

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DYWAN TYREECE HENRY,

Defendant-Appellant.

UNPUBLISHED

August 17, 2006

No. 260357

Ionia Circuit Court

LC No. 04-012783-FH

Before: Zahra, P.J., and Neff and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction for assaulting a prison employee, MCL 750.197c. He was sentenced as a habitual offender, MCL 769.12, to 4 to 15 years' imprisonment. We affirm.

I. Basic Facts And Procedure

Defendant, while a prisoner at the Bellamy Creek Correctional Facility (Bellamy Creek), assaulted a corrections officer by using a container to throw urine and feces on him.

At trial, Michigan Department of Corrections (MDOC) Officer Ronald Bigelow testified that on the day of the assault in June, 2004, he was responsible for showering and feeding the prisoners and making rounds. Bigelow stated that at approximately 3:45 p.m., he began picking up food trays from the inmates in a segregation unit of Bellamy Creek. Bigelow said he would open the food slot¹ in the cell door and the prisoner would pass the trays out to him; he would then put the trays on the food cart and move on to the next cell.

Bigelow testified that he started collecting trays at cell 131, and then he worked his way to defendant's cell (cell 133). He said that he had already retrieved the trays from cell 132 and closed that cell's food slot before he got to defendant's cell. Bigelow stated that when he got to

¹ The food slot is approximately 4 by 8 inches. It is large enough so that prisoners can slide the food trays through it with both hands, and it is used to apply restraints, including handcuffs, belly chains, and leg irons.

defendant's cell, he opened defendant's food slot, defendant handed him his food trays, and then defendant threw a cup of urine and feces on the officer, striking him in the face and on the shoulder. He said that after defendant threw the feces and urine on him, he said: "That's what you get for poisoning my food."

II. Analysis

A. Ineffective Assistance of Counsel

Defendant argues that he received ineffective assistance when defense counsel failed to sign and file defendant's pro se motion to compel discovery.² Defendant asserts that counsel's failure to file a motion was prejudicial because it resulted in the loss of a res gestae witness. An ineffective assistance of counsel claim is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The factual findings are reviewed for clear error, and the matters of law are reviewed de novo. *Id.* To establish a claim of ineffective assistance of counsel, defendant bears the burden of showing that trial counsel's performance fell below an objective standard of reasonableness and that trial counsel's representation was so prejudicial that defendant was denied a fair trial. *People v Hoag*, 460 Mich 1, 5-6; 594 NW2d 57 (1999). To meet the second prong of the test, defendant must show that a reasonable probability exists that the outcome of his trial would have been different but for trial counsel's error. *Id.* at 6.

Defendant's argument is based on his November 16, 2004, pro se motion to compel discovery. The trial court declined to address defendant's motion because the motion was not signed by defense counsel. However, defense counsel was successful in obtaining an order for discovery on October 29, 2004, requiring the prosecutor to produce, among other things, the names, prison numbers, and current locations of all inmates locked within a four-cell radius of defendant on the date of the incident. Shortly after entry of the discovery order, defense counsel again raised the issue of discovery before the trial court, noting that it was "imperative" that the prosecutor produce the names of the inmates as soon as possible. And on the morning of trial, defense counsel advised the court that he had received from the prosecutor a supplemental police report that contained the names, location, and statements of the inmates locked in defendant's unit. Defense counsel noted that approximately half of the inmates indicated that they did not see anything, and the other half gave information that was not helpful to defendant. There was only one inmate, Eric Clark, for whom the prosecutor failed to provide a location; but Clark's location could not be ascertained because he was discharged from prison before the trial. Without demonstrating how Clark's testimony would have helped defendant, his claim of ineffective assistance fails.

B. Remedy for Noncompliance with a Discovery Order

² Defendant suggests that the trial court should have made a substitution of counsel at the hearing on plaintiff's motion to add new witnesses because the trial court was made aware that there was a breakdown in the attorney-client relationship. However, because this issue is not stated in defendant's statement of the questions presented, it is abandoned. MCR 7.212(C)(5); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000).

Defendant argues that the trial court erred in failing to dismiss this case based on the prosecutor's failure to timely provide him with inmate Clark's location. We review a trial court's decision as to the appropriate remedy for noncompliance with a discovery order for an abuse of discretion. *People v Davie (After Remand)*, 225 Mich App 592, 598; 571 NW2d 229 (1997).

