

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS MICHAEL OTTER, II,

Defendant-Appellant.

UNPUBLISHED

March 10, 2005

No. 252235

Genesee Circuit Court

LC No. 02-002021-FY

Before: Zahra, P.J., and Murphy and Cavanagh, JJ.

PER CURIAM.

A jury convicted defendant of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (victim under thirteen years of age); and second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (victim under thirteen years of age). The trial court sentenced him to 84 to 240 months' imprisonment for the CSC I conviction, and to 38 to 180 months' imprisonment for the CSC II conviction, to be served concurrently. Defendant appeals as of right. We affirm.

I. Confrontation Clause

Defendant first argues that the district court violated his constitutional rights under the Confrontation Clause by allowing the victim to testify at the preliminary hearing while defendant watched the proceedings via closed circuit television from another room pursuant to MCL 600.2163a. We disagree.

Constitutional questions are reviewed de novo. *People v Hickman*, 470 Mich 602, 605; 684 NW2d 267 (2004). However, to warrant reversal, an error in a preliminary examination procedure must have affected the bindover and adversely affected the fairness or reliability of the trial. *People v McGee*, 258 Mich App 683, 698; 672 NW2d 191 (2003).

Both the United States and Michigan constitutions guarantee an accused the right "to be confronted with the witnesses against him" US Const, Am VI; Const 1963, art 1, § 20. This right is not limited solely to trial proceedings. see *People v Sammons*, 191 Mich App 351, 362; 478 NW2d 901 (1991). However, defendant has not provided this Court with authority holding that a defendant's Confrontation clause rights apply to a preliminary examination. Regardless, our Supreme Court, in *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993), stated that "there exists a general presumption by

this Court that we will not reach constitutional issues that are not necessary to resolve a case.” See also *Council of Orgs & Others for Ed About Parochiaid v Governor*, 455 Mich 557, 568; 566 NW2d 208 (1997). Thus, this Court will not unnecessarily delve into this constitutional question to resolve this case.

Here, defendant’s claim that the district court violated his Confrontation Clause rights is based solely on an assertion that the district court failed to comply with the requirements of MCL 600.2163a. We find that the court did comply with the statutory requirements, and therefore, conclude that defendant’s argument is without merit.

MCL 600.2163a governs the circumstances in which videotaped testimony may be used, and the procedures to be followed in such instances. This Court, in *People v Pesquera*, 244 Mich App 305, 311; 625 NW2d 407 (2001), interpreted former MCL 600.2163a(14)¹ to require the court find that: (1) the defendant’s presence will cause a level of trauma that renders the witness unable to truthfully and understandably relate the witness’ relevant knowledge and perceptions of the circumstances of the crime; and (2) that the witness would be unable to testify even if the procedures established in subsections 3, 4, 10, and 12 were employed.

In the present case, the prosecution brought a motion under MCL 600.2163a to videotape the nine-year-old victim’s testimony. The district court, in considering this motion, expressly found on the record that the victim was afraid of defendant and unable to testify in his presence. Further, the court considered on the record each of the available procedures set forth in MCL 600.2163a and found that the victim would be unable to testify even if subsections 3, 4, 10, and 12 were employed. Only then did the court grant the prosecutor’s motion to videotape the victim’s testimony outside of defendant’s physical presence. Moreover, the court undertook special efforts to ensure that defendant had free access to his attorney throughout the victim’s testimony. These efforts included stationing someone in the room with defendant to notify the court whenever defendant wished to speak with his attorney, and granting immediate brief recesses at those times to allow defendant to speak with his attorney. Under these circumstances, we find that the district court fully complied with the requirements of MCL 600.2163a. Moreover, any error in this regard could not have affected the fairness or reliability of the trial because the victim testified at trial and was subject to cross-examination by defense counsel. *McGee, supra*.

II. Sentencing

Defendant also argues that the trial court committed error requiring resentencing because it misscored offense variables (OV) 3, 4, and 12, and that given these scoring errors, the sentences for both convictions exceeded the statutory guidelines and the trial court failed to state on the record substantial and compelling reasons for the departure. We disagree.

On appeal, a party may not challenge the scoring of the sentencing guidelines or the accuracy of the presentence report unless he raised the issue at or before sentencing, or unless he

¹ The *Pesquera* Court interpreted the version of MCL 600.2163a that was in effect during defendant’s trial, though the statute has since been amended. 2002 PA 64.

demonstrates that the challenge was brought as soon as the inaccuracy could reasonably have been discovered. MCR 6.429(C); *People v McGuffey*, 251 Mich App 155, 165; 649 NW2d 801 (2002). In this case, defendant objected at sentencing to the scoring of OV 3, and preserved this particular question for appellate review. However, defendant did not object to the scoring of OVs 4 and 12. Moreover, defendant has not demonstrated that he brought these scoring challenges as soon as the alleged inaccuracies could reasonably have been discovered. Accordingly, defendant has not preserved these questions for appellate review.

