

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS JENKINS, JR.,

Defendant-Appellant.

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UNPUBLISHED

December 15, 1998

No. 198851

Detroit Recorder's Court

LC No. 93-007196

Before: Doctoroff, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(b); MSA 28.788(4)(1)(b). On a prior appeal to this Court, defendant's convictions were affirmed, but his sentences were vacated because the trial judge had impermissibly considered defendant's refusal to admit his guilt.<sup>1</sup> Defendant was resentenced before a different judge to concurrent terms of nine to fifteen years in prison. He now appeals from these new sentences as of right. We affirm.

Defendant first contends that at resentencing the court impermissibly double counted his multiple penetrations of his victim when it scored prior record variable 7 and offense variable 12 of the sentence guidelines. Because defendant alleges only a misapplication of guidelines which themselves are without the force of law, absent a showing that such application resulted in a disproportionate sentence, defendant does not state a claim cognizable by this Court, and we are without a basis for review. *People v Raby*, 456 Mich 487, 497; 572 NW2d 644 (1988); *People v Mitchell*, 454 Mich 145, 177; 560 NW2d 600 (1997).

Defendant also alleges that the factual predicate to the scoring of offense variable 2 was either wholly unsupported or materially false. He contends that the victim's explanation of her injuries in the Victim's Impact Statement contained in the presentence investigation report was not supported by the evidence presented at trial and, therefore, the trial court erred by considering these injuries without resolving his challenge to the accuracy of the information. Such a challenge to the factual predicate to a sentence guideline score states a claim cognizable by this Court if the sentence is disproportionate. *Mitchell*, *supra* at 177. When reviewing that determination, we examine the record for any evidence

sufficient to support the scoring. *People v Hernandez*, 428 Mich 1, 3; 503 NW2d 629 (1993); *People v Derbeck*, 202 Mich App 443, 449; 509 NW2d 534 (1993).

Here, the trial court simply indicated that it had the right to consider the victim's impact statement when fashioning an appropriate sentence. Thus, remand for clarification is not necessary. Any possible error in the sentencing court's failure to resolve the challenge is harmless. *People v Daniels*, 192 Mich App 658, 675; 482 NW2d 176 (1992). The record contains credible evidence that the victim was thrown to the floor and hit her head, which resulted in swelling and an injury to the back of her head. Thus, a factual predicate for the scoring of OV 2 was sufficiently established by the evidence.

Lastly, defendant claims that the sentences imposed are disproportionate. We disagree. The sentences, which are presumptively proportionate because they are within the minimum recommended guidelines' range, *People v Albert*, 207 Mich App 73, 75; 523 NW2d 825 (1994), are proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Affirmed.

/s/ Martin M. Doctoroff

/s/ David H. Sawyer

/s/ E. Thomas Fitzgerald

<sup>1</sup> *People v Jenkins*, unpublished opinion per curiam of the Court of Appeals, issued February 9, 1996 (Docket No. 173898).