STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 14, 2012
v	No. 300363 Livingston Circuit Court
ZACKORY SCOTT RAY, Defendant-Appellant.	LC No. 09-018103-FH

Before: BECKERING, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of assault with intent to do great bodily harm less than murder, MCL 750.84; assault of a jail employee, MCL 750.197c(1); and four counts of assault/resisting and obstructing a police officer, MCL 750.81d(1). Defendant was found guilty but mentally ill and sentenced as a habitual offender, fourth offense, MCL 769.12, to concurrent terms of 10 to 40 years on the assault with intent to do great bodily harm conviction; 1 to 40 years on the assault of a jail employee conviction; and 1 to 15 years each on the assault/resisting and obstructing a police officer convictions. Defendant challenges his sentencing guideline scores for offense variables (OVs) 1 (aggravated use of a weapon), 2 (lethal potential of weapon possessed or used), and 19 (security threat to penal institution). We affirm because although OV 2 was misscored, the correct score would not change the guidelines range.

I. BACKGROUND

While already incarcerated at the Livingston County Jail, defendant assaulted a nurse when she attempted to hand defendant a warm compress to treat his hip. The nurse testified that defendant choked her and repeatedly threatened to "cut" her. The corrections officer who was present at the time testified that he saw a metal object in defendant's hand. It was later determined that the metal object was a snap from defendant's inmate jumpsuit. Four additional deputies were required to subdue defendant. The first corrections officer sustained a cut on his ear, and the nurse suffered a torn rotator cuff.

II. ANALYSIS

Defendant argues that the trial court incorrectly scored OVs 1, 2, and 19. MCL 777.31; MCL 777.32; MCL 777.49. We review the scoring to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular

score. *People v Waclawski*, 286 Mich App 634, 680; 780 NW2d 321 (2009). We review questions of statutory construction de novo. *People v Morey*, 461 Mich 325, 329-330; 603 NW2d 250 (1999).

The trial court scored OV 1 at five points. MCL 777.31(1)(e) provides that five points should be assessed for OV 1 if "[a] weapon was displayed or implied." Defendant attacked the nurse while holding a metal snap from his inmate jumpsuit and yelled that he was going to cut the nurse. One of the officers did suffer a cut to his ear. The metal snap from defendant's jumpsuit was an instrument or device used for attack in a fight, and was used against a victim; therefore, it constitutes a weapon, and OV 1 was properly scored at 5 points. *People v Lange*, 251 Mich App 247, 257; 650 NW2d 691 (2002).

The trial court scored OV 2 at 5 points. MCL 777.32(1)(d) provides that five points should be assessed for OV 2 if "[t]he offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon." Defendant argues that the sharpened metal snap was not a "lethal" weapon as set out in the catch line heading and label of MCL 777.32. Catch line headings and labels are not controlling. *People v Mattoon*, 271 Mich App 275, 278; 721 NW2d 269 (2006); MCL 8.4b. However, MCL 777.32(1)(e) provides that one point be assessed for use or possession of "any other potentially lethal weapon." It would be inconsistent to apply five points for a sharp object too small to cause serious injury while applying only one point for potentially lethal weapons. This Court has inspected the snap. Contrary to some suggestions in the lower court record, it does not appear to have been intentionally sharpened and is an ordinary round clothing snap. The only sharp portion is a very small prong at the rear of the snap which could cause a surface scratch or small cut, but could not possibly cause serious injury or death. Defendant's use of the metal snap does not support a score of five points for OV 2. MCL 777.32(1)(d).

Defendant also argues that the trial court incorrectly scored 25 points for OV 19. MCL 777.49. Defendant affirmatively acquiesced in the scoring of OV 19 at 25 points; therefore, this issue is waived. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Defendant relatedly argues, however, that defense counsel was ineffective for failing to object to a score of 25 points for OV 19. We review unpreserved claims of ineffective assistance of counsel for errors apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

MCL 777.49(a) provides that 25 points should be assessed for OV 19 if "[t]he offender by his or her conduct threatened the security of a penal institution[.]" Evidence was adduced at trial that, in addition to assaulting a nurse, defendant fought a deputy and tried to bite him several times. Four additional deputies were necessary to subdue defendant, who resisted and refused to comply with their commands. Defendant threatened the security of the jail by diverting four deputies from other areas, leaving the jail more susceptible to a security breach. MCL 777.49(a). The record evidence in this case overwhelmingly supported a score of 25 points for OV 19. Because counsel is not ineffective for failing to make a futile objection, defendant's claim of ineffective assistance of counsel for failing to object to the proper scoring of OV 19 is meritless. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

Defendant was originally assessed 80 OV points. Once his score for OV 2 is corrected to zero points, there remain 75 total points. The new score does not change defendant's

recommended minimum sentence range. MCL 777.65. "Where a scoring error does not alter the appropriate guidelines range, resentencing is not required." *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

Defendant also argues that his sentence was disproportionate, but it is presumptively proportionate because it falls within the recommended minimum sentence range under the legislative guidelines. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008).

Affirmed.

/s/ Jane M. Beckering
/s/ Donald S. Owens
/s/ Douglas B. Shapiro