STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 24, 2009
v	No. 285309 Kent Circuit Court
GEORGE MARTIN VANDENBERG, Defendant-Appellant.	LC No. 05-011461-FH

Before: Servitto, P.J., and Bandstra and Markey, JJ.

PER CURIAM.

Defendant appeals by leave granted his guilty plea conviction for child sexually abusive activity, MCL 750.154c(2). Defendant was sentenced to 2 to 20 years' imprisonment for this conviction. We affirm defendant's guilty plea, and remand for resentencing.[1]

Defendant contends that the trial court erred in scoring two sentencing offense variables (OV) 10, MCL 777.40, and OV 13, MCL 777.43. Defendant preserved these claims of error because he raised them in the trial court. *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004); MCL 769.34(10). We review the trial court's scoring of defendant's sentencing variables to determine whether there was an abuse of discretion and whether there is record evidence to support the score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). The trial court abuses its discretion when it selects an outcome that falls outside the range of reasonable and principle outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). The proper construction of the sentencing guidelines and the legal questions involved in their applicability present issues of law that we review de novo. *Id*. at 253. The trial court's sentence may be invalid if it were based on a misconception of the law, improperly scored guidelines, or based on other inaccurate information. MCR 769.34(10); *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997).

[1] This Court initially granted defendant's delayed application for leave to appeal limited only to his sentencing issues. *People v Vandenberg*, unpublished order of the Michigan Court of Appeals, entered June 6, 2008 (Docket No. 285309). Our Supreme Court subsequently ordered this Court to also consider "as on leave granted" Issues IV and V contained in defendant's delayed application. *People v Vandenberg*, 482 Mich 980; 756 NW2d 50 (2008).

Initially, we note that defendant repeatedly asserts on appeal that he only pleaded guilty to an "attempt" to engage in child sexually abusive activity. But, in making this claim, defendant misconstrues the statute and relevant case law. MCL 750.145c(2) provides:

> A person who persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material, or a person who arranges for, produces, makes, or finances, **or a person who attempts or prepares or conspires to arrange for, produce, make, or finance any child sexually abusive activity or child sexually abusive material** is guilty of a felony, punishable by imprisonment for not more than 20 years, or a fine of not more than $100,000.00, or both, if that person knows, has reason to know, or should reasonably be expected to know that the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child. [Emphasis added.]

The statute defines "child sexually abusive activity" as "a child engaging in a listed sexual act." MCL 750.145c(1)(l). A "listed sexual act" is "sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, or erotic nudity." MCL 750.145c(1)(h). A "child" is defined as "a person who is less than 18 years of age, subject to the affirmative defense created in subsection (6) regarding persons emancipated by operation of law." MCL 750.145c(1)(b).

In *People v Thousand*, 241 Mich App 102, 104; 614 NW2d 674 (2000), rev'd in part on other gds 465 Mich 149 (2001), the defendant communicated over the Internet with an undercover police officer posing as a 14-year-old girl, and arranged to meet the fictitious girl to engage in sexual activity. The defendant argued that the doctrine of legal impossibility precluded being charged under MCL 750.145c(2). *Id.* at 114. This Court concluded, "a person may violate the statute simply by *preparing* for any child sexually abusive activity." *Id*. at 115. "Because the child sexually abusive activity statute requires only mere preparation, rather than actual abusive activity, we are satisfied that a situation such as the case at bar comes within the provision of the statute." *Id.* The fact that the fictitious girl was an adult "does not change the fact that defendant was endeavoring to find a child, to entice a child to engage in sexual activity, or to arrange to meet a child for sexual activity." *Id.* at 116. Thus, MCL 750.145c(2) "only requires that the defendant prepare to arrange for child sexually abusive activity. The statute does not require that those preparations actually proceed to the point of involving a child." *Id.* at 117. Thus, defendant's assertion that he only pleaded to "an attempt" to commit the crime for which he was convicted is unavailing because the activity constituting an attempt actually constitutes the crime prohibited by the statute.

With respect to the scoring of the challenged OVs, we first conclude that the trial court erred in scoring 15 points for OV 10 for "predatory conduct" that was "directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). In this case, defendant did not engage in "preoffense conduct" with an actual victim who was 14 years of age. Rather, defendant was unwittingly conversing with an agent from the Attorney General's office who was posing as a 14-year-old girl. See *People v Russell (On Remand)*, 281 Mich App 610, 615; 760 NW2d 841 (2008). Defendant's "conduct did not place any vulnerable victim in jeopardy

because there was, in fact, no vulnerable victim to be jeopardized." *Id.* Further, there was "no preoffense conduct" in this case because defendant's interaction over the Internet with the person he believed to be a 14-year-old girl was the offense itself. *Id.* at 615-616 n 2.

We conclude, however, that OV 13 was properly scored 25 points. MCL 777.43 provides that 25 points is scored where "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." It also provides:

> (2) All of the following apply to scoring offense variable 13:
>
> (a) For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.

In *People v Harmon*, 248 Mich App 522, 530, 532; 640 NW2d 314 (2001), the defendant was scored 25 points for OV 13 because of his four concurrent convictions for making child sexually abusive material, MCL 750.145c(2), when he took four nude photographs of two 15-year-old girls. This Court held that 25 points were properly scored "because of defendant's four concurrent convictions under MCL 750.145c(2)." *Id.* at 532. Offense variable 13 counts "crimes against a person," MCL 777.5(a), and child sexually abusive activity is designated as a crime against a person. MCL 777.16g.

