

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTONIO ALIE MCMANN,

Defendant-Appellant.

UNPUBLISHED

March 15, 2005

No. 250612

Lake Circuit Court

LC No. 02-003896-FH

Before: Hoekstra, P.J., and Neff and Schuette, JJ.

PER CURIAM.

Defendant was convicted of assaulting a prison employee, MCL 750.197c, and sentenced to twenty-eight to seventy-two months' imprisonment. He appeals as of right. We affirm.

On the evening of July 16, 2001, corrections officers at the Michigan Youth Correctional Facility in Baldwin were moving inmates from the outside yard into their housing units. Several of the inmates became disruptive, and Officer James Anderlohr found it necessary to subject them to a pat down. While patting down defendant, Anderlohr felt a hard, long object with his hand.¹ Anderlohr hesitated after feeling the object, and defendant bolted away from the wall and ran down the hallway.

Anderlohr gave chase, yelling for other officers to stop defendant. He also verbally ordered defendant to stop. Defendant ignored the commands and ran into "delta pod" with Anderlohr in pursuit. After running in a circle around the pod, defendant headed back toward the door. Officer James Thompson was in the doorway as defendant approached. Defendant, who was running at full speed, dropped one of his shoulders like a football tackle and charged Thompson, hitting him in the abdomen and knocking him to the ground. Defendant fell after hitting Thompson, and he thereafter resisted officer attempts to subdue him.

¹ Defendant was initially charged with being a prisoner in possession of a weapon, contrary to 800.283(4), in addition to the assault charge. For reasons not explained in the record the weapons charge was dismissed before trial.

I

Defendant first argues that there was insufficient evidence to sustain his conviction for assault on a prison employee. Specifically, defendant asserts that there was no evidence to support a finding that he intended to use physical force against Officer Thompson. In pursuing this argument, he asserts that the testimony unanimously supported his theory that his collision with Thompson was an accident.

When reviewing the sufficiency of the evidence in a criminal case, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt, resolving all conflicts with regard to the evidence in favor of the prosecution. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). Circumstantial evidence and reasonable inferences drawn from that evidence may be sufficient to prove the elements of a crime. *Id.*

MCL 750.197c is violated when a person, who is lawfully imprisoned in a place of confinement, uses violence to assault an employee of the place of confinement. *People v Adrian Terry*, 217 Mich App 660, 661-662; 553 NW2d 23 (1996).

A simple assault is either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery. A battery is the consummation of an assault. [*Id.* at 662 (citations omitted).]

The prosecution needs to prove that defendant intended his action. *Id.* at 662.

The evidence revealed that defendant ran at full speed toward Thompson, who was in uniform and standing in the door of “delta pod.” Defendant put his shoulder down before hitting Thompson in the abdomen. The evidence that defendant actively prepared for the hit before it took place, when viewed in a light most favorable to the prosecution, was sufficient to support an inference that defendant intended his action of hitting Thompson. Thus, we reject defendant’s claim that the evidence was insufficient to enable a rational trier of fact to find that the essential element of intent was proved beyond a reasonable doubt.

II

Defendant next argues that he was denied his constitutional right to be present during portions of his trial. We review defendant’s constitutional claim de novo. *People v Hickman*, 470 Mich 602, 605; 684 NW2d 267 (2004).

On the second day of trial after Sergeant Mark Lowing testified, defendant became angry and stated, “Stupid bitchin’ motherfucker.” Defendant apparently left the defense table and headed in Lowing’s direction. Defendant was yelling and screaming and was subdued on the floor by corrections officers. He was then removed from the courtroom and a recess, that eventually lasted more than two hours, was taken. Defendant had to be restrained in a holding cell, and he continued to misbehave during the recess.

The trial court later indicated on the record that it could not warn defendant before removing him from the courtroom because the situation was immediate and potentially violent. There was no time to warn defendant. The trial court noted that it had considered its options with respect to bringing defendant back into the courtroom, but it determined that there was no good option available. Defendant continued to thrash about in his restraints. The trial court believed that bringing him shackled or gagged into the courtroom would have been far more prejudicial to his case than proceeding in his absence.

