

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RYAN LEE SMITH,

Defendant-Appellant.

UNPUBLISHED

December 13, 1996

No. 184641

LC No. 94-006217

Before: Saad, P.J., and Griffin and M. H. Cherry,* JJ.

PER CURIAM.

The jury convicted defendant of assault with intent to commit criminal sexual conduct involving sexual penetration, MCL 750.520g(1); MSA 28.788(7)(1). Defendant appeals and we affirm.

Defendant first argues that he was denied due process by the delay between the alleged assault and the investigation of the incident and his subsequent arrest. We disagree. A defendant may be denied due process by a prearrest delay if he was prejudiced by the delay and the reasons for the delay do not justify the prejudice suffered. *United States v Lovasco*, 431 US 783, 790; 97 S Ct 2044; 52 L Ed 2d 752, 759 (1977). Here, defendant failed to meet his burden of showing substantial prejudice. See *United States v Lash*, 937 F2d 1077, 1088 (CA 6, 1991); *People v White*, 208 Mich App 126, 134; 527 NW2d 34 (1994). Although there was almost a two-year delay between the crime and defendant's arrest, defendant's alibi witnesses testified clearly and unequivocally regarding defendant's whereabouts during the time in question. Further, any memory lapses by the witnesses identified as having been at the party during which the assault occurred were equally harmful to the prosecution and defendant. Assuming that defendant was prejudiced, the delay was justifiable because the investigation began as soon as complainant notified police that she was prepared to assist in the investigation and the prosecution. The prosecution is not required to proceed with a case before they have sufficient evidence to convict. *Lovasco*, 431 US at 790.

Defendant next contends that he was denied due process by the trial court's refusal to grant discovery of complainant's counseling and school records or to order an independent psychiatric examination of complainant. Again, we disagree. Defendant failed to show that he had a good-faith

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

belief grounded on demonstrable facts that the privileged counseling records which he sought contained material information necessary to his defense. See *People v Stanaway*, 446 Mich 643, 677, 681; 521 NW2d 557 (1994). At trial, defendant argued that the information might show that the counselors' diagnoses were based on inaccurate information. However, the prosecution did not rely on these diagnoses to establish that complainant was sexually assaulted. Defendant also failed to make the necessary showing that an independent psychiatric examination of complainant would probably provide material information relevant to his defense. See *People v Freeman*, 406 Mich 514, 516; 280 NW2d 446 (1979). Further, the trial court did not abuse its discretion by denying defendant's request for discovery of complainant's school records on the grounds that this information was irrelevant to the assault charges. See *People v Lemcool*, 445 Mich 491, 498; 518 NW2d 437 (1994). Defendant argued that the school records might show that complainant was using alcohol and drugs prior to the assault, but failed to demonstrate how that information would contribute to his defense.

Defendant next claims that he was denied a fair trial because of prosecutorial misconduct. We find no misconduct requiring reversal. The prosecution properly argued from the evidence presented at trial and the inferences which could be drawn therefrom with respect to defendant's possession of a handgun during the time period of the assault and the credibility of various witnesses. See *People v Kulick*, 209 Mich App 258, 260; 530 NW2d 163 (1995); *People v Weatherspoon*, 171 Mich App 549, 557; 431 NW2d 75 (1988). Although the prosecution misrepresented, in part, defendant's testimony concerning the handgun, this error could have been corrected by a timely instruction. *People v McElhaney*, 215 Mich App 269, 284; 545 NW2d 18 (1996). Further, any such error was harmless because the jury did not convict defendant of any crime involving a firearm. Finally, there is no evidence that the prosecution knowingly presented perjured testimony at trial, see *People v Canter*, 197 Mich App 550, 568; 496 NW2d 336 (1992), and defendant had the opportunity to discredit any questionable testimony in cross-examination.

Finally, defendant challenges the trial court's scoring of the sentencing guidelines. Because the sentencing court may consider any facts or circumstances proven by a preponderance of the evidence, the trial court did not err in scoring defendant based on factual findings which the jury apparently rejected in reaching a verdict. See *People v Ewing*, 435 Mich 443, 453, 473; 458 NW2d 880 (1990); *People v Ratkov (After Remand)*, 201 Mich App 123, 126; 505 NW2d 886 (1993). Because there is evidence on the record to support the trial court's scoring of Offense Variable (OV) 1, OV 12 and OV 25, this Court will not disturb those decisions. *People v Hernandez*, 443 Mich 1, 16; 503 NW2d 629 (1993). Although this Court does not find record support for the trial court's scoring of OV 7, based on the factual finding that defendant exploited complainant because of a difference in physical size or strength, this error is harmless. Because a correct scoring of this variable would not change defendant's final sentencing level or recommended minimum sentence range, this error does not require a remand for resentencing. *People v Johnson*, 202 Mich App 281, 290; 508 NW2d 509 (1993). Accordingly, the trial court's scoring of the sentencing guidelines does not require a remand for resentencing.

Affirmed.

/s/ Henry William Saad
/s/ Richard Allen Griffin
/s/ Michael H. Cherry