

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD LEE GRIFFOR,

Defendant-Appellant.

UNPUBLISHED

April 14, 1998

No. 196605

Recorder's Court

LC No. 95-011662

Before: Gribbs, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). Defendant was sentenced to three to fifteen years for each of the convictions, the two sentences to run concurrently. We affirm.

Defendant first claims that he was denied a fair trial because the jury was kept in close proximity to the complainant and her mother for a substantial period. We disagree. This Court will reverse a trial court's determination that a juror has the ability to render an impartial verdict or that a juror is biased or prejudiced where this Court finds a clear abuse of discretion. *People v Roupe*, 150 Mich App 469, 474; 389 NW2d 449 (1986).

It is well established that error will not be presumed merely because a juror is exposed to prejudicial remarks made by a stranger or a bypasser. *People v Hayes*, 126 Mich App 721, 729; 337 NW2d 905 (1983). Prejudice must be shown, or facts clearly establishing the inference that it occurred from what was said or done. A mere possibility is not sufficient. *People v Nick*, 360 Mich 219, 227; 103 NW2d 435 (1960).

Our review of the record found that after the jury had been selected, the trial court briefly instructed the jury and then took a twenty minute recess before the trial began. After this twenty minute break, defense counsel informed the trial court that the complainant and her mother may have had some contact with the jury in the hallway. The trial court asked the jury, "[d]uring the break was there any discussion in your presence about this case at all?" The jury remained silent. The trial court then inquired, "[d]id you overhear anyone talking about the case or did anyone attempt to talk to you about

the case?” Again, the jury was silent. The trial court then warned the jury about the crowded conditions in the halls and to be careful not to discuss the case with anyone.

Nothing presented at trial established that the jurors were in any way prejudiced by standing near the complainant and her mother in the hallway outside of the courtroom. Actual prejudice or facts clearly establishing an inference of prejudice must be shown to receive a new trial. *Nick, supra*. The trial court did not clearly abuse its discretion in finding that the jurors were impartial.

Defendant also contends that his right to a fair trial was denied because the trial court failed to instruct the jury to ignore any information received from its contact with the complainant and her mother. This issue has not been preserved for appellate review as defendant did not request such a curative instruction below, nor did he object to the trial court’s questioning of the jurors. *People v Sawyer*, 215 Mich App 183, 196; 545 NW2d 6 (1996). Furthermore, the trial court instructed the jurors extensively that they were not to speak with anyone about the case and that the only information they should receive about the case should come from inside of the courtroom. The trial court also instructed the jury again after questioning them about the contact with the complainant and her mother in the hallway. Defendant was not denied a fair and impartial trial.

Defendant’s second issue on appeal is that the trial court used an improper standard in determining whether it should depart downward from the sentencing guidelines’ range. The question of whether the trial court applied the proper standard in sentencing defendant is a question of law which this Court reviews de novo on appeal. *People v Gilmore*, 222 Mich App 442, 448; 564 NW2d 158 (1997).

In sentencing defendant, the trial court incorrectly used the standard for determining whether to depart downward from a statutory minimum sentence, *People v Perry*, 216 Mich App 277, 280-281; 549 NW2d 42 (1996), rather than the standard of proportionality. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). However, any error was harmless as defendant did not present any unusual circumstances at sentencing which would make the sentence he received disproportionate. *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992). Defendant’s sentence is within the guidelines range and is presumed to be neither excessive nor disparate. *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996).

Affirmed.

/s/ Roman S. Gribbs
/s/ Mark J. Cavanagh
/s/ Henry William Saad