

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
January 15, 2013

v

DOUGLAS KEITH COONE,  
  
Defendant-Appellant.

No. 309013  
Kalkaska Circuit Court  
LC No. 11-003327-FC

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Before: OWENS, P.J., and FITZGERALD and RIORDAN, JJ.

PER CURIAM.

Defendant pleaded guilty of two counts of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(d) (relationship by blood or affinity).<sup>1</sup> The trial court sentenced defendant to a prison term of 85 to 180 months. Defendant appeals by delayed leave granted, raising only issues related to sentencing. We affirm in part, reverse in part, and remand for resentencing.

Defendant's convictions arise from nonconsensual intercourse with his stepdaughter. The victim testified that the sexual intercourse began when she was 13 years old and continued until after she turned 16 years old, approximately once or twice a week. She stated that if she did not comply with defendant's sexual demands, he would penalize her imposing additional homework or threatening to financially ruin her mother.

At the initial sentencing hearing, defendant challenged the scoring of Offense Variable (OV) 13, MCL 777.43 (continuing pattern of criminal behavior) at 25 points because the offenses used to score OV 13 had also been scored in OV 12, MCL 777.42 (contemporaneous felonious criminal acts). After much discussion the trial court changed the scoring of OV 12 from five to zero points because there was no record evidence demonstrating any felonious criminal acts occurring within 24 hours of the sentencing offense. The trial court denied

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<sup>1</sup> Defendant was originally charged with three counts of first-degree criminal sexual conduct, MCL 750.520b (multiple variables).

defendant's challenge to the scoring of OV 13.<sup>2</sup> Defendant also objected to the scoring of OV 19, MCL 777.49 (interference with the administration of justice) at 15 points because no evidence showed that defendant employed force or the threat of force against a person or the property of another person to interfere with the administration of justice.

The parties and the trial court discussed other matters, and then spoke with the victim and her mother by telephone. The victim testified that defendant manipulated her into having sexual relations with him, but that he did not threaten her to get her to do so. The victim stated that defendant manipulated her by engaging in activities such as giving her extra homework and telling her he would sell her possessions if she did not meet his sexual demands. The victim's mother stated that the victim told her that she never reported defendant's abuse because defendant threatened to bring lawsuits against her mother and to keep the children from her mother. The victim stated that she told Officer Whiteford about defendant's threats to harass her mother with lawsuits. The trial court adjourned the proceedings to allow defense counsel the opportunity to develop a legal argument to determine whether the threat "if you don't continue having sex with me, I'm going to ruin your mother financially" could be scored under OV 19.

The sentencing hearing continued. The trial court denied defendant's challenge to the scoring of OV 19, and found that a score of 15 points was appropriate based on defendant's manipulation of the victim.

The interpretation and application of the statutory sentencing guidelines presents a legal question that this Court reviews de novo. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008). The trial court has discretion in determining the number of points to be scored for a particular variable provided that evidence on the record supports the particular score. *People v Waclawski*, 286 Mich App 634, 680; 780 NW2d 321 (2009). This Court reviews the scoring to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score. *Id.* "Scoring decisions for which there is any evidence in support will be upheld." *People v Endres (On Remand)*, 269 Mich App 414, 417; 711 NW2d 398 (2006). "When the defendant's sentence is based on an *error in scoring* or based on *inaccurate information*, a remand for resentencing is required." *People v Jackson*, 487 Mich 783, 792; 790 NW2d 340 (2010) (emphasis in original).

Defendant argues that OV 12 should have been scored at five points. A trial court may score five points for OV 12 if "one contemporaneous felonious criminal act involving crimes against a person was committed." MCL 777.42(1)(d). A felonious criminal act is contemporaneous if the act occurred within 24 hours of the sentencing offense and the act will not result in a separate conviction. MCL 777.42(2)(a)(i), (ii). When scoring OV 12, a court must look beyond the sentencing offense and consider only those separate acts or behavior that

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<sup>2</sup> The court noted the victim's preliminary examination testimony that sexual activity with defendant occurred once or twice a week before she moved in with her mother and defendant, and that penile-vaginal contact would occur with the same frequency during the period when she lived with her mother and defendant.

did not establish the sentencing offense. *People v Light*, 290 Mich App 717, 723; 803 NW2d 720 (2010).

