STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Sawyer, P.J., Meter and Donofrio, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee,

v.

Supreme Court No. 147675
Court of Appeals No. 309245
Livingston County
Circuit Court Case No. 10-018981-FH

GORDON BENJAMIN WILDING,

Defendant/Appellant.
_____/

WILLIAM J. VAILLIENCOURT, JR.
LIVINGSTON COUNTY PROSECUTING ATTORNEY

Jeanice Dagher-Margosian (P35933)
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_____/

PLAINTIFF/APPELLEE'S SUPPLEMENTAL BRIEF IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

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Defendant answers:	No
The People answer:	Yes
The trial court answered:	Yes
The Court of Appeals answered:	Yes

II. Predatory conduct under OV 10 is scored when an offender engages in preoffense conduct directed at a victim for the primary purpose of victimization. Defendant approached an underaged girl, provided her alcohol, and once she was intoxicated brought her outside to his van, where he sexually assaulted her. Did the trial court properly score OV 10? Did defense counsel provide effective assistance in choosing not to object?

Defendant answers:	No
The People answer:	Yes
The trial court answered:	Yes
The Court of Appeals answered:	Yes

STATEMENT OF WHY REVIEW IS NOT APPROPRIATE

This Court should deny this Application. The Court of Appeals properly analyzed and rejected Defendant's claims of error.

If the Court wishes to analyze the scope of offense variables 8 and 10 of the sentencing guidelines, this case presents a poor vehicle to do so. At both the original sentencing and again at the probation violation sentencing, each of Defendant's attorneys specifically stated that there were no objections to the scoring of the guidelines.[1] Moreover, the Court of Appeals rejected review based on Defendant's waiver.

Given Defendant's waiver, the question actually presented is whether counsel was ineffective for agreeing to the scoring of the guidelines. That presents a different question than whether the guidelines were accurately scored. While it does not constitute ineffective assistance to make a meritless objection, it is also not ineffective to make a legal judgment that a guidelines objection might be rejected by the trial court in light of the facts and the law. Making that determination requires an assessment of trial counsel's actions based on the state of the law then existing at the time of Defendant's sentencing as well as Defendant's strategy at sentencing. In addition, it requires a broader resolution of whether the scoring was *so* wrong that no attorney could have reasonably concluded the variable was properly scored. But instead, Defendant's application simply alleges in conclusory fashion that because the guidelines scoring was "patently incorrect," trial counsel *must* have been ineffective.

Finally, because both the trial court and the Court of Appeals concluded that the guidelines were properly scored, there was no need to address the additional question of whether counsel was

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[1]August 5, 2010 Sentencing Transcript at 5; September 1, 2011 Sentencing Transcript at 3-4.

ineffective for choosing not to object to the guidelines based on a strategic plan of trying to argue for a continuation of Defendant's youthful trainee status. As the People argued in their Answer to the application, trial counsel had an announced strategy of trying to retain Defendant's YTA status. Changing the focus of the sentencing from the Defendant and why he should not be sentenced to serve a long prison sentence (an argument *enhanced* by higher guidelines), to a focus on the victim and the impact this crime had on her would have seriously undermined that strategy.

Accordingly, based on the procedural posture of this case, it does not present an appropriate opportunity for reviewing the scope of OV 8 or OV 10. The Court should deny the application without further argument.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

At the time of Defendant's original sentencing on August 5, 2010 for third degree criminal sexual conduct,[2] he was placed on youthful trainee status.[3] The presentence report contained a detailed summary of the facts underlying the offense. It was these facts that provided the basis for scoring the guidelines at both the original sentencing and the subsequent probation violation. The Evaluation and Plan section of the original presentence report states:

