child arrived at the hospital, a doctor pronounced him dead.

Rhonda Ruterbusch, a registered nurse and sexual assault nurse examiner, testified that she examined the child's body at the hospital and collected samples. Ruterbusch saw that the child had bruising on his left side, including his temple, chest, and left arm, and a circular shape on the left side of his chest that looked like a bite mark. His belly was distended. There was dried blood at the opening of his penis, and dried blood around his anal area. Ruterbusch opened his anal opening and the rectal area

[1] *People v Shelton-Randolph*, unpublished order of the Court of Appeals, entered May 23, 2022 (Docket No. 360679).

was "severely lacerated, just pocketed with blood. Pure blood was in there, bright red." Ruterbusch also testified that the child's anal opening had no muscle tone, and it was open "about the size of a half a dollar."

On the basis of the autopsy, Dr. Patrick Cho of the Genesee County Medical Examiner's Office testified that the child had abrasions and contusions on his head and face, skin missing on the bridge of his nose, abrasions behind his left ear, a torn upper lip, and a torn bottom frenulum. The child had "lacerations about the perianal area as well as rectum internally," and these injuries were most likely caused by a foreign object because they were not linear tears. The child had hemorrhages on the back of his rib cage and around his sigmoid colon caused by blunt force or pressure to the abdomen. Dr. Cho concluded that the cause of death was "multiple blunt force injuries," and the manner of death was homicide because the child could not have caused these injuries to himself.

Defendant pleaded *nolo contendere* to an amended charge of second-degree murder, MCL 750.317,[2] for the November 2013 death of her two-year-old son. The trial court entered a judgment of sentence imposing a prison sentence of 180 to 600 months' imprisonment and requiring defendant to register as a tier I sex offender under the "catchall provision," MCL 28.722(s)(*vi*), of the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*., as amended by 2011 PA 17.[3] Defendant appealed her sentence contesting the registration requirement, and this Court remanded "for the trial court to follow the proper procedures to determine whether defendant must register as a sex offender." *People v Shelton-Randolph*, unpublished per curiam opinion of the Court of Appeals, issued December 28, 2017 (Docket No. 335044), p 1.

On remand, the trial court held a hearing in which it again determined that defendant was subject to registration. The court noted that while testimony from the preliminary examination indicated that there could have been other explanations for the lacerations on the skin of the anus and the internal hemorrhage, Dr. Cho believed "it was a blunt object or blunt force[,] most likely a foreign object." The trial court further noted that "a foreign object suggests sexual activity in the rectum or in the anus." Therefore, the trial court concluded that "while the name of the charge by its nature does not constitute a sexual offense, the activity underlying the charge does." This appeal followed.

II. STANDARDS OF REVIEW

The interpretation and application of SORA is a question of law that this Court reviews de novo. *People v Anderson*, 284 Mich App 11, 13; 772 NW2d 792 (2009). The trial court's underlying factual

[2] Defendant was originally charged with felony murder, MCL 750.316(1)(b), first-degree criminal sexual conduct, MCL 750.520b(1)(a), and first-degree child abuse, MCL 750.136b(2). In exchange for defendant's plea, the prosecutor agreed to refrain from reissuing charges from the death of the child's twin two months earlier. Defendant further agreed to give the children's ashes to their paternal grandmother and register as applicable.

[3] We apply the version of SORA that was in effect at the time of the offense. See *People v Milton*, 186 Mich App 574, 582; 465 NW2d 371 (1990) ("Amendments of criminal statutes concerning sentences or punishment are not retroactive."). The language of the subject catchall provision remains the same, but the provision has been renumbered as MCL 28.722(r)(*vii*). See 2020 PA 295, effective March 24, 2021.

findings are reviewed for clear error. *Id*. Clear error exists when this Court is left with the definite and firm conviction that a mistake has been made. *Id*.

