STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 6, 2011
v	No. 298944 Kent Circuit Court
COREY JAMAL HAMILTON, Defendant-Appellant.	LC No. 09-012635-FH

Before: MARKEY, P.J., and SERVITTO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of larceny from a person, MCL 750.357, and third-degree criminal sexual conduct (CSC), MCL 750.520d(1)(b). Defendant was sentenced as an habitual offender, second offense, MCL 769.10, to 83 months to 15 years' imprisonment for larceny from a person and 12 to 22 years' imprisonment for third-degree CSC. We affirm.

First, defendant argues that defendant was denied his due process rights based on his wearing jail clothing at trial. We disagree. Because defendant failed to object to this issue below, this claim was not preserved for appellate review. We review unpreserved errors for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999).

"A defendant's timely request to wear civilian clothing must be granted." *People v Harris*, 201 Mich App 147, 151; 505 NW2d 889 (1993). This is because it is a violation of the Fourteenth Amendment to "compel an accused to stand trial before a jury while dressed in identifiable prison clothes." *Estelle v Williams*, 425 US 501, 512; 96 S Ct 1691; 48 L Ed 2d 126 (1976). However, "the failure to make an objection to the court as to being tried in [identifiable prison clothes], for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation." *Id*. at 512-513.

There was no plain error affecting defendant's substantial rights arising from his clothing at trial. Before defendant testified at trial, the trial court sent the jury outside of the courtroom. Defendant had taken off his sweatshirt and was wearing a T-shirt with the letters "KCCF," an abbreviation for Kent County Correctional Facility. The trial court suggested that defendant

wear his sweatshirt. Before the jury returned, defendant turned his shirt backwards. There is no indication in the record that defendant ever objected to or even raised the issue of his trial clothing, or that the jury was aware that "KCCF" indicated jail clothing. As the Supreme Court opined in *Estelle*, 425 US at 512, "[n]othing in this record, therefore, warrants a conclusion that [defendant] was compelled to stand trial in jail garb or that there was sufficient reason to excuse the failure to raise the issue before trial." Thus, defendant's failure to object was "sufficient to negate the presence of compulsion necessary to establish a constitutional violation." *Id.* Defendant was not denied his right to a fair trial based on his clothing.

Next, defendant argues that he is entitled to resentencing because offense variable (OV) 3 and OV 11 were improperly scored. Though defendant did not object to the OV scores at sentencing, he preserved this issue by moving this Court for remand based on the OV scores. *People v Kimble*, 470 Mich 305, 310; 684 NW2d 669 (2004); MCL 769.34(10); MCR 6.429.

The interpretation and application of statutory sentencing guidelines involve questions of law and are reviewed de novo. *People v Francisco*, 474 Mich 82, 85; 711 NW2d 44 (2006). We review OV scoring for an abuse of discretion to determine whether the evidence supports a particular score. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009). We will generally affirm scoring decisions for which there is any evidence in support. *Id.*; *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004)..

The trial court abused its discretion by scoring OV 3 at ten points because there was no evidence in the record to support the score. OV 3 should be scored at ten points if "[b]odily injury requiring medical treatment occurred to a victim." MCL 777.33(1)(d). Although there was evidence that the victim was taken to the hospital and also examined by a sexual assault nurse, there was no evidence presented that the victim sustained any bodily injuries from the sexual assaults or that she received treatment for any bodily injuries.

The trial court did not, however, abuse its discretion by scoring OV 11 at 25 points because the score was supported by the evidence in the record. For OV 11, all sexual penetrations of the victim by the offender that arise out of the sentencing offense are scored. MCL 777.41(2)(a). OV 11 is scored at 25 points if one criminal sexual penetration occurred. MCL 777.41(1)(b). At sentencing, the trial court was not restricted to considering information only admissible in open court, and it could properly consider information contained in the presentence investigation report (PSIR). *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997); *People v Uphaus (On Remand)*, 278 Mich App 174, 183-184; 748 NW2d 899 (2008). The PSIR established that in addition to the sentencing offense, defendant attempted to penetrate the victim's vagina. Defendant concedes that the PSIR contains evidence of "slight vaginal penetration." There was also evidence that defendant touched the victim's genitals. Any intrusion, however slight, of any part of a person's body into the genital or anal openings of another person's body is sexual penetration. MCL 750.520a(r).

Though OV 3 was improperly scored, defendant is not entitled to resentencing because the scoring error does not alter the appropriate guidelines range. *Francisco*, 474 Mich at 89 n 8. Moreover, there was no plain error affecting defendant's substantial rights based on defense counsel's failure to object to the OV 3 and OV 11 scores. *Carines*, 460 Mich at 763. OV 11 was

properly scored, and even if defense counsel's failure to object to the OV 3 score were deficient, it was not prejudicial because it did not affect the appropriate guidelines range.

We affirm.

/s/ Jane E. Markey
/s/ Deborah A. Servitto

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RONAYNE KRAUSE, J. (*concurring*).

I concur in the result reached by the majority, but I write separately to express my concerns regarding OV 3.

I find it inconceivable that the victim here did not sustain a "bodily injury" under the circumstances of the assault in this case, and the evidence shows that she was taken to the hospital and examined by a sexual assault nurse. OV 3 should be scored at ten points if "[b]odily injury requiring medical treatment occurred to a victim." MCL 777.33(1)(d). "'[B]odily injury' encompasses anything that the victim would, under the circumstances, perceive as some unwanted physically damaging consequence." *People v McDonald*, ___ Mich App ___, ___; ___ NW2d ___ (2011). However, on the basis of the record we have before us, I reluctantly conclude that the trial court abused its discretion by scoring OV 3 at ten points on the basis of this record. No additional evidence was put into the record of what occurred at the hospital beyond the bare fact of that examination, and no evidence at all was put into the record showing that the victim had, in fact, sustained a "bodily injury." The prosecutor asserts that if defendant had objected, as defendant should have, such evidence would have been presented. I do not doubt it. However, I am constrained to the record as it actually is, and that record does not contain the evidence necessary to score OV 3 at ten points.

I concur.

/s/ Amy Ronayne Krause