Trial resumed in defendant's absence, and the jury received a cautionary instruction about defendant's outburst. Defense counsel acknowledged that there were security issues involved, and he did not object to the trial court's decision. Defense counsel was informed by the trial court that he could stop the proceedings at any time during the remainder of trial to consult with defendant if necessary. After trial resumed, the statement of one witness was read into the record² and two stipulations were also read into the record. Both parties then rested. The parties gave closing arguments, which were followed by jury instructions and deliberations. During deliberations, the testimony of one witness was played back for the jury.

Defendant now specifically challenges the trial court's failure to warn him before removing him from the courtroom. He also claims that he was prejudiced by his absence at trial because he could not consult with counsel regarding evidence, closing arguments, jury instructions, or the re-reading of testimony to the jury after deliberations began. He also claims he was prejudiced because he was denied his right to testify.

The right of a criminal defendant to be present at trial is not absolute. *People v Staffney*, 187 Mich App 660, 663; 468 NW2d 238 (1991). Our courts have recognized that a trial judge may remove a defendant from the courtroom without warning if the nature of his disruption consists of violence toward another person. *Id.* at 664-665. It is essential to the proper administration of criminal justice that dignity, order, and decorum be the "hallmarks" of court proceedings. *Id.* Trial judges confronted with disruptive and defiant defendants must have discretion to meet the circumstances of each case. *Id.* Moreover, once a defendant loses his right to be present, he can reclaim that right only when he is willing to conduct himself consistently with the decorum and respect inherent in the concept of the courts and judicial proceedings. *Id.* In this case, defendant was removed from the courtroom without warning because of his threatening conduct, which necessitated immediate action. Given defendant's continued, defiant behavior, even after a lengthy recess, and given the valid safety concerns of the court and counsel, the trial court's act of keeping defendant from the courtroom for the remainder of trial was constitutionally permissible. Defendant lost his right to be present and never reclaimed that right.

² The witness, a corrections officer, ignored his subpoena to appear at trial. The parties agreed that the witness' written statement would be read into the record. The statement supported defendant's theory that there was an accidental collision between defendant and Officer Thompson. (Tr II, pp 187-188.)

We also conclude that there was no reasonable possibility that defendant's absence prejudiced his case. See *People v Armstrong*, 212 Mich App 121, 129; 536 NW2d 789 (1995) (the test for whether reversal is required based on a defendant's absence is whether there was any reasonable possibility that defendant was prejudiced). Defendant was removed after the last witness testified. The remainder of the trial did not involve the face-to-face confrontation with any witnesses, and defense counsel was permitted to consult with defendant any time he felt it was necessary. Moreover, the trial court did not deny defendant his right to testify. See discussion *infra*. We therefore conclude that defendant suffered no prejudice from his absence during the conclusion of his trial.

With respect to defendant's right to testify, there is no requirement that the trial court advise a defendant of that right or make a determination on the record that a defendant has knowingly and intelligently waived that right. *People v Harris*, 190 Mich App 652, 661-662; 476 NW2d 767 (1991). A defendant's decision to testify or refrain from testifying is a strategic decision best left to defendant and his counsel. *People v Martin*, 150 Mich App 630, 640; 389 NW2d 713 (1986). In *People v Simmons*, 140 Mich App 681, 684-685; 364 NW2d 783 (1985), this Court stated that if the record demonstrates that the trial court prevented defendant from testifying it would not hesitate to reverse. However, if a defendant decides not to testify or acquiesces in his attorney's decision that he not testify, the right to testify is deemed waived. *Id.* at 685.

In this case, there is no indication in the record that defendant ever expressed a desire or intent to testify at any time during trial. Only at sentencing did defendant complain that he was denied the right to testify. At that time, defendant, speaking on his own behalf, acknowledged that his trial counsel had repeatedly advised him not to testify. Defendant nevertheless claimed for the first time that he still wished to testify. He admitted that another inmate, who allegedly knew and understood the law, had explained to him that he had the right to testify and did not waive the right unless he did so intentionally and knowingly. He therefore argued that he should receive a new trial because he never properly waived his right to testify.

