

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GUADALUPE MATA a/k/a LUPE MATA,

Defendant-Appellant.

UNPUBLISHED

December 20, 1996

No. 182909

LC Nos. 94-005719-FC

94-005720-FC

Before: Hood, P.J., and Neff and M.A. Chrzanowski*, JJ.

PER CURIAM.

Defendant was originally charged with assault with intent to murder, first degree criminal sexual conduct and second degree criminal sexual conduct involving his daughter. He was also charged with felonious assault on his wife. Defendant was convicted by a jury of lesser charges of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(b)(ii); MSA 28.788(3)(1)(b)(ii), and two counts of felonious assault, MCL 750.82; MSA 28.277. He was sentenced to concurrent terms of ten to fifteen years for CSC II and thirty-two to forty-eight months for each count of felonious assault. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court's sentence was not proportionate. He maintains that although the trial court's sentence was within the recommended range under the guidelines, it failed to consider mitigating circumstances that overcame the presumption of proportionality. Specifically, defendant argues that the trial court failed to consider the jury's findings when it scored the guidelines and fashioned his sentence. He also argues that the court failed to consider that he performed well under community supervision and the connection between his alcohol abuse and his criminal behavior. We find that the trial court did not abuse its discretion in sentencing defendant.

A sentence should have an appropriate relationship to the circumstances of the offender and the offense. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). We review the trial court's sentencing of a defendant for an abuse of discretion *Id.* A sentence within the guidelines range

* Circuit judge, sitting on the Court of Appeals by assignment.

is presumed proportionate. *People v Rivera*, 216 Mich App 648, 652; ___ NW2d ___ (1996). A defendant must present “unusual” circumstances to overcome the presumption of proportionality. *Id.*

In this case, a number of facts in the record indicate that the ten-year minimum sentence for the CSC II conviction has an appropriate relationship to the offense and defendant’s background. The sentencing judge noted that he sat through the jury trial and found the facts of the case to be very serious, that defendant has a “substantial criminal record which includes breaking and entering, assault with intent to rape and cruelty to children,” and that past sentencing efforts to rehabilitate defendant have failed. The victim of one of the felonious assault convictions and the CSC II conviction was defendant’s daughter, and the victim of the second felonious assault was his wife. Moreover, we find defendant’s claimed unusual circumstances of his good performance under community supervision and the nexus between his alcohol abuse and criminal conduct to be insufficient to overcome the presumption of proportionality. Defendant’s sentence is not disproportionate.

Next, defendant argues that he was entitled to a corrected presentence investigation report (PSIR). We agree, but find that it was corrected. If a sentencing court states that it will disregard information in a PSIR challenged as inaccurate, the defendant is entitled to have the information stricken from the report. MCL 711.14(5); MSA 28.1144(5); *People v Britt*, 202 Mich App 714, 718; 509 NW2d 914 (1993). Defendant points out that his trial counsel objected to two incorrect statements made in his PSIR and the trial court agreed to amend it with a memorandum indicating that the references were stricken. However, while the copy of the PSIR provided by defendant to this Court includes the second of the stricken statements, the copy provided to this Court from the trial court reveals that both challenged statements were stricken. Therefore, it appears that the PSIR has properly been amended.

Finally, defendant argues that the trial court failed to resolve defendant’s objection concerning his scoring under offense variable (OV) 25 for contemporaneous criminal acts. Defense counsel challenged the score, noting that defendant was scored for multiple criminal acts when the jury convicted him of only one criminal act. Based on *People v Ewing (After Remand)*, 435 Mich 443; 458 NW2d 990 (1990), the trial court denied defendant’s motion for resentencing, holding that “the acquittal of the defendant on certain charges does not necessarily preclude using [the other alleged incidents of CSC] to score the sentence guidelines.” We find defendant’s argument meritless. The factfinder need not find the facts that form the basis for the score of a guidelines variable when rendering its verdict. *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993). The court may consider all record evidence when making the guidelines calculations, and any controverted factual assertions need be proved by the prosecution only by a preponderance of the evidence. *Id.* The trial court appropriately used the preponderance of the evidence standard in scoring the variables for defendant and properly responded to defendant’s allegations of inaccuracies in denying defendant’s motion for resentencing. *People v Boucher*, 165 Mich App 361, 363; 418 NW2d 464 (1987).

Affirmed.

/s/ Harold Hood
/s/ Janet T. Neff
/s/ Mary A. Chrzanowski