

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY DEWAYNE TYLER,

Defendant-Appellant.

UNPUBLISHED

January 10, 2008

No. 273960

Ionia Circuit Court

LC No. 06-013289-FH

Before: Fitzgerald, P.J., and Markey and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault upon a prison employee, MCL 750.197c, and was sentenced as a third habitual offender, MCL 769.11, to three to eight years' imprisonment. We affirm.

Defendant first claims that the prosecution failed to present sufficient evidence for a rational jury to find him guilty of assault upon a prison employee. We review sufficiency of the evidence challenges de novo, viewing the trial evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that all the elements of the offense were proved beyond a reasonable doubt. *People v Cox*, 268 Mich App 440, 443; 709 NW2d 152 (2005). Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of a crime. *People v Schumacher*, 276 Mich App 165, 167; 740 NW2d 534 (2007). In addition, "we are 'required to draw all reasonable inferences and make credibility choices in support of the jury verdict.'" *Cox, supra*, quoting *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

To support a finding that a defendant assaulted a prison employee, the prosecution must prove that the defendant (1) was lawfully imprisoned; (2) assaulted a staff member by using violence, threats of violence, or a dangerous weapon; and (3) knew that the victim was a staff member. MCL 750.197c; See *People v Terry*, 217 Mich App 660; 553 NW2d 23 (1996).

Defendant only disputes the first element. Defendant alleges that the prosecution failed to present sufficient evidence that he was lawfully imprisoned at the Bellemay Creek Correctional Facility. We disagree. The lawfulness of a defendant's confinement may be inferred from the fact of imprisonment at a state prison. *People v Neal*, 233 Mich App 649; 592 NW2d 95 (1999); *People v Williams*, 173 Mich App 312, 318; 433 NW2d 356 (1988). In this case, the jury could reasonably infer that defendant was lawfully imprisoned from the testimony

of five corrections officers that he was a prisoner at the Bellemay Creek Correctional Facility. Defendant did not dispute the fact that he was an inmate at the facility. Viewed in a light most favorable to the prosecution, the evidence was sufficient to support defendant's conviction of assault upon a prison employee. *Schumacher, supra* at 167.

Defendant next argues he should be resentenced because although the trial court stated it would not consider his juvenile record for sentencing purposes, it subsequently relied upon the juvenile record in assessing points for Prior Record Variable 3.

A trial court has discretion in scoring the sentencing guidelines. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). We will uphold the guidelines scoring if there is any evidence in the record to support it. *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003). We review the trial court's factual findings at sentencing for clear error. MCR 2.613(C); *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003).

We are required to remand for resentencing only when the guidelines have been mis-scored or when inaccurate information results in the sentence imposed falling outside the appropriate guidelines range. MCL 769.34(10). Moreover, if it appears that the guidelines were incorrectly scored but the correct score would not change the guidelines recommended minimum range, we need not remand for resentencing. *People v Davis*, 468 Mich 77, 83; 658 NW2d 800 (2003).

In the instant case, the trial court chose to disregard defendant's challenged juvenile adjudication for purposes of sentencing. However, despite the trial court's statements that it would not consider defendant's juvenile record in calculating the sentencing guidelines, the court scored PRV-3 at 10 points for one prior high severity juvenile adjudication. See MCL 777.53. Although the trial court in fact relied on defendant's juvenile record for sentencing purposes, remand for resentencing is not required because correcting defendant's PRV-3 score would not change the guidelines recommended minimum range. *Davis, supra* at 83.

Defendant's also argues the trial court inaccurately scored Offense Variable 1 on aggravated use of a weapon. Defendant submits that saliva is not a harmful biological substance for purposes of scoring OV 1. See MCL 777.31(1)(b).

Defendant failed to challenge the accuracy of the scoring of OV 1 at sentencing; therefore, our review is limited to determining whether defendant has demonstrated plain error affecting his substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004).

OV 1 is scored at 20 points when "[t]he victim was subjected or exposed to a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material, harmful radioactive device, incendiary device, or explosive device." The statute does not directly define "harmful biological substance," but MCL 777.31(3)(a) directs us to the definition contained in MCL 750.200h, which defines "harmful biological substance" as "a bacteria, virus, or other microorganism or a toxic substance derived from or produced by an organism that can be used to cause death, injury, or disease in humans, animals, or plants."