III. ANALYSIS

Defendant argues that the trial court erred by ordering her to register as a sex offender under the catchall provision of the SORA because her criminal activity did not, by its nature, constitute a sexual offense. Defendant contends that she did not admit to or make any statements regarding sexual assault or sexual activity, and there is no indication that there was a history of sexual abuse or sexual assault. Additionally, defendant argues that the trial court focused solely on the injuries to the victim's rectal area but did not look at the rest of the facts giving rise to the conviction. Because an admission by the defendant was not required, and the testimony from the preliminary examination established by a preponderance of the evidence that the violation, by its nature, constituted a sexual offense, we affirm defendant's conviction.[4]

"SORA requires an individual who is convicted of a listed offense after October 1, 1995, to register as a sex offender." *People v Golba*, 273 Mich App 603, 605; 729 NW2d 916 (2007); see also MCL 28.723(1)(a). A "listed offense" includes "a tier I, tier II, or tier III offense." MCL 28.722(k), as amended by 2011 PA 17. A tier I offense includes violations of specific statutes and, under a catchall provision, also includes "[a]ny other violation of a law of this state or a local ordinance of a municipality, other than a tier II or tier III offense, that by its nature constitutes a sexual offense against an individual who is a minor." MCL 28.722(s)(*vi*). The language of the catchall provision requires that three conditions be satisfied before "a person must register as a sex offender: (1) the defendant must have been convicted of a state-law violation or a municipal-ordinance violation, (2) the violation must, by its nature, constitute a sexual offense, and (3) the victim of the violation must be under 18 years of age." *Golba*, 273 Mich App at 607 (quotation marks and citation omitted). Only the second condition is at issue in this case.

The condition that the violation must, by its nature, constitute a sexual offense "is not to be determined solely by reference to the legal elements of the offense of which the defendant was convicted." *Anderson*, 284 Mich App at 14. Instead, "the particular facts of a violation are to be considered in determining whether the violation by its nature constitutes a sexual offense against an individual who is less than 18 years of age." *Id*. (quotation marks and citation omitted); see also MCL 769.1(13) (stating that if a court sentences a defendant under the catchall provision, "the court shall include the basis for that determination on the record and include the determination in the judgment of sentence"). When a sentencing court decides whether a defendant must register under SORA, the court may consider all record

[4] During defendant's sentencing, the trial court explained to defendant that if she pleaded no contest, she would have to "be registered on the sex registry." When asked if she understood, defendant responded, "Yes, sir." In addition, in defendant's written plea agreement, signed by defendant November 30, 2015, it states defendant will submit to "CSC registration requirements as applicable." Because defendant agreed to SORA registration "as applicable" and did not attempt to withdraw her plea, defendant arguably has waived the argument of whether SORA registration was proper. See *People v Ward*, 206 Mich App 38, 43-44; 520 NW2d 363 (1994) ("[A] defendant who pleads guilty and is sentenced in accordance with a plea bargain and sentencing agreement waives the right to challenge the sentence unless there is also an attempt to withdraw the plea for a sound legal reason."). But even if not waived, defendant's arguments are unconvincing.

evidence, including evidence presented during a preliminary examination, "as long as the defendant has the opportunity to challenge relevant factual assertions and any challenged facts are substantiated by a preponderance of the evidence." *Anderson*, 284 Mich App at 14-15 (quotation marks and citation omitted).

The evidence introduced during the preliminary examination supported the trial court's determination that although defendant pleaded *nolo contendere* to second-degree murder, the activity underlying the charge constituted a sexual offense. The court relied on the testimony of Dr. Cho, who performed the victim's autopsy and testified as an expert in forensic pathology. Dr. Cho testified that the victim had "lacerations about the perianal area as well as rectum internally," and these injuries were most likely caused by a foreign object because they were not linear tears. Furthermore, Dr. Cho stated that the nonlinear-type tears "indicated blunt force," and "[t]he hemorrhage internally also was . . . most probably blunt force or some pressure applied to the abdomen."