> The offense for which the defendant stands before the Court for sentencing involves his sexual penetration of the victim who was 15 years old at the time. On 12/12/08, the female victim along with two female friends were attending the Hartland School System Battle of the Bands competition when they met two male subjects later identified as the defendant, Gordon Wilding, and co-defendant, James Witgen. During the course of socializing with these male subjects, the subject of obtaining alcohol came up and the victim paid James Witgen $20 to obtain alcohol. Mr. Witgen returned to the dance and the victim, along with her friends, accompanied Gordon Wilding and James Witgen out to the parking lot to Mr. Witgen's van where they were both given water bottles containing a clear liquid, presumably alcohol. Both girls indicated to police that they immediately began feeling disoriented. Subsequently the victim's friend wound up passing out in a snow bank outside in the parking lot of the school and the victim was found by a third friend in the van with the defendant, Gordon Wilding, on top of her. The third friend stated to police that she saw that clearly the victim had no pants on nor did the defendant Gordon Wilding who was on top of her in the position consistent with sexual intercourse.
>
> A review of the Livingston County Sheriff's Incident Report indicates that it is possible that the victim and her friend may have been given a substance other than alcohol. However, this was never charged or proven.

The Agent's Description of the Offense section went into much greater detail:[4]

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[2]MCL 750.520d. The charge here is based on the victim being under 16 years of age.

[3]MCL 762.11.

[4]Given that these pleadings are generally published on the Court's website, the victim's name has been redacted and she is referred to as AC and her friends are also identified with their initials.

On 12/13/08, the Livingston County Sheriff's Department was requested to respond to the University of Michigan Hospital Emergency Room reference a possible sexual assault which had occurred on 12/12/08 at the Hartland Performing Arts Building.

Deputies arrived and spoke to [RC] who identified herself as the victim's mother. She explained to deputies that her daughter, [AC], age 15, had gone with two friends and her parents to the Hartland Performing Arts Center for what is know [sic] as the Battle of the Bands competition. She further stated that her daughter and her friend ST went to get some pizza and water from the concession stand with two boys. These boys whom the victim did not know told both the victim and her friend that they had water in their van that they could drink.

According to Mrs. C[ ], her daughter and her friend went out to the van and shared a bottle of water with the boys at which time her daughter stated she began to feel dizzy and confused. She stated that both she and her girlfriend wanted more water so they went back inside to go buy water. At some point shortly thereafter, her daughter ran into the boys again and followed them back out to the van by herself. She stated further that her daughter's friend [WC] eventually went to the van which had been moved and opened the door and found her daughter inside with an unknown male on top of her. She assisted her daughter out of the van who had no pants on nor did the boy on top of her. Additionally, her friend ST was found passed out in a snow bank in the parking lot and was being transported to Livingston County St. Joseph Hospital.

Deputies interviewed ST who was with the victim. She stated that the victim and she were dancing with two boys and that the victim smelled alcohol on his breath and subsequently asked him if he could get any alcohol for her. This subject left the van and returned with a bottle of red raspberry Smirnoff from which he filled an empty water bottle for the victim. Both ST and the victim shared the water bottle and she indicated to police that she immediately started feeling strange and believed that the alcohol was interfering with the seizure medication which she was taking. She further stated that after the first water bottle was emptied, the victim returned to the van with one subject, later identified only by first name as Gordon, along with the second subject known by the first name of James. ST stated that she was attempting to locate the van which had been moved, but in doing so she passed out into a snow bank and was taken to the hospital.

Deputies interviewed the third friend who was along for the dance with the victim and ST. WC was interview [sic] by the deputies and indicated that she saw both the victim and ST dancing with two unknown male subjects and that they had gone out into the parking lot a couple of times. Witness [WC] stated that the victim was very drunk and that she eventually found her friend S passed out in a snow bank

and then found the van and opened the sliding door, finding the male subject known as Gordy on top of her friend, the victim. She also noted that neither Gordy nor her friend had pants on.

The Livingston County Sheriff's Department collected evidence from the hospital ER and placed it into the Evidence Room at the Livingston County Sheriff's Department pending further investigation. The case was eventually investigated further in the spring of 2009 after two suspects were identified. Suspect #1 was identified as Gordon Benjamin Wilding ... and Suspect #2 was identified as James ....

During the second interview with ST, she stated that they had both met the boys James and Gordy at the dance and that they indicated that they had water out in their van. ST stated that the victim AC had asked if either Gordy or James could get them alcohol and that James had said he could but he would need money. AC gave James a $20.00 bill and he left the scene presumably seeking alcohol.

Both Gordy, the victim and ST returned inside to the dance area and danced a few more dances until Gordy called James on his cell phone and found that he had returned to the parking lot. AC then returned out to the parking lot alone with Gordy while ST stayed inside the dance area near the pizza concession.