Defendant first asserts that the prosecutor was required under MCR 6.201(F) to respond to the trial court's discovery order within seven days. Although the version of MCR 6.201(F)³ in effect at the time of defendant's trial did require the prosecutor to comply with the discovery requirements of that rule within seven days after a request for discovery, by its clear terms the court rule does not apply to the trial court's order for discovery in this case. See MCR 6.201(B).⁴

Defendant also asserts that under MCL 767.40a(5) the prosecutor was obligated to assist him in locating and serving inmate Clark because he was a res gestae witness. Defendant relies on *People v Baskin*, 145 Mich App 526; 378 NW2d 535 (1985), to support his argument. Defendant's reliance on *Baskin* is misplaced, however, because that case was decided when the statute mandated that the prosecutor endorse and produce all res gestae witnesses. Under the version of the statute applicable to this case, the prosecutor's duty is to provide notice of the witnesses and reasonable assistance in locating the witnesses on defendant's request. *People v Burwick*, 450 Mich 281, 289; 537 NW2d 813 (1995). Here, defendant never made a written request for assistance from the prosecutor in locating inmate Clark. Therefore, MCL 767.40a(5) was not implicated in this case. Moreover, the trial court read the missing witness instruction to the jury. CJI2d 5.12. Therefore, we conclude that the trial court did not abuse its discretion in refusing to dismiss this case based on the prosecutor's failure to provide defendant with the location of inmate Clark.⁵

C. Right to a Fair Trial

³ MCR 6.201 was amended in 2005, changing compliance to 21 days.

⁴ MCR 6.201(B) Discovery of Information Known to the Prosecuting Attorney. Upon request, the prosecuting attorney must provide each defendant: (1) any exculpatory information or evidence known to the prosecuting attorney; (2) any police report and interrogation records concerning the case, except so much of a report as concerns a continuing investigation; (3) any written or recorded statements by a defendant, codefendant, or accomplice pertaining to the case, even if that person is not a prospective witness at trial; (4) any affidavit, warrant, and return pertaining to a search or seizure in connection with the case; and (5) any plea agreement, grant of immunity, or other agreement for testimony in connection with the case.

⁵ We note that defendant also argues under this issue that the prosecution did not present sufficient evidence that the victim was battered. Again, because this issue is not stated in defendant's statement of the questions presented, it is abandoned. MCR 7.212(C)(5); *Brown, supra* at 748.

Defendant also argues that the trial court's decision to shackle him during trial denied him a fair trial. Because defendant failed to raise this issue below, we review for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999).

"Freedom from shackling is an important component of a fair trial." *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996). Accordingly, "[r]estraints should be permitted only to prevent the escape of the defendant, to prevent the defendant from injuring others in the courtroom, or to maintain an orderly trial." *Id.*

This Court has held that a trial court's decision to shackle a defendant with an extensive institutional misconduct record is justified. *Id.* at 405. In *Dixon* the Court reasoned that an extensive misconduct record demonstrates that the "defendant lacks respect for authority, lacks the discipline to conform his behavior to accepted norms, and has a tendency towards violence." *Id.* Here, defendant had 63 prison misconducts, including 6 for assaults on staff and 23 for threatening behavior. Therefore, the trial court's decision to require defendant to remain shackled during the trial was not erroneous.⁶

D. Motion for a Directed Verdict

Defendant argues that the trial court erred in denying his motion for directed verdict because the prosecution failed to show that he was lawfully imprisoned. We review a trial court's decision on a motion for directed verdict de novo to determine whether, viewed in the light most favorable to the prosecution, the evidence presented by the prosecutor could persuade a rational jury that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

In *People v Neal*, 232 Mich App 801, 806; 592 NW2d 92 (1998) (*Neal I*),⁷ this Court observed that "the prosecution may, but need not, proffer a judgment of conviction or other additional evidence to prove the lawfulness of the imprisonment." Rather, "[t]he prosecution may instead simply elect to rely on the reasonable inference drawn from the defendant's incarceration in a state prison." *Id.* Here, Department of Corrections employees testified that defendant was an inmate at Bellamy Creek Correctional Facility at the time of the incident. Such testimony provides the basis for a reasonable inference that defendant was lawfully confined. Therefore, the trial court did not err in denying defendant's motion for directed verdict.

E. Motion for a New Trial

Defendant also argues that the verdict is against the great weight of the evidence because the victim's testimony was seriously impeached and inherently implausible. Specifically, defendant refers to alleged inconsistencies in the victim's testimony regarding his retrieval of

⁶ Defendant also argues that the trial court erred in failing to instruct the jury regarding his shackles. But because this issue is not stated in defendant's statement of the questions presented, it is abandoned. MCR 7.212(C)(5); *Brown, supra* at 748.

⁷ Reasoning adopted by *People v Neal*, 233 Mich App 649; 592 NW2d 95 (1999).

defendant's food tray and the food tray of another inmate. We review a trial court's denial of defendant's motion for a new trial for an abuse of discretion. *People v Lemmon*, 456 Mich 625, 648 n 27; 576 NW2d 129 (1998).

When determining if a verdict is against the great weight of the evidence this Court must review the whole body of proofs. *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993), overruled in part on other grounds in *Lemmon*, *supra* at 625. The test is "whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003). Further, if there is conflicting evidence, the question of credibility should ordinarily be left to the fact-finder. *Lemmon*, *supra* at 642-643. Although there were some inconsistencies in the victim's testimony, they are not exceptional and were properly left to the fact-finder. *Id.* at 642-643. Therefore, we conclude that the guilty verdict was not against the great weight of the evidence.