The trial court's conclusion is further supported by the preliminary examination testimony of paramedic Michael Galajda, Flint Police Department Officer Steven Howe and Sergeant Alfino Donastorg, and Ruterbusch. Galajda testified that he saw bleeding around the victim's rectum during the ambulance transport to the hospital. Officer Howe testified that after the victim was pronounced dead at the hospital, the officer went to the room where the victim was located and saw blood around the victim's rectum, which "was open the size of a large coin." Ruterbusch, who performed a sexual assault examination on the victim's body, testified that the victim's anal opening had no muscle tone, and it was open "about the size of a half a dollar." Ruterbusch described the victim's rectal area as "severely lacerated," "pocketed with blood," and "shredded," likening its appearance to meat ground "through a meat grinder." Furthermore, Sergeant Donastorg testified that when he questioned defendant, she told him that "nobody else was home at the time" of the incident.

The witness testimony from the preliminary examination established by a preponderance of the evidence that the violation, by its nature, constituted a sexual offense. The lack of an admission by defendant that she committed a sexual offense and the existence of other injuries to the victim's body do not alter the weight of the evidence that demonstrates a sexual offense occurred. See *Anderson*, 284 Mich App at 15 (holding that although "[t]he victim's mother testified that the victim had recanted on three occasions," "the evidence showed by a preponderance of the evidence that the aggravated assault, by its nature, constituted a sexual offense"). Therefore, the trial court did not err when it ordered defendant to register as a tier I sex offender under MCL 28.722(s)(*vi*).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Anica Letica

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GLEICHER, J. (*concurring*)

I join the majority's holding because this Court's opinion in *People v Anderson*, 284 Mich App 11; 772 NW2d 792 (2009), compels me to do so. Like *Anderson*, this case exemplifies that horrific facts make bad law.

The question presented is whether defendant Crystal L. Shelton-Randolph must register as a tier I sex offender when she is released from prison. The answer depends on whether her offense of conviction—second-degree murder, MCL 750.317—is an offense mandating registration under the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*. The majority concludes that SORA's "catchall provision," MCL 28.722(s)(*vi*), captures second-degree murder because in addition to murdering her child by inflicting "blunt force injuries," Shelton-Randolph sexually assaulted him. I agree that *Anderson* supports that conclusion. But I suggest that *Anderson*'s construction of the SORA deviates considerably from the reasonable meaning of the statutory text.

A tier I offender under the SORA is defined as "an individual convicted of a tier I offense who is not a tier II or tier III offender." MCL 28.722(q). This definition requires that an individual be "convicted" of an offense falling within tier I. MCL 28.722(r) lists seven offenses that fall within tier I. Almost all involve crimes that are obviously and indisputably sexual in nature, such as criminal sexual conduct, indecent exposure, and solicitation of prostitution.[1] At issue here is

[1] The exception is MCL 28.722(r)(*iii*), which provides for SORA registration of offenders convicted of unlawful imprisonment if the victim is a minor.

the "catchall provision" for tier I offenses, MCL 28.722r(*vii*), which states that a tier I offense also includes "[a]ny other violation of a law of this state or a local ordinance of a municipality, other than a tier II or tier III offense, *that by its nature constitutes a sexual offense against an individual who is a minor*." (Emphasis added.) The majority and *Anderson* hold that an individual falls within this catchall provision based on conduct for which she was never "convicted." I read the statute differently. In my view, the plain language of MCL 28.722(q) and (r)(*vii*) includes as an essential element a *conviction* of an offense that by the *offense*'s nature "constitutes a sexual offense against an individual who is a minor."

Shelton-Randolph was not convicted of an obviously or inherently sexual offense. Rather, she pleaded nolo contendere to second-degree murder, MCL 750.317. The prosecutor originally charged her with felony murder, MCL 750.316(1)(b), first-degree criminal sexual conduct, MCL 750.520b(1)(a), and first-degree child abuse, MCL 750.136b(2). But to obtain a plea, the prosecution dismissed the first-degree criminal sexual conduct charge that would have mandated registration. Shelton-Randolph pleaded guilty only to second-degree murder. She can be compelled to register under SORA, however, only if she was convicted of an offense "that by its nature constitutes a sexual offense against an individual who is a minor." MCL 28.722(r)(*vii*). Second-degree murder is not such an offense.