ST mentioned to police that she had gone out into the parking lot and attempted to locate the van which was in a different spot than it was prior. She stated that she located the van and opened the passenger front door and climbed in where James was sitting in the driver's seat. She noticed immediately that Gordy and her friend, the victim AC, were in the back seat and that Gordon was on top of AC. However, she could not tell if they were having sex but related to police that they were in a position consistent with sexual intercourse.

ST indicated that James immediately began attempting to pull down ST's leggings and she resisted his efforts to the point where she believed she may have actually bitten his finger or hand area. At this time, James called ST a bitch and pushed her out of the van. ST told police that she then felt very disorientated [sic] and tried to make her way back into the Hartland School Building. However, she wound up passing out in the snow bank in the parking lot.

At the hearing on Defendant's probation violation, Defendant agreed that the guidelines were properly scored but made an extensive plea to the court to continue him on YTA status.[5] Based on

[5]September 1, 2011 Sentencing Transcript at 4-6.

Defendant's continued drug use and new criminal convictions, the trial court revoked Defendant's youthful trainee status and imposed a sentence at the top of the sentencing guidelines, 85 months to 15 years.[6]

Defendant filed a motion for resentencing in the trial court claiming that the guidelines were incorrectly scored. Included as exhibits in support of that motion were police reports from the underlying investigation containing statements from AC and ST. AC told police that Defendant suggested getting alcohol. AC told police that "she felt funny right away" after drinking what Defendant had provided. ST, who took seizure medicine, also reported being so badly affected that she eventually passed out. Both AC and ST told police that at no point did Defendant or his friend drink any of the alcohol that they provided the girls.[7]

After the trial court denied Defendant's motion for resentencing on March 8, 2012, Defendant's appeal was eventually heard and rejected by the Court of Appeals.[8] The Court of Appeals affirmed the sentence finding that Defendant "waived appellate review of his claims of error by explicitly stating that the sentencing guidelines range indicated on the Sentencing Information Report was correct."[9]

On November 27, 2013, this Court ordered that oral argument be scheduled and directing the parties to address two specific issues: "whether the trial court erroneously assessed 15 points each

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[6]September 1, 2011 Sentencing Transcript at 7-8.

[7]Appendix B to Defendant's Application (Livingston County Sheriff's Incident Report detailing interviews with ST and AC.

[8]*People v Wilding*, unpublished opinion per curiam of the Court of Appeals, issued July 16, 2013 (Docket No 309245).

[9]*Id., slip op* at 1.

for offense variables 8 (MCL 777.38(1)(a)) and 10 (MCL 777.40(1)(a)).”[10]

Additional facts are contained in the argument where relevant.

[10]*People v Wilding*, ___ Mich ___; 839 NW2d 494 (2013).

ARGUMENT

I. OV 8 is scored when a victim is moved to a place or situation of greater danger. Defendant provided alcohol to his 15 year old victim, making her dizzy, confused, and intoxicated; then both Defendant and the victim left a public performing arts center to a van in a parking lot where he sexually assaulted her. Sufficient evidence supported the trial court's scoring of OV 8 and defense counsel was not ineffective for choosing not to object.

Standard of Review and Issue Preservation

As previously indicated, Defendant waived any objection to the scoring of the sentencing guidelines by agreeing that they were correctly scored. Thus, this *extinguished* any error and there is no error to review.[11] At Defendant's original sentencing, the trial court stated directly to defense counsel:[12]

> THE COURT: Counsel, have you read the report, are there any additions, corrections or deletions? The guidelines are 51 to 85 months, are they correct and is there anything else you'd like to say on behalf of your client?
>
> MR. SCHARRER: Your Honor, I've read the report as has my client. I have no corrections to make and no challenges to the guidelines.

The trial court placed Defendant on a term of probation under the Youthful Trainee Act.

After Defendant subsequently pled guilty to violating probation, the trial court again stated directly to defense counsel:[13]

> THE COURT: Counsel, have you reviewed the report, are there any additions, corrections or deletions? The guidelines are 51 to 85 months, are they correct and is there anything else you'd like to say on behalf of your client?

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[11] *People v Carter*, 462 Mich 206, 215-219; 612 NW2d 144 (2000).