Defendant's self-serving statements at sentencing were not made under oath, and are inadequate to support his claim that he was improperly denied his right to testify. There is no record support for a finding that the trial court would have precluded defendant from returning to the courtroom to testify if he or his counsel had notified the trial court of his desire to do so. On the basis of the record before us, we cannot conclude that the decision for defendant to refrain from testifying was anything other than a strategic decision. There is no basis to conclude that the trial court prevented defendant from testifying.³

³ Defendant incorrectly asserts that the denial of the right to testify is a structural error that may not be subject to a harmless error analysis. While a harmless error analysis is unnecessary in this case because defendant was not unconstitutionally deprived of his right to testify, this Court has previously held that the denial of a defendant's right to testify is subject to a harmless error analysis. *People v Solomon (Amended Opinion)*, 220 Mich App 527, 535-536; 560 NW2d 651 (1996).

In reaching our conclusion, we disagree that defendant was prevented from exercising his right to testify because he was not present in the courtroom. The right to testify is important but is not without limitation. *People v Solomon (Amended Opinion)*, 220 Mich App 527, 533-534; 560 NW2d 651 (1996). The right may bow to accommodate other legitimate interests in the criminal trial process. *Id.* In this case, there was a legitimate security risk with respect to defendant's presence in the courtroom. After a lengthy recess, defendant was still thrashing about and could not be returned to the courtroom. Short of adjourning trial, defendant left the trial court with no other option than to proceed in defendant's absence. Defendant was nevertheless represented by counsel, who was given access to defendant throughout the remainder of the trial and could have alerted the court if defendant actually desired to testify. The fact that defendant was not physically present in the courtroom did not hinder his ability to assert his right to testify.

We also reject defendant's additional claim that counsel was ineffective for failing to request that defendant be allowed to return to trial and testify. Our review of this ineffective assistance claim is limited to errors apparent on the record because no *Ginther*⁴ hearing was held. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). In order to prevail on a claim that counsel was ineffective, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). He must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *Id.*

The decision whether a defendant will testify is a matter of trial strategy for defendant and his counsel. *Martin, supra*. This Court will not second-guess counsel on matters of trial strategy. *People v Knapp*, 244 Mich App 361, 386 n 7; 624 NW2d 227 (2001). Defendant has not overcome the presumption that the decision to refrain from testifying was sound strategy. As previously noted, other than making self-serving statements at sentencing, there is no indication in the record that defendant wished to testify, and it is clear that counsel had advised him not to do so. Because defendant has not met his burden, his claim of ineffective assistance of counsel fails.

III

Defendant next argues that he was denied his right to a speedy trial. Defendant raised this issue in a pretrial motion, which the trial court denied. *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999). We review this constitutional issue de novo. *Id.* In *Cain, supra* at 112, this Court succinctly set forth the applicable rules for analyzing a speedy trial issue:

⁴ *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973).

Michigan courts apply the four-part balancing test articulated in *Barker v Wingo*, 407 US 514; 92 S Ct 2182, 33 L Ed 2d 101 (1972), to determine if a pretrial delay violated a defendant's right to a speedy trial. The test requires a court to consider "(1) the length of the delay, (2) the reasons for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant." This fourth element, prejudice, is critical to the analysis. A delay that is under eighteen months requires a defendant to prove that the defendant suffered prejudice. [Citations omitted.]

With respect to factor (1), the length of delay is not determinative of a speedy trial claim. *Id.* at 112. In this case, defendant argues that the length of delay was over two years. Defendant's calculation is based on his misunderstanding of the applicable law. He improperly calculates the delay from the date of the offense and not the date the charge was brought against him. "A formal charge against, or restraint of, the accused is necessary to call the right to speedy trial into play." *People v Rosengren*, 159 Mich App 492, 506 n 16; 407 NW2d 391 (1987).

A felony warrant was issued in this case on July 18, 2002. Defendant was arrested on the charge on August 13, 2002. In the interim, defendant was not formally restrained on this charge. Rather, he was serving a prison sentence for another crime. Therefore, the length of delay is calculated from the date of defendant's formal charge, which was August 13, 2002.⁵ Defendant was tried within one year of that date. This delay is not substantial when compared to delays noted in other reported cases. See, e.g., *Cain*, *supra* at 112.

