

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
November 29, 2012

v

EDWARD BERNEAL ARMSTRONG, III,
Defendant-Appellant.

No. 305147
Berrien Circuit Court
LC No. 2010-015618-FC

Before: SERVITTO, P.J., and MARKEY and MURRAY, JJ.

PER CURIAM.

Defendant appeals by leave granted his plea-based conviction of second-degree criminal sexual conduct, MCL 750.520c(1)(a). The trial court sentenced defendant to 71 to 180 months' imprisonment. Because offense variable (OV) 11 was properly scored, we affirm.

As the basis for his plea, defendant admitted that he fondled his nine-year-old nephew, who was spending the night at his house. The assault took place in defendant's bathroom when others in the house were asleep. The record reveals that during the assault, defendant also engaged in digital-anal penetration of the victim. As part of a plea agreement, defendant pled guilty to the contact offense, and the prosecutor dismissed the penetration charge. However, at sentencing, the trial court scored OV 11 at 25 points for the penetration that occurred contemporaneously to the sentencing offense.

Defendant later moved for a corrected sentence arguing, among other things, that there was no evidence that any penetration occurred and, even if it did occur, such conduct could not be scored against him under OV 11 because the sentencing offense only involved sexual contact. The trial court upheld the scoring.

On appeal, defendant again contends that OV 11 was improperly scored at 25 points. We disagree.

This Court reviews the trial court's factual findings at sentencing for clear error. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). "A scoring decision is not clearly erroneous if the record contains *any* evidence in support of the decision." *People v Hicks*, 259 Mich App 518, 522; 675 NW2d 599 (2003) (citation omitted; emphasis in original). "The interpretation and application of the legislative sentencing guidelines, MCL 777.1 *et seq.*,

involve legal questions that this Court reviews de novo.” *People v McGraw*, 484 Mich 120, 123; 771 NW2d 655 (2009).

OV 11 instructs a court to “score all sexual penetrations of the victim by the offender *arising out of the sentencing offense.*” MCL 777.41(2)(a). As explained in *People v Johnson*, 474 Mich 96, 101; 712 NW2d 703 (2006), “[s]omething that ‘aris[es] out of,’ or springs from or results from something else, has a connective relationship, a cause and effect relationship, of more than an incidental sort with the event out of which it has arisen. For present purposes, this requires that there be such a relationship between the penetrations at issue and the sentencing offenses.”

The evidence of record, both in statements in the PSIR and testimony at the hearing, fully support that a penetration arising out of the sentencing offense occurred. It is true that at the hearing on defendant’s motion, defendant testified that he did not penetrate the boy and, in fact, contrary to defendant’s statements under oath at the plea hearing and sentencing, never even fondled the boy. The trial court is not, however, required to accept the version of events as recounted by a defendant who admits to previously lying under oath to the same court on the same issue. See *People v Shields*, 200 Mich App 554, 558; 504 NW2d 711 (1993) (“Resolution of facts about which there is conflicting testimony is a decision for the trial court. A trial court’s resolution of disputed facts is given deference by this Court.”).

More importantly, there was evidence of penetration. At the hearing on defendant’s motion, the prosecution introduced reports of interviews with the victim and defendant’s son wherein the victim recounted the penetration and defendant’s son somewhat corroborated the account. The victim’s mother also testified that the victim told her of the penetration. Information concerning the penetration also appears in the presentence investigation report. A trial court may rely upon a presentence investigation report in imposing sentence, the contents of which are presumed to be accurate unless challenged by the defendant. *People v Ratkov*, 201 Mich App 123, 125; 505 NW2d 886 (1993), remanded on other grounds, 447 Mich 984 (1994). Defendant did not challenge the accuracy of the report either at or after sentencing.

Finally, the penetration occurred contemporaneously with the fondling that formed the basis of the second-degree CSC charge. The fondling and the penetration occurred in the same bathroom during the same uninterrupted assault. The court did not err in scoring OV 11 at 25 points.

Affirmed.

/s/ Deborah A. Servitto
/s/ Jane E. Markey
/s/ Christopher M. Murray