[12] August 5, 2010 Sentencing Transcript at 5.

[13] September 1, 2011 Sentencing Transcript at 3-4.

MR. MUAWAD: Your Honor, they are correct.

Because of the waiver, at neither proceeding was the trial court called upon to review the sufficiency of the underlying facts or to make any factual findings regarding the scoring. Defendant's appellate counsel, however, filed a motion for resentencing alleging that the guidelines were misscored and that counsel was ineffective.

On appeal, the Court of Appeals held that Defendant "waived appellate review by explicitly stating that the sentencing guidelines range indicated on the Sentencing Information Report was correct."[14]

For a preserved challenge to the sentencing guidelines, this Court clarified the standard of review in *People v Hardy*.[15] Under *Hardy*, a trial court's factual findings are reviewed for clear error and there must be a preponderance of evidence to support the scoring.[16] Whether the facts as found by the trial court satisfy the statutory requirements of the particular variable is a question of law reviewed *de novo*. A trial court, however, must score the highest number of points that the facts

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[14]*People v Wilding*, unpublished opinion per curiam of the Court of Appeals, issued July 16, 2013 (Docket No 309245), *slip op* at 1. Although the Court of Appeals has since created what appears to be a new and narrower standard for applying waiver involving the sentencing guidelines in *People v Hershey*, ___ Mich App ___ (2013)(COA Case No 309183), that decision does not undermine the efficacy of the specific waiver in this case.

[15]*People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). Although *Hardy* was decided after the Court of Appeals opinion in this case, Defendant does not claim that *Hardy* has any impact on the decision in this case.

[16]But if this case is viewed through the prism of ineffective assistance, published case law at the time of sentencing and appeal required only *any* evidence to support the scoring of an offense variable. *Id.*, at 438 n 18.

support.[17] An unpreserved challenge, however, would be reviewed for plain error under *People v Carines*, i.e, that error occurred, that the error was clear or obvious, and that the error affected the outcome of the proceeding.[18] Finally, even if Defendant established plain error, further review would be *discretionary* and should be exercised only "when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence."[19]

But in this case, however, counsel waived any objection to the scoring of the guidelines. A motion for resentencing does not revive a previously waived scoring challenge.[20] Thus review is limited to whether that waiver was the result of the ineffective assistance of counsel.

Discussion

Offense variable 8 of the sentencing guidelines requires the scoring of 15 points when "[a] victim is asported to another place of greater danger or to a situation of greater danger..."[21] Defendant argues that there was no asportation nor was the victim moved to a place or situation of greater danger.

Although this Court has not addressed the precise contours of OV 8 in an opinion, in an order

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[17]*People v Houston*, 473 Mich 399, 408; 702 NW2d 530 (2005)(relying on statutory language commanding the trial court to assign "the number of points attributable to the one that has the highest number of points.")

[18]*People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

[19]*Id.* at 763-764 (internal quotation omitted).

[20]*People v McGraw*, 484 Mich 120, 131 n 36; 771 NW2d 655 (2009).

[21]MCL 777.38(1)(a).

issued in *People v Thompson*,[22] it adopted the standard articulated by the Court of Appeals in *People v Spanke*.[23] To constitute asportation under OV 8, there must be some movement of the victim that is not merely incidental to the crime.[24] But there is no requirement that the movement be forceful or against the victim's will. To the contrary, voluntary movement by the victim can constitute asportation under OV 8.[25] Although the *Spanke* court used kidnapping as a guide to construe the meaning of "asportation," asportation is also an element of common law larceny. Asportation in that context requires only the "slightest movement."[26]

Defendant's claim that there is no asportation is premised on his view that the evidence fails to establish that the victim was "carried away." But asportation, i.e., movement, is what is required. Looking at the totality of the circumstances,[27] the entire tenor of this case demonstrates asportation. Defendant and his friend met up with the 15 year old victim and her friends at a concert. They went out to their van and provided alcohol to the girls (and only the girls), which caused the victim to

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[22]*People v Thompson*, 488 Mich 888; 788 NW2d 677 (2010). The precedential value of *Thompson* beyond its acceptance of *Spanke* is limited, however, as the Court did not analyze the specific facts of that case or explain how the *Spanke* standard was not satisfied. *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 369; 817 NW2d 504 (2012)(Supreme Court order "is binding precedent if it ... contains a concise statement of the applicable facts and reasons for the decision.") Although there is a compelling dissent, it does not illuminate the rationale of the majority. On the facts described by the dissent, the dissent presents an appropriate view of the scope of OV 8.

