

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENO DESHON GLOVER,

Defendant-Appellant.

UNPUBLISHED

November 29, 2007

No. 272993

Oakland Circuit Court

LC No. 2006-207155-FH

Before: Schuette, P.J., and Borrello and Gleicher, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of criminal sexual conduct in the third degree, MCL 750.520d(1)(a) (sexual penetration of a person at least 13 years of age and under 16 years of age). He was sentenced to concurrent terms of ten to 15 years in prison. Defendant appeals as of right, challenging only his sentence. We vacate the sentence and remand to the trial court for a corrected scoring of Prior Record Variable (PRV) 5 and resentencing. We decide this appeal without oral argument under MCR 7.214(E).

I. FACTS

The victim testified that while visiting a friend, defendant repeatedly touched and rubbed her thighs, which made her uncomfortable. She further testified that at some point that day, she consensually performed fellatio on defendant but felt pressured. She said that a couple of hours later, she engaged in consensual sexual relations with defendant. She explained that she got on top of him, that he unsuccessfully tried to penetrate her vagina with his penis, and that it hurt. Then, they switched positions and he penetrated her. She said that she wanted him to stop because “it was starting to hurt,” and that she asked him to stop, but he did not. When she asked him again, he did stop, and she then pushed him off. At the time, the victim was 15 years old and defendant was 34 years old. The victim said that she did these acts because defendant asked her to, but she did not want to.

Defendant acknowledged that the victim had performed fellatio on him earlier in the day while he was awake. He claimed that she initiated this encounter. He also claimed that he later awoke to find the victim on top of him and his penis in her vagina. He acknowledged that he rolled over on top of her and continued the act, but he claimed that he stopped voluntarily without her having requested that he do so.

II. STANDARD OF REVIEW

“This Court reviews a sentencing court’s scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score.” *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). An erroneous scoring of the guidelines range does not require resentencing if the trial court would have imposed the same sentence regardless of the error. *People v Mutchie*, 468 Mich 50, 51-52; 658 NW2d 154 (2003). Similarly, an erroneous score that would not, when corrected, result in a different recommended range does not require resentencing. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

III. ANALYSIS

Under MCL 777.55(1)(c) and (d), PRV 5 is to be scored at ten points if the “offender has 3 or 4 prior misdemeanor convictions or prior misdemeanor juvenile adjudications,” and at five points if there are only two prior misdemeanors. However, under MCL 777.55(2)(a), a prior misdemeanor or prior juvenile misdemeanor is to be scored “only if it is an offense against a person or property, a controlled substance offense, or a weapon offense.” Defendant received a score of ten points. However, his prior misdemeanors were resisting and obstructing, OWI, and failure to stop and identify after an accident. Defendant challenges the inclusion of the failure to stop conviction in the scoring of PRV 5. We find that defendant’s objection to the scoring was sufficient to preserve this issue, and that the failure to stop conviction was not an offense “against a person or property, a controlled substance offense, or a weapon offense.” To the extent damage to a vehicle must occur for this misdemeanor to be committed, the damage is complete before the failure to stop, and it is the failure to stop, not the damage, that is proscribed by the statute. See MCL 257.618. The failure to stop is not a crime against a person or property. Accordingly, defendant should have received a PRV 5 score of five points.

If PRV 5 had been correctly scored, defendant’s PRV level would have been C instead of D. This would have resulted in a minimum sentence range of 51 to 85 months, which is below the minimum sentence of 10 years that defendant received. Thus, defendant is entitled to resentencing.

Defendant also challenges the score of 25 points for Offense Variable (OV) 11, which was based on there having been one sexual penetration apart from the sentencing offense. See 777.41(1). Under MCL 777.41(2) and *People v Johnson*, 474 Mich 96, 100-103; 712 NW2d 703 (2006), a penetration can be scored only if it “aris[es] out of the sentencing offense.” Here, the first conviction related to the fellatio performed on defendant, whereas the second conviction was for the subsequent vaginal penetration. However, there was testimony that defendant and the victim were at the home of the victim’s friend for the better part of a day; that at one point, defendant was watching pornography; that at another point, he offered the victim a “roach”; and that at another point, defendant began touching and rubbing her thighs even though she kept telling him to stop. Although there was an interval between the fellatio and the vaginal penetration, the evidence supported a conclusion that a sequence of events over the course of this day was consistent with inducing the victim to engage in sexual acts with the defendant. Accordingly, we find no error in the scoring of this offense variable.

Defendant's sentence is vacated, and this case is remanded to the trial court for a rescoring of the sentencing guidelines consistent with this opinion, and for resentencing. We do not retain jurisdiction.

/s/ Bill Schuette

/s/ Stephen L. Borrello

/s/ Elizabeth L. Gleicher