STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRANCE LAMON JONES,

Defendant-Appellant.

UNPUBLISHED
February 4, 1997

No. 179816
LC No. 94-049972-FC

Before: Taylor, P.J., and Markey and N.O. Holowka,* JJ.

PER CURIAM.

Pursuant to a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(f); MSA 28.788(2)(1)(f). He was sentenced to serve 300 to 450 months' imprisonment. Defendant appeals as of right from his conviction and sentence. We affirm.

Defendant argues that the trial court abused its discretion in refusing to give his requested jury instructions on the lesser included misdemeanors of assault and battery and aggravated assault. We disagree. In conjunction with its duty to instruct the jury on the applicable law, a trial court must instruct on lesser included offenses of the charged offense if requested by the defendant, if there is an inherent relationship between the charged offense and the requested misdemeanor, if convictions on the lesser offenses are supported by a rational view of the evidence, and if the requested instructions will not result in undue confusion or other injustice. *People v Mills*, 450 Mich 61, 80-81; 537 NW2d 909 (1995); *People v Stephens*, 416 Mich 252, 261-264; 330 NW2d 675 (1982); *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). The trial judge is vested with substantial discretion in determining whether to give the lesser included misdemeanor instruction. *Stephens, supra* at 265.

We find that the trial court did not abuse its discretion in refusing to give the requested instructions. Here, although defendant made a proper request for the misdemeanor instructions, *Stephens, supra* at 261, the charged offenses do not relate to the protection of the same interests, and proof of the misdemeanors would not necessarily be presented in proving the greater offense.

* Circuit judge, sitting on the Court of Appeals by assignment.

This Court has recently addressed a very similar situation and that case is dispositive of the matter at hand. In *People v Corbiere* ___Mich App ___; ___ NW2d ___ (Docket No 188096, issued 11/26/96), defendant was convicted of two counts of third-degree CSC, MCL 750.520d(1)(b); MSA 28.788(4)(1)(b), for raping his wife by means of force or coercion. The issue on appeal was whether the trial court committed reversible error by denying the defendant's request for a jury instruction on the misdemeanor offense of domestic assault. MCL 750.81(2); MSA 28.276(2). *Id.*, slip op at 1.

In holding that domestic assault is not a necessarily included misdemeanor of third-degree CSC, this Court focused on the precise problem the Legislature "sought to countervail" and relied on the fact that the CSC statutes and the assault statutes "were enacted to protect distinct [l]egislative interests." *Id.*, slip op at 2. Thus, the second part of the *Stephens* test could not be satisfied.

Additionally, the *Corbiere* court concluded that the proofs relative to the misdemeanor offense are not generally shown in proving the CSC charge. *Id.*, slip op at 3. The same analysis applies here: the CSC offenses are general intent crimes proved by showing the defendant committed a proscribed sexual act, *People v Pettway*, 94 Mich App 812, 817; 290 NW2d 77 (1980); see also CJI2d 20.12(2)(a), 20.15, and 20.24 (1)-(4); see *Langworthy*, *supra* at 645, *People v Brown*, 197 Mich App 448, 450; 495 NW2d 812 (1992), and *People v Perry*, 172 Mich App 609, 623; 423 NW2d 377 (1988), while the misdemeanor assault charges are specific intent crimes proved by establishing either that defendant (1) committed a battery and (2) intended to injure the victim or place the victim in reasonable fear of an immediate battery,[1] MCL 750.81; MSA 28.276, or that defendant (1) tried to physically injure another, (2) intended to injure the victim or make the victim reasonably fear an immediate battery, and (3) as a result of the assault, caused a serious or aggravated injury,[2] MCL 750.81a; MSA 28.276(1). Hence, proof of assault and battery and/or aggravated assault are not necessarily or generally established by showing first-degree or third-degree CSC because unlike CSC, the misdemeanor assaults cannot be proven without establishing criminal intent.

Defendant next argues that his due process rights were violated by a delay of more than eight months between the offense and his arrest. We disagree. The rape occurred in the early morning hours of July 4, 1993. The prosecutor's office authorized a warrant for his arrest on September 29, 1993. Defendant was not arrested until February 22, 1994, when he turned himself in at the request of the investigating officer. Before trial, defendant filed a motion to dismiss the charges against him due to the delay and the trial court denied the motion. In determining whether dismissal is warranted because of pre-arrest delay, a defendant must show substantial prejudice to his right to a fair trial and the prosecution's intent to gain a tactical advantage, and the prosecution must show that any delay was not intended to gain tactical advantage or deliberately prejudice the defendant. *People v White*, 208 Mich App 126, 134; 527 NW2d 34 (1994); *People v Shelson*, 150 Mich App 718, 726-727; 389 NW2d 159 (1986).