With respect to factor (2), each period of delay is examined and attributed to the prosecutor or defendant. Defendant was arraigned in circuit court on August 27, 2002. On October 1, 2002, the trial court noted that the case would be set for trial as soon as possible. Trial was set for December 18, but the parties later agreed to adjourn that trial date. Trial was later reset for February 12, 2003. On January 7, 2003, defendant moved for an independent DNA analysis. On January 10, 2003, the trial court reset the trial date to February 24, 2003, to account for the time DNA processing was expected to take. On February 24, 2003, trial was reset to April 23, 2003. The trial court's docket entries note that a felony murder trial was given precedence. On April 1, 2003, defendant requested new counsel. The trial court appointed a new attorney for defendant on April 17, 2003, and adjourned the trial date. The trial date was adjourned because of the substitution of attorneys. Trial was rescheduled for July 29, 2003, and began on that date. The record reveals that more than three months of delay was clearly attributable to defendant due to his request for new counsel and his request for DNA testing, 2-1/2 months of delay was caused by agreement of the parties on stipulation, and several additional months of delay was caused by the trial court's schedule. Delays attributed to trial court scheduling only weigh minimally against the prosecutor. *People v Gilmore*, 222 Mich App 442, 460; 564 NW2d 158 (1997). When considered together, we find no evidence that the prosecutor was substantially to blame for the delay. *Cain*, *supra*.

⁵ Defendant does not raise any issue with respect to the delay in bringing the formal charge against him and no explanation for the delay is apparent from the record.

With respect to factor (3), the assertion of the speedy trial right, this Court looks at when the defendant asserted the right and when trial took place in relation to the assertion. See *Cain, supra* at 113-114. In this case, defendant asserted his right on April 1, 2003, but requested new counsel on the same date. When new counsel was appointed on April 17, 2003, trial was adjourned to enable new counsel to prepare. Trial was held on the next scheduled trial date. This factor does not support a speedy trial claim.

Finally, with respect to factor (4), defendant was required to prove prejudice. *Cain, supra* at 112. Defendant argues that he was generally prejudiced because the delays deprived him of the opportunity to investigate the accusation against him and deprived him of the possibility of introducing exculpatory evidence in the form of witnesses and a lost videotape. The record, however, does not reveal that any specific witnesses were lost and unavailable because of delay. The record also does not demonstrate how defendant was prejudiced by the lack of witnesses or the lack of a videotape from the correctional facility. A general allegation of prejudice caused by delay, such as the unspecified loss of evidence or memory, is insufficient to establish that defendant was denied his right to a speedy trial. *Gilmore, supra* at 462.

Under the circumstances, we affirm the trial court's decision denying defendant's motion to dismiss on speedy trial grounds. Additionally, we find no merit in defendant's contention that he is entitled to jail credit for the time he served between the offense date and his trial. MCL 780.131, the statute upon which defendant relies, does not apply when a criminal offense is committed by an inmate of a state correctional facility while that inmate is incarcerated. MCL 780.131(2)(a).

IV

Defendant next argues that the prosecutor committed a discovery violation by failing to turn over a videotape from the correctional facility. At the outset, we note that it is arguable whether this issue is preserved. Defendant never filed a formal discovery request in this case. At the preliminary examination, defense counsel orally requested the Department of Correction files or Wackenhut files that were prepared with respect to the incident. The court instructed the prosecutor that Wackenhut should turn over everything it had. Specifically, it indicated, "[i]f they've got statements of people out there that were witnesses or whatever, have them turn it over. Or if they've got tapes turn them over to Sergeant Pratt. Let him look it over, see what they've got."

The trial court's statements were somewhat contradictory. It ordered everything turned over to the defense, but then ordered any tapes to be turned over to Sergeant Pratt for review. The record does not reveal whether Sergeant Pratt reviewed any videotapes. Defendant never subsequently raised any issue about a missing videotape, and he never objected to the failure of the prosecutor to turn over any videotape to him. In March 2003, defendant filed his witness and exhibit list and did not list any videotape as a possible exhibit. A timely, pretrial objection or assertion of a discovery violation would have provided the trial court with an opportunity to correct any alleged violation and would have obviated the necessity of further legal proceedings with regard to discovery. It would have been the best time to address defendant's constitutional

claim that exculpatory evidence was withheld. Because defendant never raised the issue of a discovery violation before trial, he foreclosed the trial court from fashioning an appropriate remedy or ordering compliance. We therefore conclude that this issue is unpreserved and, accordingly, review the issue for plain error affecting defendant's substantial rights. *Carines, supra* at 763-765.