A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score, and 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). However, the interpretation of the statutory sentencing guidelines and legal questions presented by the application of guidelines are subject to de novo review. *People v Babcock*, 469 Mich 247, 253; 666 NW2d 231 (2003). This Court reviews unpreserved sentencing guidelines issues for plain error affecting substantial rights. *People v Kimble*, 252 Mich App 269, 275-276; 651 NW2d 798 (2002), aff'd 470 Mich 305 (2004).

At sentencing, the trial court assigned defendant five points in connection with OV 3. This variable provides that a defendant should be scored five points if bodily injury not requiring medical treatment occurred to a victim. MCL 777.33. Defendant asserts that the evidence on the record did not support a finding that the victim suffered bodily injury not requiring medical treatment. However, the victim testified that when defendant inserted his penis in his anus, it "hurt a lot," and the officer in charge of the case testified that the victim had indicated to him that area hurt the entire night after defendant anally penetrated him. Because there is evidence in support of the court's scoring decision regarding OV 3, pursuant to *Hornsby, supra*, the trial court did not abuse its discretion in scoring OV 3.

At sentencing, the trial court assigned defendant ten points in connection with OV 4 in accordance with the Sentencing Investigation Report (SIR), and defendant did not object to this score. This variable provides that a defendant should be scored ten points if serious psychological injury requiring professional treatment occurred to a victim. MCL 777.34. Defendant asserts that the evidence on the record did not support a finding that the victim suffered serious psychological injury requiring professional treatment. However, the Presentencing Investigation Report (PSIR) stated that the victim's mother had advised that she would be taking the victim to counseling regarding this incident. A court may rely on the information in the presentence report, which is presumed to be accurate, unless the defendant effectively challenges the information presented in the report. *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997). In the present case, defendant did not challenge this information, and therefore, there is evidence of record to support the court's scoring decision regarding OV 4. Accordingly, pursuant to *Hornsby, supra*, the trial court did not commit plain error in scoring OV 4.

At sentencing, the trial court assigned defendant five points in connection with OV 12 in accordance with the Sentencing Investigation Report (SIR), and defendant did not object to this score. This variable provides that a defendant should be scored five points if he engaged in two contemporaneous felonious criminal acts involving other crimes within twenty-four hours of the sentencing offense, which have not and will not result in a separate conviction. MCL 777.42. This variable also provides that a defendant should be scored one point if he engaged in one

contemporaneous felonious criminal act involving any other crime within twenty-four hours of the sentencing offense, which has not and will not result in a separate conviction. Defendant asserts that the evidence on the record did not support a finding that defendant engaged in two contemporaneous felonious criminal acts involving other crimes within twenty-four hours of the CSC I conviction. We agree. Defendant admitted at trial that he had committed a number of breaking and enterings to steal food. However, defendant stated that only one of these breaking and enterings may have occurred on the date the victim alleged the assault occurred. The victim himself testified that the assault occurred a few days after the breakings and enterings. Accordingly, the evidence on the record at most supports a score of one point for OV 12. Therefore, we find that the court committed plain error when it assigned defendant five points for OV 12.

However, where a court has abused its discretion in scoring one or more offense variables, but where reduction of the score would not alter the total offense variable score so as to change the level at which defendant was ultimately placed in calculating the guidelines range, the error is harmless and remand for resentencing is not required. *People v Johnson*, 202 Mich App 281, 290, 292; 508 NW2d 509 (1993). In the present case, defendant's total offense variable score including the error was thirty points. Defendant's total offense variable score as reduced by correction of the four or five point scoring error would be twenty-five or twenty-six points. Defendant's offense is a Class A offense, and his Prior Record Variable level is C. Pursuant to MCL 777.62, total offense variable scores between twenty and thirty-nine points constitute the same level for calculating the guidelines range. Accordingly, reduction of defendant's score would not alter the total offense variable score so as to change the level at which defendant was ultimately placed in calculating the guidelines range. As a result, the error is harmless, his sentence is within the guidelines range, and remand for resentencing based on this error is not required.

With regard to defendant's sentence on the CSC II conviction, the trial court's failure to prepare a SIR in connection with this offense was not error. Where there are multiple convictions for a single offender and the sentences are to run concurrently, the trial court is only required to complete the sentencing guidelines for the conviction that carries the highest statutory maximum. MCL 771.14(2)(e)(i)-(iii). In the present case, that conviction is the CSC I conviction, for which the court did complete the sentencing guidelines. Accordingly, no error occurred in this regard.

Affirmed.

/s/ Brian K. Zahra
/s/ William B. Murphy
/s/ Mark J. Cavanagh