

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERRY LEE COCHRANE a/k/a JERRY LEE
COCRHANE,

Defendant-Appellant.

UNPUBLISHED
October 25, 1996

No. 178961
LC No. 94-002380-FH

Before: Gribbs, P.J., and MacKenzie and Griffin, JJ.

PER CURIAM.

Defendant appeals by right his convictions of assault on a prison employee, MCL 750.197c; MSA 28.396(2), and habitual offender, second offense, MCL 769.10; MSA 28.1082, which arose out of an incident in which defendant spit at a hearing officer in the correctional facility where defendant was incarcerated. Defendant's spittle hit the hearing officer in the head and face. Defendant was sentenced to eighteen months to six years' imprisonment, to be served consecutively to the sentence already being served. We affirm.

Defendant argues that the act of spitting should not give rise to a felony offense and that, at most, he should have been charged with a misdemeanor. However, we agree with the trial court that defendant's conduct fell within the purview of MCL 750.197c; MSA 28.396(2). *People v Johnson*, 115 Mich App 630, 633; 321 NW2d 752 (1982); *People v Boyd*, 102 Mich App 112, 115-117; 300 NW2d 760 (1980). We believe that the reasoning of these cases, that the term "violence" within the statute was intended to include the concept of violence implicit in any assault and that the purpose of the statute was to "elevate misdemeanor assaults to the status of felonies in order to deter assault of prison guards," is sound. *Id.* It is entirely reasonable for penological reasons for the Legislature to consider any prisoner assault on a prison employee a serious offense. Further, with the possibility of transmission of communicable disease through spitting, this type of assault should not be considered benign. Accordingly, defendant was properly charged under this statute.

We reject defendant's argument that the trial court should have sua sponte prevented his attorney from presenting evidence regarding his major misconduct history. *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995). Although recitation of defendant's extensive misconduct history presented a negative picture of defendant to the jury, defendant's counsel introduced the evidence for a strategic purpose, to show that the hearing officer had been biased against defendant. Defendant had few other possible defense strategies available. Thus, there was no error in allowing defense counsel to pursue this defense.

We must also reject defendant's argument that judicial bias tainted the trial. If a trial court's comments pierce the veil of judicial impartiality such that they unduly influenced the jury, a defendant's conviction must be reversed. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). Defendant points to a single judicial comment where the court asked defense counsel, who was seeking to "recreate the scene of the crime," whether he intended to have defendant spit. Because this comment was made while the jury was not in the courtroom, it could not have influenced the jury in any way.

Finally, defendant argues that his sentence was disproportionate. Nothing in defendant's argument is persuasive in demonstrating an abuse of the sentencing court's discretion. *People v Coles*, 417 Mich 523, 535, 550; 339 NW2d 440 (1983), overruled on other grounds *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Defendant's proper conduct at trial and his history of mental health and substance abuse were insufficient to mitigate the severity of defendant's offense and defendant's history, including twenty-nine major misconduct citations that included four previous assaults on corrections staff. Defendant's sentence was proportionate to the offense and the offender.

Affirmed.

/s/ Roman S. Gibbs
/s/ Barbara B. MacKenzie
/s/ Richard Allen Griffin