A criminal defendant has a due process right of access to certain information possessed by the prosecution. *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). This due process requirement of disclosure applies to evidence that might lead a jury to entertain a reasonable doubt about a defendant's guilt. . . .

* * *

In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

. . . Undisclosed evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." Accordingly, undisclosed evidence will be deemed material only if it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." In determining the materiality of undisclosed information, a reviewing court may consider any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case. [*People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998) (citations omitted).]

In this case, defendant speculates that the videotape must have been exculpatory. The record does not support this assertion. The videotape is not part of the record, and no hearing was held with respect to the tape. Moreover, at trial, no witness testified that the entire assault was captured on videotape or could have been captured on videotape. Officer Anderlohr testified that there were cameras in the hallways, but he was unaware of how they operated. He was unsure whether a videotape existed of the incident. Officer Thompson testified that there were cameras in the area of the incident and that the cameras ran constantly. He was not sure, however, of the specific operations of the system, and he never saw a videotape of the incident. In sum, defendant has failed to establish that the prosecution suppressed a videotape containing evidence favorable to him. He also has failed to establish that a reasonable probability exists that the outcome of trial would have been different if the videotape was produced. We find that no plain error exists.

V

Defendant next argues that the trial court erred when it refused to grant his motion for a mistrial, which was based on his own conduct in front of the jury and his removal from the courtroom. The motion was made after the jury retired to deliberate. The denial of a motion for a mistrial is reviewed for an abuse of discretion and will be granted only when there is an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003). This Court will not, however, condone or permit a defendant to perpetrate chaos at his own trial and then obtain a mistrial on the basis of prejudice. *People v Siler*, 171 Mich App 246, 256; 429 NW2d 865 (1988).

In this case, defendant caused the chaos at trial and caused his own removal from the courtroom. Therefore, we find no merit in his argument that he was entitled to a mistrial. Moreover, we note that the trial court provided the jury with a cautionary instruction when trial resumed without defendant. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). The trial court did not abuse its discretion in denying defendant's motion for a mistrial.

VI

Defendant additionally argues that the trial court denied him due process when it removed him from the courtroom without inquiring about his competency. Defendant argues that his conduct on the second day of trial should have raised issues about his competency and, therefore, the trial court had a duty to explore the matter. This issue is not preserved. It was not raised before, or decided by, the trial court.

The due process concerns that are implicated with respect to a defendant's competency are normally reviewed de novo. *In re Carey*, 241 Mich App 222, 225-226; 615 NW2d 742 (2000). However, unpreserved constitutional issues are reviewed for plain error. *Carines, supra*.

A criminal defendant is presumed competent to stand trial absent a showing that "he is incapable because of his mental condition of understanding the nature and object of the proceedings against him or assisting in his defense in a rational manner." An incompetent defendant "shall not be proceeded against while he is incompetent." The issue of a defendant's competence to stand trial may be raised by either party or the court. Although the determination of a defendant's competence is within the trial court's discretion, a trial court has the duty to raise the issue of incompetence where facts are brought to its attention which raise a "bona fide doubt" as to the defendant's competence. However, the decision as to the existence of a "bona fide doubt" will only be reversed where there is an abuse of discretion. [*People v Harris*, 185 Mich App 100, 102; 460 NW2d 239 (1990)].

Competence is an ongoing matter and, when evidence of incompetence appears, whether "before, during or after the trial," a hearing should be held. *People v Whyte*, 165 Mich App 409, 413; 418 NW2d 484 (1988), citing *People v Matheson*, 70 Mich App 172, 180; 245 NW2d 551 (1976). The issue of competence is raised when there is evidence of incompetence. *Id.*

In this case, the record does not demonstrate any bona fide doubt or dispute about defendant's competence at any time. Before trial, defendant was clearly competent to assist in his own defense. For example, after the trial court denied his motion to obtain new counsel, he moved for a rehearing in propria persona. The motion was granted. The record does not reveal any change in circumstances during trial that rendered defendant incompetent. The record does not support that he was unable to understand the proceedings or assist his counsel had he chosen to do so.