The trial court did not err by scoring OV 12 at zero points. There is no record evidence that defendant had sexual contact with the victim “within 24 hours of the sentencing offense.” MCL 777.42(2)(a)(i). The victim testified that sexual intercourse occurred once and sometimes twice a week, and defendant admitted to having sexual intercourse with the victim at least twice. This evidence is insufficient, however, to establish that a felonious criminal act occurred within 24 hours of the sentencing offense.<sup>3</sup>

Defendant also argues OV 13 should have been scored at zero points because conduct used to score OV 12 could not be used to score OV 13 as well. MCL 777.43(2)(c). Defendant points out that a trial court must score OV 12 and include all conduct properly scorable under that OV before proceeding to score OV 13. *People v Bemer*, 286 Mich App 26, 35; 777 NW2d 464 (2009).

Here, the trial court properly refused to score any conduct under OV 12. Thus, defendant’s argument that the same conduct used to score OV 12 could not also be used to score OV 13 is without merit.

Defendant also argues that the trial court erred in scoring OV 19 at 15 points because no evidence showed that he used “force or the threat of force against another person or the property of another person” to interfere with the administration of justice.” MCL 777.49(b). Defendant asserts that no evidence showed that he interfered with the police or used physical force or the threat of physical force against the victim. The trial court based its finding that a score of 15 points was appropriate on the victim’s statements that defendant manipulated her by threatening to file lawsuits against her mother and withholding privileges such as using the computer if she refused to engage in sexual relations with him.

The directive in MCL 777.49(b) that a person “interfered with or attempted to interfere with the administration of justice” is broad and is not limited to “acts that constitute obstruction of justice.” *People v Barbee*, 470 Mich 283, 286; 681 NW2d 348 (2004). The directive also “encompasses more than just the actual judicial process.” *Id.* at 287-288. For example, providing the police with a false name, requiring a victim to promise not to contact the police as a condition of release, threatening to kill a victim if the victim reported the crime, and telling a victim not to disclose the acts to avoid jail are all scoreable under OV 19. *Id.* at 288; *People v McDonald*, 293 Mich App 292, 299-300; 811 NW2d 507 (2011); *People v Steele*, 283 Mich App 472, 492-493; 769 NW2d 256 (2009); *Endres*, 269 Mich App at 420-422. However, in this case

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<sup>3</sup> Although the presentencing information report (PSIR) states that in January 2009 the victim and defendant began having sex in a church and, according to the victim, it sometimes happened twice a day, this time period is not relevant because defendant’s alleged offenses in this case occurred sometime between September 1, 2007 and December 31, 2008.

no evidence showed that defendant threatened to take action against the victim or her mother if the victim contacted the police. Rather, the victim indicated that defendant threatened to file lawsuits against her mother or to withhold privileges from her if she did not accede to his sexual demands. Defendant's conduct was not aimed at interfering with the administration of justice and the record does not support a finding that defendant's actions diminished the victim's ability to report his crimes. Thus, the trial court erred in scoring OV 19 at 15 points.

Finally, defendant argues that certain information in the PSIR should be deleted. A PSIR must include the defendant's criminal history, MCR 6.425(A)(1)(a), and can mention arrests that did not result in convictions. See *People v Cross*, 186 Mich App 216, 218; 463 NW2d 229 (1990).

Defendant argues that any information regarding the victim's sister, his ex-wife and their divorce, and his small-claims suit against his ex-wife should be excised from the PSIR because it does not relate to the sentencing offense. At sentencing, defendant challenged the information regarding the small-claims suit, along with other information contained in the agent's description of the offense. The trial court allowed defendant to submit his own written statement responding to the issues he raised, which was included in the PSIR.

We conclude that the challenged information was necessary to explain the circumstances surrounding defendant's offense and his social history. The information painted a picture of the family dynamic and the relationship between the victim, defendant, and defendant's ex-wife. It was necessary to explain how the sexual contact came about and how it continued, particularly regarding how defendant manipulated the victim into having sexual intercourse with him. Defendant is not entitled to have any statement with which he disagrees stricken from the PSIR.

Affirmed in part, reversed in part, and remanded for resentencing in accordance with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens  
/s/ E. Thomas Fitzgerald  
/s/ Michael J. Riordan