

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CRAIG FERGUSON,

Defendant-Appellant.

UNPUBLISHED

February 9, 2001

No. 219698

Wayne Circuit Court

LC No. 98-011692

Before: Zahra, P.J., and Smolenski and Gage, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of unarmed robbery, MCL 750.530; MSA 28.798. He was sentenced as a third habitual offender, MCL 769.11; MSA 28.1083, to a term of 6-30 years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erroneously denied his motion for mistrial. A trial court should only grant a mistrial when an irregularity occurs that prejudices the rights of the defendant and impairs his ability to receive a fair trial. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). This Court reviews a trial court's decision regarding a motion for mistrial for an abuse of discretion. *Id.*

Defendant argues that his motion for a mistrial should have been granted because a prosecution witness revealed that defendant was wanted for a probation violation when police arrested him for the robbery. The record reveals that the prosecutor did not encourage the witness's response, but told the witness twice before trial not to mention the issue. Generally, "an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). Further, as soon as the statement was made, the trial court instructed the jurors to disregard the comment and not to consider it in their deliberations. We conclude that this comment, when viewed in light of the cautionary instruction read by the trial court, did not result in manifest injustice and does not merit reversal of defendant's conviction.

Defendant next argues that resentencing is required because the trial court erroneously believed that the habitual offender statute required it to double the maximum sentence which defendant could have received for the underlying offense of unarmed robbery. The habitual offender statute does not require a trial court to increase a defendant's maximum sentence.

People v Turski, 436 Mich 878; 461 NW2d 366 (1990). Rather, when sentencing an habitual offender, a trial court must exercise its discretion in setting the maximum sentence. *Id.* This Court has held that resentencing is required when a trial court mistakenly believes that doubling a defendant's sentence is mandatory, rather than discretionary. *People v Mauch*, 23 Mich App 723, 730; 179 NW2d 184 (1970). However, *Mauch* is distinguishable from the present case because the trial court never stated that it lacked discretion over defendant's maximum sentence. *People v Beneson*, 192 Mich App 469, 471; 481 NW2d 799 (1992). We find nothing in the record indicating that the trial court abdicated its discretionary role in sentencing defendant. On the contrary, the trial court articulated appropriate reasons for defendant's sentence and exercised its discretion without abuse.

Defendant next argues that the sentence imposed was disproportionate to the offender and the severity of the offense. This Court reviews the sentence imposed on an habitual offender for an abuse of discretion. *People v Hansford (After Remand)*, 454 Mich 320, 323; 562 NW2d 460 (1997). Because the statutory maximum for the underlying felony of unarmed robbery was fifteen years, MCL 750.530; MSA 28.798, the third habitual offender statute provides for a maximum sentence of thirty years. MCL 769.11; MSA 28.1083. A trial court does not abuse its discretion by imposing a sentence within the statutory limits established by the Legislature when an habitual offender's underlying felony, in the context of his previous record, evidences that the defendant has an inability to conform his conduct to the laws of society. *Hansford, supra* at 326. In the present case, the trial court explained that defendant had failed to rehabilitate himself after committing previous offenses. Further, the court considered that defendant had attacked a frail, elderly woman in broad daylight. No unusual circumstances exist in this case to overcome the presumption that the sentence was proportionate. *People v Harrington*, 194 Mich App 424, 431; 487 NW2d 479 (1992). We find no abuse of discretion.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael R. Smolenski
/s/ Hilda R. Gage