[23]*People v Spanke*, 254 Mich App 642; 658 NW2d 504 (2003).

[24]*Id.* at 647.

[25]*Id.* at 647-648.

[26]*See, e.g., Freeman v Meijer, Inc*, 95 Mich App 475, 479; 291 NW2d 87 (1980).

[27]Defendant makes extensive reference to the police reports in this case. But the only information available to the trial court at the time of sentencing and the probation violation hearing was the information contained in the presentence reports.

suddenly feel dizzy and confused. They went from a public location - the concert hall - out to a van where the Defendant sexually assaulted the victim. Even the Defendant acknowledged that the van "was the obvious place for sex to take place."[28] That's why Defendant was going to the van with the victim. That the van was the place for sex is evidenced from Defendant's own statement in the presentence report. Defendant reported that the first time they went out to the van, the victim expressed a willingness to engage in sexual activity in the van:[29]

> We went to ask Willy to go get alcohol. He said yay. So we stood outside smoked some cigs and then he got back. He took it and poured it into water bottles. They gave him $20. When he was giving it to them she said. As in [the victim] I'll give you a blow job for getting the alcohol. He said no thanks but you can help Gord out She said Ok and we made out a little bit and we whent [sic] back inside. We danced a bit listend [sic] to my friends band and by the time that was over they were both drunk and we whent to the van ...

Because the van had been moved from where it had been previously parked to a new location, the victim didn't know where she was going. And because the new location of the van was unknown by the victim and her friends, the victim's friend was unable to easily find her. This was movement of the victim in furtherance of the sexual assault sufficient to score OV 8 under *Spanke*. Just as in *Spanke*, "the crime[ ] could not have occurred as [it] did without the movement of defendant and the victim[ ] to a location where they were secreted from observation by others."[30]

Defendant further argues that, even if there was asportation, the victim was not asported to

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[28]Defendant's Application at 17.

[29]Defendant's Description of the Offense, Presentence Report at 7 (including original spelling and other errors).

[30]*Spanke*, 254 Mich App at 648.

a place or situation of greater danger as required to score OV 8.[31] The victim was in a public concert hall. There was asportation from that public place to the Defendant's van in the parking lot. Defendant's argument is essentially that because the van was the only place to *effectively* commit the sexual assault, that the victim was not asported from a place of danger to a place of *greater* danger. This argument is wrong as a matter of logic and common sense.

Drawing a comparison between where asportation starts and where it finishes to determine if a person has moved to a "place of greater danger" does not require that the "place of greater danger" must compare only those places where the crime *could* have been committed. Nothing in the statutory language supports such a tortured construction. What the statute commands is to simply look at the starting point and the ending point of the victim's movement. If the ending point is either a place or situation of greater danger than the starting point, then the points are scored. In this case, the starting point is the concert hall - a public place with many people milling about able to observe what goes on. The ending point was a van parked in a parking lot. Being inside the van is undoubtedly a place or situation of greater danger because the victim was moved "to a location where [she] was secreted from observation by others."[32] This is also consistent with the view of OV 8 taken by the Court of Appeals in its published opinion in *People v Steele*.[33] In *Steele*, the defendant committed his sexual assaults after taking one victim to a trailer on his property, another onto a tree stand, and yet another after riding on a dirt bike away from a house. The Court of Appeals held that

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[31]There is no claim that the scoring is based on the theory that the victim "was held captive beyond the time necessary to commit the offense." MCL 777.38(1)(a).

[32]*Spanke*, 254 Mich App at 648.

[33]*People v Steele*, 283 Mich App 472, 490-491; 769 NW2d 256 (2009), *lv den.*

each of these instances involved the asportation of a victim to "places or situations of greater danger because they are places where others were less likely to see defendant committing crimes."[34] That the victim is moved from a place of safety, i.e., a place of no danger, to a place of danger, i.e., a place of *greater* danger, is precisely the point of OV 8.