The prosecutor argues that there were five different occasions when defendant violated MCL 750.145d[2] by using the Internet to solicit sexual intercourse with the fictitious girl. To establish a violation of MCL 750.145d premised on a violation of MCL 750.145c, the prosecutor must show "(1) that defendant used the Internet or a computer to communicate with any person, (2) for the purpose of attempting to arrange for, produce, or make any child sexually abusive material [or activity], and (3) defendant believed that the intended victim in the child sexually abusive activity or material is a minor." *People v Cervi*, 270 Mich App 603, 624; 717 NW2d 356 (2006).

Here, there was sufficient evidence in the record to support scoring 25 points for OV 13. Between September 26, 2005, and October 10, 2005, defendant engaged in several conversations over the Internet with the fictitious girl, and in these sexually explicit conversations defendant requested that they engage in sexual intercourse and other sexual acts and arranged for a meeting

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[2] MCL 750.145d(1)(a) provides:

> (1) A person shall not use the internet or a computer, computer program, computer network, or computer system to communicate with any person for the purpose of doing any of the following:
>
> (a) Committing, attempting to commit, conspiring to commit, or soliciting another person to commit conduct proscribed under section 145a, 145c, . . . in which the victim or intended victim is a minor or is believed by that person to be a minor.

in order to engage in sexual intercourse. Defendant was ultimately arrested when he arrived as the designated place at the set time. We affirm the scoring OV 13 at 25 points.

Because OV 10 was improperly scored, defendant is entitled to a remand to the trial court for resentencing. Defendant's prior record variable (PRV) score is zero, placing him in PRV level A, and his OV score of 45 placed him in level IV. The guidelines recommended a minimum sentence range of 21 to 35 months' imprisonment. MCL 777.63. But, if OV 10 had been properly scored at zero points, defendant's OV score should have been 30 points, and placed him at OV level III (25-34 points). MCL 777.63. Thus, as properly scored, the guidelines recommended minimum sentence range is 15 to 25 months' imprisonment. *Id*. Because the trial court based its sentence on inaccurately scored guidelines, which placed defendant in an improper recommended sentence range, remand for resentencing is required. MCR 769.34(10); *People v Francisco*, 474 Mich 82, 89-91; 711 NW2d 44 (2006).

On appeal, defendant also argues that his guilty plea lacked a sufficient factual basis and that his "belief" that the fictitious girl was 14 years of age did not amount to "knowledge" of this fact. We review this unpreserved issue to determine whether plain error affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). There is no absolute right to withdraw a guilty plea, which is within the discretion of the trial court. *People v Ovalle*, 222 Mich App 463, 465; 564 NW2d 147 (1997). Whether particular conduct falls with the prohibition of a statute is a question of law reviewed de novo on appeal. *People v Adkins*, 272 Mich App 37, 39; 724 NW2d 710 (2006).

MCR 6.302 governs plea-taking procedures. *People v Saffold*, 465 Mich 268, 272; 631 NW2d 320 (2001). The trial court must establish the factual basis for the plea, MCR 6.302(D), which is sufficient if the factfinder could properly convict on the basis of the defendant's admissions, *People v Hogan*, 225 Mich App 431, 433; 571 NW2d 737 (1997).

At the guilty plea proceeding, the prosecutor questioned defendant:

> *Q*. Mr. Vandenberg, on or about those dates [September 26, 2005 through October 10, 2005], were you using the Internet to communicate with somebody who you believed was a 14-year-old girl?
>
> *A.* Yes, ma'am.
>
> *Q*. And during the course of that communication, did you express an interest in meeting with that person for the purpose of engaging in sexual activity?
>
> *A.* Yes, ma'am.
>
> *Q*. And was that sexual activity including sexual intercourse as well as oral sex?
>
> *A.* Yes, ma'am.
>
> *Q*. And did you in fact show up on October 10th in the City of Rockford to meet with the person for that purpose?
>
> *A.* Yes, ma'am.

At the time the plea was entered, the parties agreed with the trial court that this factual basis was adequate. We also agree the trial court satisfied MCR 6.302(D).[3]

The facts presented in this case are substantially similar to those supporting the defendant's guilty plea in *Adkins*, *supra* at 43-44. There, in establishing the factual basis supporting the defendant's guilty plea for violating MCL 750.145c(2), he admitted that he used the Internet to communicate with someone whom he believed to be 14 years old to attempt to arrange for child sexually abusive activity. *Id.* Like the defendant in *Adkins*, defendant in the present case admitted to the trial court that he was communicating over the Internet in a sexually explicit way with someone whom he *believed* was 14 years of age and arranged to meet that person to engage in sexual activity. This Court has previously rejected defendant's argument that there was insufficient evidence to show child sexually abusive activity because the fictitious girl was actually an adult officer. *Thousand*, *supra* at 114-115. A factfinder could properly convict defendant of violating the statute on the basis of his admissions. *Adkins*, *supra* at 44; *Hogan*, *supra* at 433. Defendant has not established plain error affected his substantial rights. *Carines*, *supra* at 763.

We affirm in part, but remand for resentencing. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Richard A. Bandstra
/s/ Jane E. Markey

[3] To the extent that defendant raises a claim that defense counsel rendered ineffective assistance in advising defendant to plead guilty and in failing to object to the factual basis, we note that defendant failed to fully brief this issue on appeal. This claim is therefore abandoned. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). Regardless, the undisputed facts of this case support that defendant's conduct violated the statute under which he was charged and thus, counsel was not ineffective for failing to advise against or object to the plea.