

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
March 11, 2014

v

DANTE DESHAWN MOORE,  
Defendant-Appellant.

No. 312909  
Macomb Circuit Court  
LC No. 2007-001116-FC

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Before: JANSEN, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM.

This case is before this Court a second time following a remand for resentencing. This Court originally affirmed defendant's convictions and sentences, *People v Moore*, unpublished opinion of the Court of Appeals, issued May 31, 2011 (Docket No. 281046), but in lieu of granting leave to appeal, the Michigan Supreme Court ordered that this Court's judgment be reversed and the case remanded to the Macomb Circuit Court for resentencing. *People v Moore*, 490 Mich 965; 806 NW2d 306 (2011). On remand, the trial court sentenced defendant to concurrent terms of 136 months to 30 years' imprisonment for each of his jury-trial convictions of four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(b)(i). Defendant now appeals his sentences as of right. We affirm.

Defendant first argues that the trial court erred by scoring OV 13 because it did not make specific factual findings and it relied on uncharged allegations. We disagree. We review a trial court's factual determinations for clear error, and they must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). We review de novo whether the facts are sufficient to support a particular score for an offense variable. *Id.*

The trial court must assign 50 points for OV 13 if the sentencing offense is first-degree criminal sexual conduct, and "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more sexual penetrations against a person or persons less than 13 years of age." MCL 777.43(1)(a) and (2)(d). The trial court is to consider all crimes within a five-year period, including the sentencing offense, regardless of whether the crime resulted in a conviction. MCL 777.43(2)(a).

In this case, the victim testified that defendant began touching her when she was 11 years old and he touched her over 50 times. When the touching first started, she testified that they were living in Clinton Township where it occurred "two or three times." She testified that the

touching mainly occurred “in between the lips” of her vagina, which is sufficient to constitute sexual penetration. See MCL 750.520a(r) (defining sexual penetrations as any intrusion, however slight); *People v Bristol*, 115 Mich App 236, 238; 320 NW2d 229 (1981) (indicating that, at the very least, there must be evidence that the labia majora was penetrated to constitute a sexual penetration). Further, she testified that the family moved to Sterling Heights when she was 12, where the same type of touching continued “a lot” in her bedroom. Therefore, it is clear that at least two sexual penetrations occurred in Clinton Township when she was 11 years old and at least one more occurred when she moved to Sterling Heights when she was 12 years old. This evidence was sufficient to assign 50 points for OV 13. Contrary to defendant’s argument, although these incidents are uncharged offenses, the plain language of the statute only requires criminal activity. See *People v Harverson*, 291 Mich App 171, 180; 804 NW2d 757 (2010). Each incident “clearly constitutes criminal activity because [each] amounts to a violation of a criminal statute, [MCL 750.520b(1)(a),] even though that violation is not resolved in a criminal proceeding.” *Id.* (quotation marks and citation omitted).

Moreover, although the trial court did not specifically say that the assignment of 50 points for OV 13 was supported by a preponderance of the evidence, MCR 2.517 does not require the trial court to state its factual findings in any specific format. “Brief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without overelaboration of detail or particularization of facts.” MCR 2.517(A)(2). In this case, the trial court’s factual findings are implied in its assignment of 50 points for OV 13, considering the trial court entertained both parties’ arguments regarding the scoring of OV 13 and then decided to assign 50 points, thereby accepting the prosecutor’s argument. Therefore, contrary to defendant’s unsupported assertion, his due process rights were not violated by the trial court’s conclusion that OV 13 should be scored 50 points. Accordingly, the trial court did not err in scoring OV 13.

Defendant also argues that the law of the case doctrine prevented the trial court from adjusting defendant’s minimum sentencing guidelines range to 126 to 210 months because the Supreme Court determined that the range should be 108 to 180 months. We disagree. We review this unpreserved error for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The law of the case doctrine prevents a sentencing court from taking action that is inconsistent with the judgment of the appellate court. *People v Fisher*, 449 Mich 441, 446-447; 537 NW2d 577 (1995). However, the doctrine does not apply “where a case is remanded without directions to the lower court; in such a case the lower court would enjoy the same power as if it made the ruling itself.” *Id.* at 447.

In this case, the Supreme Court based its decision to reverse this Court’s judgment affirming defendant’s sentence for the reasons stated in this Court’s dissenting opinion, which was primarily due to an error in scoring OV 11. The dissenting opinion simply noted that had defendant not been assessed 50 points for OV 11, his minimum sentencing guidelines range would be 108 to 180 months, but it did not direct the trial court to resentence defendant within a certain range, nor did the Supreme Court’s order. Rather, the Supreme Court’s order simply remanded the case for resentencing and did not provide any further instructions. Therefore, the law of the case doctrine does not apply. Upon remand, the case was before the trial court in a

presentence posture and every aspect of defendant's sentence was before the judge de novo. See *People v Rosenburg*, 477 Mich 1076; 729 NW2d 222 (2007); *People v Williams (After Second Remand)*, 208 Mich App 60, 65; 526 NW2d 614 (1994). Accordingly, the trial court did not err when it resentenced defendant and adjusted his minimum sentencing guidelines range.

Affirmed.

/s/ Kathleen Jansen

/s/ Donald S. Owens

/s/ Douglas B. Shapiro