My analysis flows from the text and structure of MCL 28.722(q) and MCL 28.722(r)(*vii*), which together establish the prerequisites for registration as a tier I offender. In evaluating whether registration under SORA is required, MCL 28.722(q) compels us to focus on the offense(s) of conviction rather than the facts surrounding the conviction. The statute instructs that a tier I offender is "an individual *convicted* of a tier I *offense* who is not a tier II or tier III offender." (Emphasis added.) By its terms, the statute is offense-centric rather than fact-centric. As the United States Supreme Court explained when evaluating a similarly structured statute, "This language requires us to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime." *Leocal v Ashcroft*, 543 US 1, 7; 125 S Ct 377; 160 L Ed 2d 271 (2004).

I concede that this perspective contradicts *Anderson*, which holds that whether a violation constitutes a sexual offense "is *not* to be determined solely by reference to the legal elements of the offense of which the defendant was convicted." *Anderson*, 284 Mich App at 14 (emphasis added). Rather, *Anderson* holds that "the particular facts of a violation are to be considered in determining whether the violation by its nature constitutes a sexual offense against an individual who is less than 18 years of age." *Id.* (quotation marks and citation omitted). When an offense of conviction is not inherently sexual, *Anderson* instructs, a sentencing judge must discern whether what occurred during the commission of the crime included an uncharged sexual offense.

I suspect that the majority would concede that "by its nature," the crime of second-degree murder, and even the second-degree murder of a minor, does not "constitute a sexual offense against an individual who is a minor." After all, "by its nature" second-degree murder is universally understood to be an unlawful killing committed with malice, without justification or excuse, and without premeditation. See *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). There is nothing inherently sexual in this definition. The majority's conclusion that Shelton-Randolph's conviction for second-degree murder qualifies her for SORA registration rests on the fact that during the commission of the second-degree murder of her child, Shelton-Randolph

sexually assaulted him. Unspeakably terrible as that sex crime was, Shelton-Randolph was not convicted of it. Although the prosecution originally charged Shelton-Randolph with first-degree criminal sexual conduct, it dismissed that charge in exchange for her plea to second-degree murder. Because the crime of conviction was nonsexual in nature, absent *Anderson*, I would hold that registration is not required.

My approach coincides with that of federal courts interpreting statutory "residual clauses" closely resembling the SORA's "catchall provision." *Sessions v Dimaya*, __ US __; 138 S Ct 1204, 1211; 200 L Ed 2d 549 (2018), for example, involved the interpretation of the term "crime of violence" in 18 USC §16(b). Like MCL 28.722(r)(*vii*) and the statute construed in *Leocal*, 18 USC § 16 contains a clause using the term "by its nature":

> The term "crime of violence" means—
>
> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, *by its nature*, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. [Emphasis added.]

The Supreme Court referred to these two parts of the statute as "the elements clause" and "the residual clause." *Sessions*, 138 S Ct at 1211. Citing *Leocal*, the Court reiterated that "[t]he question . . . is not whether 'the particular facts' underlying a conviction posed the substantial risk that § 16(b) [the residual clause] demands." *Id*. Neither is the question solely element-specific, the Court explained. Rather, "[t]he § 16(b) inquiry . . . turns on the 'nature of the offense' generally speaking. More precisely, § 16(b) requires a court to ask whether 'the ordinary case' of an offense poses the requisite risk." *Id*. (citations omitted).

If I were writing on a clean slate, I would apply the interpretive approach used in *Sessions* because it is true to the ordinary meaning of the term "by its nature," and the context and structure of MCL 28.722(r)(*vii*).

"[G]enerally speaking," second-degree murder is not a sexual offense. "[T]he ordinary case" of second-degree murder does not include an interwoven sexual offense. Second-degree murder is a crime that can be committed against a minor, and it can involve sexual components, as this case grotesquely illustrates. But in defining the offenses of *conviction* for which registration under SORA is required, the Legislature used the phrase "by its nature constitutes a sexual offense against an individual who is less than 18 years of age" as a *limiting* clause. Reasonably constructed, the clause means that registration as a tier I offender is required only if the defendant is convicted of a crime that is naturally or inherently sexual, even if the crime is not specifically identified as a tier I offense. But I acknowledge that *Anderson* holds otherwise, and therefore join the majority in affirming Shelton-Randolph's sentence.

/s/ Elizabeth L. Gleicher