At sentencing, defendant apologized for his conduct and indicated that he was not crazy. He claimed only that he had an impulsive disorder and did not intend to disrupt the court. He also made a coherent legal argument and cited case law in support of his argument that his rights were violated when he was not permitted to return to the courtroom. He argued that he should have been allowed to return to *continue* to assist his attorney. Thus, he acknowledged that he was assisting counsel during trial until he was removed from the courtroom.

Upon review, the record does not demonstrate that either party or the court had any reason to question defendant's competency during trial. Defendant's inability to control his impulses does not lead to a conclusion that he may have been legally incompetent to understand the nature and object of the proceedings or to assist in his defense in a rational manner. No authority supports that a competency inquiry must be made whenever a defendant creates a disturbance in the courtroom. Under the circumstances, we find no plain error in the trial court's failure to explore the issue of defendant's competency during trial.

Further, we reject defendant's cursory argument that his counsel was ineffective for failing to raise the issue of his competency after his outburst on the second day of trial. Defendant has not met his burden of demonstrating that, but for his counsel's failure to raise the issue, the outcome of trial would have been different. Moreover, given the absence of any evidence that a competency hearing was warranted, counsel's conduct in failing to raise the issue did not fall below an acceptable standard. Counsel is not required to make frivolous or meritless motions. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

VII

Defendant next argues that the trial court abused its discretion when it denied his request for a jury view of the corrections facility. We disagree. We review this preserved evidentiary issue for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 418; 633 NW2d 376 (2001). Defendant argued to the trial court that he was hampered by the inability to present photographs of the correctional facility and to present evidence of the lighting and angles in the area. Therefore, he argued that a jury view was necessary.

At trial, the jurors were shown artist drawings of the area in question. Thus, they were presented with a basic layout of the area. Moreover, the record reveals that the area in question was not physically complicated such that the jury could not understand defendant's arguments based on the drawings alone. And, there were legitimate security issues given that the facility was a correctional facility. For these reasons, we find no abuse of discretion in the trial court's denial of defendant's request. Even if the decision to deny the jury view could be considered a

close call, a trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Houston*, 261 Mich App 463, 466; 683 NW2d 192 (2004).

VIII

Defendant argues that he must be resentenced because offense variable (OV) 3, MCL 777.33, was improperly scored at ten points. This issue is preserved because it was raised before the trial court at sentencing. MCL 769.34(10).

A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. "Scoring decisions for which there is any evidence in support will be upheld." [*People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002) (citations omitted).]

MCL 777.33 provides that OV 3 should be scored at ten points if the victim suffers bodily injury requiring medical treatment. In this case, Officer Thompson answered "no" when asked by defense counsel whether he was hurt during the assault. However, the presentence investigator was in possession of documentation that Officer Thompson required medical treatment after the assault and was diagnosed with a "jam and/or sprain" to his hand. The prosecutor confirmed that there were medical reports supporting that Officer Thompson was treated for a sprain to his wrist. Because there was evidence to support the scoring decision, we find no abuse of discretion.

Even if OV 3 was improperly scored at ten points, defendant's minimum sentence of twenty-eight months would still be within the minimum sentence range under the legislative guidelines. See MCL 777.67, which sets forth the minimum sentence ranges for class F felonies.⁶ Remand for resentencing is required when the guidelines are misscored or inaccurate information results in a sentence outside of the appropriate guidelines range. *Houston, supra* at 472-473. Because defendant's sentence is within the appropriate guidelines range regardless of the scoring of OV 3, resentencing is not required.

IX

Finally, defendant argues that the cumulative effect of the errors at trial denied him his due process right to a fair trial. This argument fails because we have found no errors of

⁶ Defendant's offense variable level was level "II," which prescribes a minimum sentence range of ten to twenty-three months. MCL 777.67. Because defendant was an habitual offender second, the upper limit of the minimum sentence range was increased twenty-five percent to twenty-eight months. MCL 777.21(3). If ten points were not scored for OV 3, defendant's offense variable level would have been level "I," and the minimum sentence range would have been five to twenty-three months, MCL 777.67, which upper limit would also have been raised to twenty-eight months. MCL 777.21(3). Defendant was sentenced to twenty-eight months, which is within the sentencing guidelines range regardless of whether his OV level is I or II.

consequence, which cumulatively denied defendant a fair trial. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999).

Affirmed.

/s/ Joel P. Hoekstra

/s/ Janet T. Neff

/s/ Bill Schuette