

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEMARIS DESHAWN WHITSON,

Defendant-Appellant.

UNPUBLISHED

September 17, 2026

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Nos. 375565; 375567

Kent Circuit Court

LC Nos. 22-000088-FH;

22-000212-FH

Before: BAZZI, P.J., and PATEL and ACKERMAN, JJ.

PER CURIAM.

Defendant was convicted by jury of one count of third-degree criminal sexual conduct (CSC-III), MCL 750.520d(1)(a) (victim at least 13 years of age and under 16 years of age); and one count of distributing or promoting child sexually abusive activity, MCL 750.145c(3)(a).¹ On remand for resentencing, the trial court sentenced defendant as a second-offense habitual offender, MCL 769.12, to serve 13 to 22½ years’ imprisonment for the CSC-III conviction. In this consolidated appeal,² defendant appeals by right, arguing that Offense Variable (OV) 11 was improperly assessed at 25 points because “oral sex” did not constitute a penetration for purposes of assessing points for OV 11 and that defense counsel was ineffective for stipulating to an assessment of 25 points for OV 11. We affirm.

I. BACKGROUND

In September 2021, it was discovered that the 14-year-old victim and then 30-year-old defendant had spent two days alone together in August 2021 in a hotel room, during which time

¹ Defendant does not challenge his conviction or sentence for distributing or promoting child sexually abusive activity in this appeal.

² *People v Whitson*, unpublished order of the Court of Appeals, entered May 20, 2025 (Docket Nos. 375565 and 375567).

they engaged in oral sex and sexual intercourse, the latter of which defendant videorecorded on his cell phone. Defendant sent the video to the victim but it was intercepted by the victim's mother.

Defendant was arrested and charged, in pertinent part, with one count of CSC-III, as a second offense, specifically alleging "penile/vaginal" sexual penetration with a child who was at least 13 years of age but under 16 years of age. Defendant was convicted and sentenced as described.

Defendant appealed to this Court, arguing that OV 11 was improperly assessed at 50 points rather than 25 points and that he was entitled to resentencing. He maintained that the victim's testimony substantiated two incidents of criminal sexual penetration, specifically "the sexual intercourse that occurred (and was videotaped)" and "the incident of oral sex." Because only sexual penetrations beyond those that arise out of the sentencing offense may be scored for OV 11, defendant argued that only the oral sex penetration could be assessed for OV 11. The prosecutor agreed with defendant's position, and the parties filed a stipulated motion to dismiss the appeals and for resentencing.³

During resentencing, the trial court explained that the "case was remanded from the Court for Appeals for resentencing" because the parties agreed that OV 11 should be assessed 25 points. Noting that "the guidelines have not changed substantially," the trial court sentenced defendant within the guidelines to serve 13 to 22¹/₂ years' imprisonment for his CSC-III conviction.

In July 2025, defendant moved to correct an invalid sentence, arguing that OV 11 was improperly reassessed at 25 points and that defense counsel was ineffective for stipulating to a 25-point assessment at resentencing. The trial court entered an order and opinion denying defendant's motion, finding that he waived the OV 11 argument at resentencing, that "OV 11 was properly scored at 25 points," and that he received effective assistance of counsel.

Defendant now appeals.

II. WAIVER

Defendant waived the ability to substantively challenge his OV-11 scoring because he and defense counsel repeatedly expressly agreed to assessing OV 11 at 25 points.

In general, waiver is the intentional relinquishment or abandonment of a known right. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). "When defense counsel clearly expresses satisfaction with a trial court's decision, counsel's action will be deemed to constitute a waiver." *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011).

³ See *People v Whitson*, unpublished order of the Court of Appeals, entered September 13, 2024 (Docket No. 368207); *People v Whitson*, unpublished order of the Court of Appeals, entered September 13, 2024 (Docket No. 368208).

In *People v Hershey*, 303 Mich App 330, 351-352; 844 NW2d 127 (2013), this Court concluded that a defendant does not waive a challenge to the scoring of the guidelines by indicating that he does not have any additions or corrections to PSIR without clearly expressing satisfaction with the court's decision as to an OV score. Defendant attempts to liken the instant case to *Hershey*. But *Hershey* supports that defendant waived appellate review of the OV 11 issue by expressing clear satisfaction with the 25-point score adjustment. See *id.* In *Hershey*, there was no discussion of OV scoring, the trial court asked the parties a "broad, not specific" question about additions or corrections, and the record reflected a failure to lodge an objection or merely a failure to recognize a sentencing error. *Id.*

Conversely, in this case, the trial court began the resentencing hearing by confirming that it was undisputed that OV 11 needed to be reassessed at 25 points. The trial court asked defense counsel if she agreed, and counsel replied, "I agree." The trial court then confirmed that changing OV 11 to 25 points changed the sentencing guidelines from 84 to 175 months to 78 to 162 months, which included defendant's habitual-offender status. The trial court asked defense counsel if she agreed, and counsel replied, "I agree, your Honor." After defendant reviewed the PSIR and made no objection, the trial court again addressed defense counsel and asked if she had "[a]nything further to say on the guideline issue," to which defense counsel responded, "No." These inquiries and responses demonstrate that the trial court in this case asked the parties much more specific and targeted questions than in *Hershey*. There was ample discussion with respect to OV 11 scoring at resentencing, and defense counsel and defendant had ample opportunity to object. "[A]ffirmative approval constitute[s] waiver." *People v McDonald*, 293 Mich App 292, 295; 811 NW2d 507 (2011). Indeed, in this case, defendant stipulated before resentencing that OV 11 be reassessed at 25 points.

