

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN JERRONE FRAZIER,

Defendant-Appellant.

UNPUBLISHED

November 10, 2009

No. 287582

Oakland Circuit Court

LC No. 2008-219150-FH

Before: Stephens, P.J., and Cavanagh and Owens, JJ.

PER CURIAM.

Defendant was charged with third-degree criminal sexual conduct, MCL 750.520d(1)(a) (victim at least 13 but under 16 years old), attempted third-degree criminal sexual conduct, and fourth-degree criminal sexual conduct, MCL 750.520e(1)(b) (force or coercion). The jury convicted him of attempted third-degree criminal sexual conduct and acquitted him of the other charges. He was sentenced to 23 months to five years in prison. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The conviction arises from defendant's conduct with the victim, "TC," then 15 years old, when she stayed overnight with defendant so that he could drive her to school the following day. She testified that, as they shared defendant's bed, he penetrated her vagina with his penis, and she pushed him off and rolled onto her side with her back facing him. He then tried to insert his penis from behind her, and although it touched her buttocks, it did not go into her body because she moved up. According to Detective Swanderski, defendant admitted in an interview that he digitally penetrated TC's vagina. At trial, defendant testified that TC stayed at his home, that they slept in the same bed, and that their bodies touched, but he denied touching her vaginal area, rubbing her back, and having sex with her. He also denied making inculpatory statements to the detective in his interview.

On appeal, defendant challenges the scoring of Offense Variable (OV) 11 at 25 points for one criminal sexual penetration. MCL 777.41(1)(b). Pursuant to MCL 777.41(2)(c), the court is not allowed to score points "for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense." He claims that TC's testimony indicated only one penetration, that it was that penetration that was the basis of the conviction, and therefore, the variable should have been scored zero points.

This Court will uphold a trial court's scoring decision "'for which there is any evidence in support'" *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009), quoting *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

The following colloquy occurred between the court and defense counsel at sentencing:

THE COURT: . . . OV-11 is scored 50 points and it should be 25 points. This offense involves two penetrations, only one of which is scorable under the statute.

MS. BARRETT: Well, your Honor, we would have an argument.

THE COURT: If you want me to score it higher, I will.

MS. BARRETT: We would request lower one based he was convicted –

THE COURT: This Court finds that the OV's are 60 points. He's a B-V. The guidelines are 5 to 23 months.

These statements indicate that the trial court concluded there were two penetrations and one of them, rather than an attempted penetration, formed the basis of defendant's conviction. This conclusion is consistent with the summary of TC's account in the presentence investigation report. According to that summary, defendant was also successful in penetrating her vagina after she rolled away from him.

Defendant was convicted only of attempted third-degree criminal sexual conduct; the verdict is consistent with a determination that defendant attempted to penetrate TC while she was lying on her side. Whether the attempt was successful is immaterial for the purpose of this issue. The critical point is that the initial penetration described by TC was not "the 1 penetration that forms the basis" of his conviction. Therefore, MCL 777.41(2)(c) did not preclude the court from scoring points for that penetration. Although the verdict indicates that the jury did not find that penetration was established beyond a reasonable doubt, the trial court's scoring, based on the standard of the preponderance of the evidence, need not be consistent with the verdict. See *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008); *People v Ratkov (After Remand)*, 201 Mich App 123, 125-126; 505 NW2d 886 (1993). Because there was evidence to support the scoring, the trial court's decision on OV 11 is affirmed.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Mark J. Cavanagh

/s/ Donald S. Owens