But even accepting the narrow view of the statute urged by Defendant - that the starting point must also be a place where the victim is in danger - there is no reason that the Defendant could *not* have sexually assaulted the victim at the concert. Concert halls are loud, dark places. There are plenty of places to go in such a venue to commit a sexual assault on a minor. And frankly, given that the assault here was not (apparently) accomplished by violent physical force or coercion, it is certainly not beyond the pale for sexual acts to be committed *in* a public setting like a concert or dance. That a rapist would never consider committing such in act in that location because he would easily be caught demonstrates why OV 8 should be scored. By moving a victim to a more isolated place facilitates commission of the crime and enhances the opportunity to escape being caught. And it is an aggravating factor that the guidelines account for by requiring the assessment of additional points. Thus, even under Defendant's analysis, his argument fails.

Viewed through the prism of ineffective assistance, there was certainly sufficient evidence for Defendant's counsel to reasonably conclude that OV 8 was properly scored, especially where counsel wanted to convince the trial court not to revoke Defendant's youthful trainee status. But in any event, the trial court properly scored 15 points for OV 8. Because the scope of OV 8 has been

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[34] *Id.* The Court of Appeals reached a similar result in *People v Apgar*, 264 Mich App 321, 329-330; 690 NW2d 312 (2004), *lv den*, upholding the scoring of OV 8 where the underaged victim voluntarily got into a van and was transported to a unfamiliar house where she was involved in sexual encounters with a number of men.

properly analyzed by the Court of Appeals, guidance from this Court is unnecessary.

II. Predatory conduct under OV 10 is scored when an offender engages in preoffense conduct directed at a victim for the primary purpose of victimization. Defendant approached an underaged girl, provided her alcohol, and once she was intoxicated brought her outside to his van, where he sexually assaulted her. The trial court properly scored OV 10 and defense counsel was not ineffective for choosing not to object to the scoring.

Standard of Review and Issue Preservation

The standard of review used for the preceding issue applies here as well. Not only is the issue unpreserved, it was waived. Thus, the only issue is the ineffective assistance of counsel regarding that waiver.

Discussion

The trial court scored 15 points for predatory behavior under OV 10. Offense variable 10 provides:[35]

> (1) Offense variable 10 is exploitation of a vulnerable victim. Score offense variable 10 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) Predatory conduct was involved.....15 points
>
> (b) The offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status.....10 points
>
> (c) The offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious.....5 points
>
> (d) The offender did not exploit a victim's vulnerability.....0 points

[35]MCL 777.40.

(2) The mere existence of 1 or more factors described in subsection (1) does not automatically equate with victim vulnerability.

(3) As used in this section:

(a) "Predatory conduct" means preoffense conduct directed at a victim for the primary purpose of victimization.

(b) "Exploit" means to manipulate a victim for selfish or unethical purposes.

(c) "Vulnerability" means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation.

(d) "Abuse of authority status" means a victim was exploited out of fear or deference to an authority figure, including, but not limited to, a parent, physician, or teacher.

Defendant claims that OV 10 is improperly scored citing a lack of any conduct to justify it.[36] By his own admission, Defendant saw the victim and her friend at the dance, approached them to dance, and even asked their age.[37] He then admits that "we" went to find someone to get alcohol. And according to the victim's statement to police, Defendant suggested getting alcohol.

Two separate factors exist that are indicative of victim vulnerability. First, the young age of the victim. Second, and more significantly in this case, the victim was intoxicated. Each one is recognized as a separate manner of being vulnerable under the variable, and the facts here indicate that both *together* were exploited. Defendant *created* the intoxication that allowed him to exploit

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[36]But again, it is important to remember that in the context of an ineffective assistance challenge the standard requires a defendant to establish that a guidelines objection is such a slam-dunk winner that no reasonable attorney could have thought it was properly scored. And even that ignores the tactical consideration of whether a defendant trying to seek or continue his YTA status would want to convert the sentencing hearing from how the Defendant should be given YTA into a debate over the nature of the Defendant's conduct and whether it was egregious enough to be considered predatory, or merely exploitive.