For these reasons, defendant waived this issue by expressing clear satisfaction with OV 11 being reassessed 25 points. See *Kowalski*, 489 Mich at 503.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant contends that defense counsel was ineffective for stipulating to the 25-point assessment of OV 11. This argument lacks merit.

Whether counsel was ineffective presents a mixed question of fact and law, with factual findings reviewed for clear error and questions of law reviewed de novo. *People v Head*, 323 Mich App 526, 539; 917 NW2d 752 (2018). "The trial court's findings are clearly erroneous if this Court is definitely and firmly convinced that the trial court made a mistake." *People v Shaw*, 315 Mich App 668, 672; 892 NW2d 15 (2016).⁴

⁴ Because the trial court denied defendant's request for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), our review is limited to errors apparent on the record. *People v Abcumby-Blair*, 335 Mich App 210, 227; 966 NW2d 437 (2020).

The United States and Michigan Constitutions afford criminal defendants the right to effective assistance of counsel. *People v Yeager*, 511 Mich 478, 488; 999 NW2d 490 (2023), citing Const 1963, art 1, § 20; US Const Am VI; *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To prevail on a claim of ineffective assistance, “a defendant must show that (1) counsel’s performance fell below an objective standard of reasonableness and (2) but for counsel’s deficient performance, there is a reasonable probability that [the] outcome would have been different.” *Yeager*, 511 Mich at 488 (cleaned up). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* (cleaned up). “Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *Head*, 323 Mich App at 539 (cleaned up).

OV 11 concerns criminal sexual penetration. MCL 777.41(1). The trial court must assign 50 points for OV 11 if “[t]wo or more criminal sexual penetrations occurred.” MCL 777.41(1)(a). Twenty-five points must be assessed for OV 11 if “[o]ne criminal sexual penetration occurred.” MCL 777.41(1)(b). And zero points must be assessed for OV 11 if “[n]o criminal sexual penetration occurred.” MCL 777.41(1)(c). In scoring OV 11, a trial court may not count a sexual penetration that formed the basis for a CSC-I or CSC-III conviction, MCL 777.41(2)(c), but may score all other ‘sexual penetrations of the victim by the offender arising out of the sentencing offense,’ MCL 777.41(2)(a).” *People v Baskerville*, 333 Mich App 276, 297; 963 NW2d 620 (2020). “The sentencing offense is the crime of which the defendant has been convicted and for which he or she is being sentenced.” *People v McGraw*, 484 Mich 120, 122 n 3; 771 NW2d 655 (2009).

MCL 750.520a(r) defines “sexual penetration,” in pertinent part, as “sexual intercourse, cunnilingus, [or] fellatio” “The acts of cunnilingus and fellatio are both commonly referred to, and understood to be, ‘oral sex.’ ” *People v Harris*, 158 Mich App 463, 469; 404 NW2d 779 (1987). “Vaginal penetration, fellatio, and cunnilingus are considered separate sexual penetrations when scoring OV 11 under MCL 777.41.” *People v Johnson*, 298 Mich App 128, 132; 826 NW2d 170 (2012).

In this case, for OV 11 purposes, the sentencing offense was CSC-III based on the penile-vaginal “sexual intercourse” depicted on defendant’s cell phone. See *McGraw*, 484 Mich at 122 n 3. As defendant acknowledges in his latest appellate brief, the victim testified that she and defendant had “oral sex and sexual intercourse.” Compliance with MCL 777.41(2)(c) mandated that the “sexual intercourse” not be included in the original OV 11 scoring, leaving the reassessment of OV 11 from 50 points to 25 points on the basis of the “oral sex” mentioned during the victim’s testimony. Despite conceding in his first appeals that the oral sex constituted penetration, defendant now asserts that the victim’s failure to explain what she meant when she said “oral sex” meant that the evidence was insufficient for the trial court to find that the “oral sex” was a penetration arising out of the CSC-III. But defendant’s argument disregards that, “[i]n criminal sexual conduct cases, a victim’s testimony may be sufficient to support a defendant’s conviction and need not be corroborated.” *People v Solloway*, 316 Mich App 174, 181; 891 NW2d 255 (2016). See MCL 750.520h. Although the victim was never specifically asked to define “oral sex,” she expressly differentiated it from “sexual intercourse,” which she defined as defendant’s “private part in [her] private part.” Her testimony gave no reason to question whether she understood the meaning of “oral sex” as anything other than the common meaning. The victim’s testimony and the common understanding of the term “oral sex” was sufficient to support the trial

court's scoring of OV 11 by a preponderance of the evidence. Because the victim clearly identified "oral sex" as a separate penetration arising out of the sentencing offense, defense counsel was not ineffective for failing to advocate for a meritless position. See *Head*, 323 Mich App at 539.

Affirmed.

/s/ Mariam S. Bazzi

/s/ Sima G. Patel

/s/ Matthew S. Ackerman