

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALVIN EASTER,

Defendant-Appellant.

UNPUBLISHED

December 21, 1999

No. 208806

Wayne Circuit Court

Criminal Division

LC No. 97-004361

Before: White, P.J., and Sawyer and Griffin, JJ.

PER CURIAM.

Defendant was charged with three counts of first-degree criminal sexual conduct (CSC) under MCL 750.520b(1)(c); MSA 28.788(2)(1)(c) or, in the alternative, under subsections (1)(e) or (1)(f). He was also charged with one count of armed robbery, MCL 750.529; MSA 28.797. Following a bench trial, the court found defendant guilty of one count of second-degree CSC under MCL 750.520c(1)(f); MSA 28.788(3)(1)(f), one count of third-degree CSC under MCL 750.520d(1)(b); MSA 28.788 (4)(1)(b), and one count of larceny from a person, MCL 750.357; MSA 28.589. The court sentenced defendant to concurrent terms of 7-1/2 to 15 years each for the CSC convictions and 6 to 10 years for the larceny conviction. Defendant appeals as of right. We affirm.

Defendant's sole claim on appeal is that the trial court failed to respond to his challenges to the scoring of the sentencing guidelines and resolve them in his favor.

Because the sentencing "guidelines do not have the force of law, a guidelines error does not violate the law. Thus, the claim of a miscalculated variable is not in itself a claim of legal error." *People v Mitchell*, 454 Mich 145, 175; 560 NW2d 600 (1997) (footnotes omitted). The scoring of the guidelines is reviewable on appeal "only where (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate." *Id.* at 177. The trial court has discretion in determining the number of points to be scored provided there is evidence on the record, including the contents of the presentence report and testimony taken at trial, that adequately supports a particular score. *People v Haacke*, 217 Mich App 434, 435; 553 NW2d 15 (1996). Appellate review of guidelines calculations is very limited and the trial court's scoring will be upheld if

there is any evidence to support the score. *Haacke, supra*; *People v Garner*, 215 Mich App 218, 219; 544 NW2d 478 (1996).

Defendant did not expressly challenge the factual bases for offense variables one or five, but simply indicated that he would have scored them differently if the decision were up to him. Therefore, there was no challenge for the court to resolve. Even if there were, however, the complainant's testimony supported a finding that defendant displayed a weapon. Although the court did not convict defendant under any of the statutory subsections predicated upon the use of a weapon, a fact may not be proved beyond a reasonable doubt at trial, but may still be supported by a preponderance of the evidence for purposes of sentencing, and thus such a discrepancy does not establish that the variable was improperly scored. *People v Purcell*, 174 Mich App 126, 130-131; 435 NW2d 782 (1989). The complainant's testimony also provided sufficient support for a score of fifteen points for offense variable five. *People v Jarvi*, 216 Mich App 161, 163; 548 NW2d 676 (1996); *People v Piotrowski*, 211 Mich App 527, 529; 536 NW2d 293 (1995).

Defendant did challenge the factual basis for offense variable two. Contrary to defendant's assertion, the court did respond to this challenge and rejected it as a difference of opinion regarding the evidence, which included the complainant's testimony that she sustained cuts and bruises during the assault. Again, the fact that the court failed to find that one of the charged acts of penetration resulted in personal injury, and thus convicted defendant of the lesser included offense of third-degree CSC, did not preclude a finding that a personal injury was supported by a preponderance of the evidence for purposes of sentencing. *Purcell, supra*. In any event, even if the record did not support a finding of personal injury, it clearly supported a finding that the complainant was terrorized, *People v Johnson*, 202 Mich App 281, 289; 508 NW2d 509 (1993), and thus the court did not err in assessing twenty-five points for offense variable two.

Although the trial judge's remarks indicated that he personally held the concept and usefulness of the guidelines in low esteem, he did utilize them as required, properly scored them, and imposed a minimum sentence that was squarely within them, thus indicating that defendant's sentences are presumptively proportionate. *People v Lyons (After Remand)*, 222 Mich App 319, 324; 564 NW2d 114 (1997). Defendant has therefore failed to establish a right to relief.

Affirmed.

/s/ Helene N. White
/s/ David H. Sawyer
/s/ Richard Allen Griffin