[37]Defendant's Version of the Offense, Presentence Report at 7.

the victim by providing alcohol.[38] But the circumstances go further than that. Contrary to Defendant's characterization of this as merely a case of a high school boy and some high school girls, Defendant knew that the victim was at least too young to drink, assisted in providing her alcohol, knew she was drunk, and then led her back to his van where he sexually assaulted her. Defendant's predatory conduct and aggressive nature when it comes to sex with underage girls is further illustrated by Defendant's prior criminal history. At the time of this sexual assault, Defendant was already under juvenile court supervision for another assault with sexual overtones.[39] According to the presentence report,[40] that

> [o]ffense involved defendant entering the home of [the] underage female victim and confronting her and two other females in her bedroom. Defendant stated, "I'm so wasted," then approached each girl stating, "Who wants to have sex?" The victim was then choked for refusing. Victim's father escorted defendant out of house. Defendant told him, "I'll be back to kill your mother fucking ass."

Taking all these circumstances together demonstrate that Defendant engaged in preoffense conduct directed at a vulnerable victim for the primary purpose of victimization. He chose a young girl who was underaged, and he at least knew she was too young to drink. He exploited her young age by assisting in providing her alcohol. He engaged in some preliminary sexual behavior with her and then, after she was drunk, led her from a place of relative safety to his van, which had been moved from where the victim and her friends had seen it earlier, where he sexually assaulted her.

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[38]In *People v Huston*, 489 Mich 451, 461; 802 NW2d 261 (2011), this Court recognized that predatory conduct is where "that conduct itself created or enhanced the vulnerability in the first place."

[39]Because the rules of evidence do not apply to sentencing, MRE 1101(b)(3), it is permissible to consider Defendant's prior history and character in making factual determinations in scoring the guidelines.

[40]Criminal Justice Section, Juvenile History, No 1 of 2, Presentence Report at 8.

The combination of the victim's age and state of intoxication created a vulnerability that Defendant exploited for sexual purposes. This was not just run-of-the-mill planning that occurs in every criminal case.

In *People v Cannon*, this Court held that when a trial court can affirmatively answer these three questions, scoring 15 points for OV 10 is proper:[41]

> (1) Did the offender engage in conduct before the commission of the offense?
> (2) Was this conduct directed at one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation?
> (3) Was victimization the offender's primary purpose for engaging in the preoffense conduct?

Defendant engaged in conduct before commission of the offense. He saw the victim at the dance, approached her, asked her age, helped her obtain alcohol, engaged in some preliminary sexual conduct with her, and then, after seeing she was drunk, took her back to his van. His behavior was directed at the victim, who was readily and apparently susceptible to assault by virtue of her age and state of intoxication. And Defendant engaged in this behavior in order to take advantage of the victim for a sexual purpose. He had already "made out" with the victim in the van before she was drunk. Defendant obviously hoped to escalate that conduct drastically once her inhibitions were lowered by being intoxicated after he provided the alcohol.

In addition to these facts, the circumstances of this case support the inference that something more nefarious was provided to the victim than merely water or alcohol. When Defendant provided something to drink to the victim and her friends, the victim drank it and immediately felt dizzy and disoriented. Both the victim and her friend noted that neither the Defendant nor his friend drank. Yet *both* girls became disoriented. While one might not *necessarily* conclude from these

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[41] *People v Cannon*, 481 Mich 152, 162; 749 NW2d 257 (2008).

circumstances that something was slipped into the drinks provided to the victim and her friend, it is nonetheless an inference that can be reasonably drawn from the circumstances.[42] This circumstance alone justifies scoring 15 points for predatory behavior.

Defendant asserts that the published opinion by the Court of Appeals in *People v Apgar* accurately sets forth "a good example" for scoring OV 10.[43] The People agree and, in fact, this Court used *Apgar* to illustrate a proper application of OV 10 in *People v Huston*.[44] In *Apgar*,[45] the defendant and a friend provided marijuana to the victim. In this case, it was alcohol. Although *Apgar* involved the *forced* consumption of marijuana, nothing in OV 10 requires the exploitation of a vulnerable victim to be forced. In *Apgar*, the defendant took the victim to an unfamiliar house and sexually assaulted her. In this case, Defendant took the victim to a van that was parked in a location unknown to the victim and her friend and sexually assaulted her. In *Apgar*, providing marijuana to the victim was for the obvious purpose of making her an easier target. The trial court here made a similar finding, stating that "Supposedly drinking water. You have somebody that's under age, you've plied them with alcohol to the point where they're passing out and they're not really with it as to what's going on. I do believe that the scoring for OV 10 is appropriately scored as well under