Defendant's claim of prejudice stems from the unexpected May 24, 1994, death of the person who had been on desk duty at the motel on the night the incident took place. Defendant claims that this witness would have testified that the victim arrived at the motel five to ten minutes before defendant and

waited for him in the parking lot. At trial, the victim testified that she followed defendant to the motel. Because defendant's defense was consent, the victim's credibility was important to his case. Defendant argues that if he had been brought to trial before the witness's death, the desk clerk's testimony would have bolstered defendant's credibility and weakened the victim's. Although defendant established that he was prejudiced by the delay, we believe that the prosecution also established that the delay was not intended to prejudice the defendant. *White, supra; Shelson, supra.* We agree with the trial court's finding that the police had been trying to locate defendant between the time when the arrest warrant was issued and the date when defendant turned himself in to the police. Indeed, defendant was responsible in part for the delay in that he canceled or failed to appear for at least two appointments with investigating officers. Accordingly, the prosecution met its burden of proving that any delay was not intended to prejudice defendant. Therefore, defendant's motion to dismiss the charges was properly denied. *White, supra* at 135*; Shelson, supra* at 727.

Defendant also argues that he was unfairly prejudiced by the trial court's instruction to the jury on the issue of flight. We disagree. In reviewing a claim that the jury was improperly instructed, we will not reverse a verdict or order a new trial unless, after reviewing the record, it appears to this Court that the error resulted in a miscarriage of justice. MCL 769.26; MSA 28.1096; *People v Hall,* 435 Mich 599, 603-604; 460 NW2d 520 (1990). A miscarriage of justice, or manifest injustice, occurs when an erroneous or omitted instruction pertained to a basic and controlling issue in the case. *People v Johnson,* 187 Mich App 621, 628; 468 NW2d 307 (1991). The defendant normally bears the burden of establishing reversible error stemming from an inappropriate jury instruction. See, generally, *People v Minor,* 213 Mich App 682, 685; 541 NW2d 576 (1995).

The trial court gave the standard jury instruction on flight, CJI2d 4.4. The instruction states that some evidence was presented at trial that defendant ran away after the alleged crime but that it was for the jury to decide whether the evidence was true and, if true, whether defendant ran away for innocent reasons or from a consciousness of guilt. We agree that the trial court erred in giving this instruction at the request of the prosecution and over defendant's objection. Although evidence was presented at trial that defendant left the motel before the victim, there was no evidence presented that defendant hid or feared apprehension. "Mere departure from the scene is insufficient to constitute flight in a legal sense." *People v Hall,* 174 Mich App 686, 691; 436 NW2d 446 (1989). Nevertheless, we find that the error was harmless because it did not result in a miscarriage of justice. *Chatfield, supra.* Any error in giving this instruction did not offend the maintenance of the judicial system and was harmless beyond a reasonable doubt because the instruction permitted the jury to determine defendant's state of mind when he left the motel. *Pickens, supra*. Thus, we find no reversible error.

Finally, defendant argues that the sentence imposed, although within the guidelines range, was disproportionately severe in light of his prior record and current situation. We disagree. When reviewing a claim that a sentence within the sentencing guidelines is disproportionate, this Court will conduct a limited review for abuse of discretion. A sentence constitutes an abuse of the trial court's discretion if it violates the principle of proportionality. *People v Milbourn,* 435 Mich 630, 636; 461 NW2d 1 (1990). A sentence within the minimum sentencing guidelines range is presumptively proportionate, and a defendant must present evidence of unusual circumstances to overcome the

presumption of proportionality. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Cotton*, 209 Mich App 82, 85; 530 NW2d 495 (1995). A sentence within the guidelines could be an abuse of discretion, however, should the sentence be disproportionately severe or lenient. *Milbourn, supra* at 661. For instance, where the circumstances do not place the offender in the most serious class with respect to the particular crime, the trial court is not justified in imposing the maximum penalty. *Id.* at 654.

Defendant's minimum sentence, although at the high end of the range, is within the guidelines' recommended range of 120 to 300 months and is therefore presumptively proportionate. *Cotton, supra*. At his sentencing hearing, defendant informed the judge that he had attended college, held a job, and had only one prior misdemeanor conviction. We have previously found, however, that employment and the lack of a criminal history are not unusual circumstances that overcome the presumption of proportionality. *Id.; People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Further, defendant provides no case support for the proposition that his educational pursuits constituted unusual circumstances. In light of the jury's conclusion that defendant duped the victim into meeting with him so he could commit the rape and the unique facts surrounding this offense and offender, we find that defendant's sentence is proportionate and defendant is not entitled to resentencing.

Affirmed.

/s/ Clifford W. Taylor
/s/ Jane E. Markey
/s/ Nick O. Holowka

[1] See CJI2d 17.2.

[2] See CJI2d 17.6.