F. Sentencing Guidelines

Defendant argues that he is entitled to resentencing because the trial court erred in scoring his sentencing guidelines and improperly departed from the guidelines without substantial and compelling reasons. We review sentencing issues for an abuse of discretion by the trial court. *People v Sabin (On Second Remand)*, 242 Mich App 656, 660; 620 NW2d 19 (2000).

Defendant argues that he should not have been scored ten points under offense variable (OV) 1. MCL 777.31(1)(d) provides that ten points is scored for OV 1 if "[t]he victim was touched by any other type of weapon." Resolution of this issue turns on whether feces and urine can be considered a weapon under the statute. We conclude that it can.

In *People v Goolsby*, 284 Mich 375, 378; 279 NW 867 (1938), our Supreme Court made the following observations regarding what constitutes a dangerous weapon:

Some weapons carry their dangerous character because so designed and are, when employed, per se, deadly, while other instrumentalities are not dangerous weapons unless turned to such purpose. The test as to the latter is whether the instrumentality was used as a weapon and, when so employed in an assault, dangerous. The character of a dangerous weapon attaches by adoption when the instrumentality is applied to use against another in furtherance of an assault. When the purpose is evidenced by act, and the instrumentality is adapted to accomplishment of the assault and capable of inflicting serious injury, then it is, when so employed, a dangerous weapon. [See also *People v Lynn*, 459 Mich 53, 59, 586 NW2d 534 (1998) (holding "that where a defendant is charged with carrying a 'dangerous weapon' contrary to MCL 750.227, the burden is on the prosecution to prove that the instrument carried by the defendant is a dangerous weapon per se or that the instrument was used, or intended for use, as a weapon for bodily assault or defense").]

In *People v Lange*, 251 Mich App 247, 256-257; 650 NW2d 691 (2002), this Court relied in part on the above language when it concluded that a glass mug could be considered a weapon under

OV 1. *Lange* also made the following observation regarding the common, everyday meaning of the term “weapon”: “[W]e note that *Random House Webster's College Dictionary* (1997) defines ‘weapon’ as ‘any instrument or device used for attack or defense in a fight or in combat’ and ‘anything used against an opponent, adversary or victim.’” Under this definition, the feces and urine were the means by which defendant carried out his assault. This is consistent with the discussion set forth in *Goolsby*, i.e., those substances were adapted by defendant to be used against his victim in furtherance of an assault. *Goolsby*, *supra* at 378. Therefore, the scoring of OV 1 is supported.

Defendant next argues that the trial court erred in scoring any points under OV 3 because the victim suffered no physical injury. Under OV 3, a trial court must assess points for any physical injury to the victim. MCL 777.33. Here, the trial court scored ten points under OV 3 for “[b]odily injury requiring medical treatment” because even though the victim did not sustain any permanent injuries from the assault, the course of treatment that he endured supports the scoring of ten points. We agree. A score of ten points under OV 3 is proper where the victim has sustained a bodily injury that requires medical treatment. MCL 777.33(1)(d). Here, when the victim was hit in the face with the feces and urine mixture, it went into his eye, requiring him to seek immediate medical attention because of the potential for exposure to disease. The fact that the victim did not actually contract a disease does not negate the potential exposure and the need for immediate medical treatment. Therefore, we conclude that the trial court’s score of ten points under OV 3 was proper.

Defendant also argues that the trial scoring of 25 points under OV 19 was erroneous. Under OV 19, a trial court must assess 25 points if the defendant’s conduct “threatened the security of a penal institution or court.” MCL 777.49(a). As the trial court noted, when defendant assaulted the victim, there was a chance that other inmates would follow suit, which could eventually lead to an unstable condition within the facility. Additionally, because the victim was required to seek immediate medical attention, it left the institution short-staffed and more susceptible to a breach of security. Therefore, because there is evidence in the record to support the trial court’s decision the trial court did not err in scoring OV 19 at 25 points. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Defendant argues that the trial court improperly departed from the sentencing guidelines. Specifically, defendant asserts that his prison misconduct cannot be a substantial and compelling reason for departure because it was already taken into consideration under prior record variable 1. However, the trial court did not depart from the sentencing guidelines in this case. Therefore, defendant’s argument is without merit.

Defendant also raises a *Blakely*⁸ argument, asserting that his constitutional right to a jury trial was violated by impermissible judicial fact-finding at sentencing. However, our Supreme Court has determined that *Blakely* does not apply to sentences imposed in Michigan that are, as

⁸ *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

in this case, below the statutory maximum. *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006).

G. Sentencing Enhancement

We reject defendant's argument that the trial court abused its discretion in enhancing his sentence under the habitual offender act because his prior convictions were invalid as to the dates of the convictions, and one of the convictions was improperly named. Defendant does not challenge the validity of his convictions; rather, he only contends that the dates of the convictions are erroneous and that the name of one conviction is incorrect. MCL 769.13(5), (6). Therefore, because defendant does not dispute that he was convicted of three prior felonies, the trial court's enhancement of his sentence under MCL 769.12 was not erroneous. *Carines, supra* at 764-765.

Affirmed.

/s/ Brian K. Zahra

/s/ Janet T. Neff

/s/ Donald S. Owens