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[42]That Defendant was never charged with criminal sexual conduct alleging the use of a substance is irrelevant. He was already charged with an offense carrying a 15 year maximum that required a prison sentence and that required only proof of the victim's age and sexual penetration. The Court is free - in fact, required - to consider *all* the facts of the offense in scoring the guidelines, not merely those minimally necessary to prove the specific elements of the crime.

[43]Defendant's Application at 19 n 3.

[44]*Huston*, 489 Mich at 467.

[45]*Apgar*, 264 Mich App at 330.

the facts."[46] In addition, the Defendant's own version of the offense acknowledged that he knew the victim was drunk and that they had been previously "making out." Any difference between *Apgar* and this case is simply one of degree. In both, predatory conduct under OV 10 is established.

Similarly, the Court of Appeals published opinion in *People v Lockett*,[47] supports the scoring of predatory conduct in this case. In *Lockett*, the victim was 12 years old and was with friends (aged 17 and 14) who told the defendant's friend where to pick them up.[48] As the Court explained:[49]

> Lockett picked up J in the middle of the night in his van. Lockett drove to a liquor store to purchase alcohol. He then drove the van to a city park and parked it. Because of J's young age, she was susceptible to injury, physical restraint, or temptation. Moreover, given Lockett's actions that night, it is a reasonable inference that victimization was his primary purpose for engaging in the preoffense conduct. The trial court correctly scored OV 10.

While Defendant attempts to distinguish *Lockett*, in all critical matters it is analogous to this case. Just like *Lockett*, Defendant took the underaged victim to his van and was a party to providing alcohol. And here the defendant knew the victim was drunk and he took advantage of her age and her intoxication to commit a sexual assault.

Finally, Defendant claims that this Court's order in *People v Taylor*,[50] supports reversal of the scoring. Aside from the fact the *Taylor* did not address the issue in an ineffective assistance of

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[46]March 8, 2012 Motion Hearing at 33.

[47]*People v Lockett*, 295 Mich App 165; 814 NW2d 295 (2012), *lv den.* Defendant mistakenly refers to this opinion as unpublished.

[48]*Id.* at 172.

[49]*Id.* at 184.

[50]*People v Taylor*, 486 Mich 904; 780 NW2d 833 (2010)(relying on Court of Appeals unpublished dissenting opinion).

counsel context, the Court of Appeals dissent adopted by this Court simply found that the "mere fact that the victim was 16 years old is insufficient to score [OV 10]."[51] This just restates the statutory provision contained in MCL 777.40(2) that "[t]he mere existence of 1 or more factors described in subsection (1) does not automatically equate with victim vulnerability." But *this* record is different from that in *Taylor*. Nothing is assumed here. The record in this case supports the scoring by the trial court and demonstrates that a decision not to object to the scoring was reasonable under the circumstances.

There was certainly sufficient evidence for Defendant's counsel to reasonably conclude that because OV 10 was properly scored, there was no good reason to object, especially where counsel wanted to convince the trial court not to revoke Defendant's youthful trainee status. But in any event, the trial court properly scored 15 points for OV 10.

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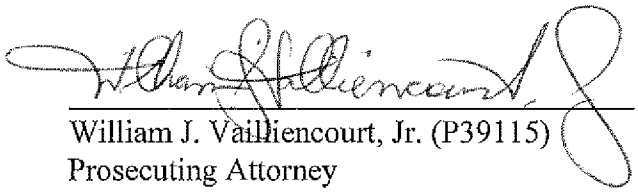
[51] *People v Taylor*, unpublished opinion per curiam of the Court of Appeals, issued October 27, 2009 (Docket No 284983)(dissenting opinion of Shapiro, J).

RELIEF REQUESTED

FOR THE FOREGOING REASONS, the People request that the Court deny the Application.

Respectfully submitted,



William J. Vailliencourt, Jr. (P39115)
Prosecuting Attorney

Dated: January 31, 2014