We note that this Court has recently held that saliva may contain a “harmful biological substance” supporting scoring OV 1 at 20 points for spitting on another person. *People v Odom*, 276 Mich App 407, 411-413; ___ NW2d ___ (2007) (saliva containing HIV-infected blood). Nevertheless, we accept for purposes of analysis defendant’s argument that the record here contains no evidence that defendant’s saliva contained “bacteria, virus, or other microorganism or a toxic substance derived from or produced by an organism that can be used to cause death, injury, or disease in humans, animals, or plants.” But defendant’s argument still fails because he has not demonstrated that plain error has affected his substantial rights.

Remand for resentencing is required only when the guidelines have been misscored or when inaccurate information results in the sentence imposed falling outside the appropriate guidelines range. MCL 769.34(10). Remand for resentencing is not required in this case because correcting defendant’s OV 1 score would not change the guidelines recommended minimum range. *Davis, supra*, 468 Mich at 83.

Defendant last argues that the trial court failed to correct defendant’s Presentence Investigation Report (PSIR), which reflected his disputed juvenile record. Defendant submits that the PSIR must be amended to eliminate reference to defendant’s juvenile record. We review the trial court’s response to a defendant’s claim of inaccuracies in the PSIR for an abuse of discretion. *Spanke, supra* at 648.

The abuse of discretion standard recognizes that there may be no single correct outcome in certain situations. *Babcock, supra* at 269. Instead, there may be more than one reasonable and principled outcome. *Id.* When the trial court selects one of these principled outcomes, it has not abused its discretion, and this Court will defer to the trial court’s judgment. *Id.* An abuse of discretion occurs when the trial court chooses an outcome falling outside the principled range of outcomes. *Id.*

The sentencing court must respond to challenges to the accuracy of information in the PSIR and has three options in responding: (1) hold an evidentiary hearing to determine the accuracy of the information, (2) accept the defendant’s version, or (3) disregard the challenged information. *Spanke, supra* at 649. The court must make a finding on the record on the merits of defendant’s challenge. *People v Hoyt*, 185 Mich App 531, 535; 462 NW2d 793 (1990). If a sentencing court finds the challenged information inaccurate or irrelevant, that finding must be made part of the record, and the information must be corrected or stricken from the PSIR before sending the PSIR to the Department of Corrections. MCR 6.425(E)(2); MCL 771.14(6).

Because in this case the trial court chose to disregard the challenged juvenile adjudication, the court effectively determined that the information was irrelevant. Ordinarily, defendant would be entitled to have the information stricken from the PSIR. *Spanke, supra* at 649; *People v Swartz*, 171 Mich App 364, 381; 429 NW2d 905 (1988). But at sentencing, the PSIR is presumed to be accurate, and defendant bears the burden of raising an effective challenge regarding claims of inaccurate information. See *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003). Here, defense counsel noted that defendant questioned the juvenile

adjudication.¹ Defense counsel requested a two-week adjournment of the sentencing proceeding to await a response to counsel's inquiry to the juvenile court regarding its records. Instead, the trial court offered to disregard defendant's juvenile record, and the probation officer interjected that the PSIR could be corrected later if it was shown to be inaccurate.

MR. MILLER: Then if Mr. Winters [defense counsel] has some later confirmation or non confirmation that it was not - - it shouldn't be in there, we could have it removed at a later date certainly.

THE COURT: Okay. With that Mr. Winters, is it agreeable with your client to proceeding [sic] to sentencing today?

Defense counsel subsequently explored with defendant whether he agreed to proceed with sentencing with the understanding that, "[i]f you find out otherwise that there's an error with the juvenile adjudication . . . that you certainly could come back and address those." Defendant explicitly agreed to this procedure by stating, "Okay."

By agreeing to proceed to sentencing as the trial court proposed, defendant also agreed that the PSIR would be corrected if subsequent information confirmed it was inaccurate. Thus, with respect to the juvenile adjudication noted in the PSIR, defendant has waived his right to have that information stricken from the report solely because the trial court agreed to disregard it at sentencing. The trial court is vested with wide discretion in addressing challenges to the accuracy of information at sentencing. *Spanke, supra* at 648. The court's response, to which defendant agreed, was reasonable and principled, not an abuse of discretion. *Babcock, supra*.

We affirm.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

/s/ Michael R. Smolenski

¹ Neither defense counsel nor defendant elaborated on the nature of defendant's question about the juvenile adjudication. The PSIR for the instant offense indicates that "defendant denies committing this crime," referring to the 1979 juvenile adjudication. A PSIR prepared for a 1992 sentencing proceeding, which is attached to the current PSIR, provides more information about the 1979 juvenile case. The 1992 PSIR states, "the defendant denies committing this offense. He does admit that he was adjudicated but he states that he did not do what they say."