

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS LEROY FULLER,

Defendant-Appellant.

UNPUBLISHED

November 17, 2005

No. 255961

Tuscola Circuit Court

LC No. 03-008864-FH

Before: Smolenski, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendant was convicted by a jury of fourth-degree criminal sexual conduct (CSC), MCL 750.520e, resisting and obstructing a law enforcement officer (2 counts), MCL 750.81d(1), and possession of marijuana, MCL 333.7403(2)(d). He was sentenced as a fourth habitual offender, MCL 769.12, to 5-1/2 to 15 years' imprisonment for the CSC and resisting and obstructing convictions, plus 365 days in jail for the marijuana conviction. He appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. FACTS

Defendant's convictions arise from incidents in which he fondled the breast of a convenience store clerk and then resisted and obstructed arrest when apprehended by the police officers who responded to the CSC complaint.

At the start of his trial, defendant requested that he be appointed a new attorney because the original attorney had allegedly only consulted with him for five minutes to formulate a defense. This request was granted. The trial court recessed the beginning of trial for approximately one-and-a-half hours to allow new counsel to speak with defendant. After the recess, defense counsel moved to adjourn the trial in order to give her more time to prepare a defense. The motion was denied. Defense counsel then moved for an order in limine prohibiting the prosecution witnesses from mentioning defendant's parole status or that he had an active warrant at time of the arrest. The trial court ordered that the prosecutor could elicit testimony about the warrant but not that defendant was on parole at the time. Subsequently, during the direct examination of one of the arresting police officers, it was inadvertently revealed that defendant was on parole. The court immediately ordered that the testimony be stricken and instructed the jury to disregard it. During the next recess, defense counsel moved for a mistrial. The court took the motion under advisement but ultimately denied it. Instead, the court prepared

a special verdict form that was given to the jury after it had rendered its decision on the charges to determine whether defendant's parole status affected the verdict. The form indicated that the jury did not consider defendant's parole status during its deliberations and that its verdict was not affected in any way by that information.

During sentencing, the trial court exceeded the upper range of the recommended minimum sentencing range of 46 months and imposed minimum sentences of 66 months. The court reasoned that defendant's initial flight from officers and resistance to arrest exhibited a callousness toward law enforcement that could have escalated into a threat to public safety, defendant fondled the breast of a woman who was eight months pregnant, and the CSC offense occurred in a public place and was therefore particularly brazen.

II. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant first claims he was denied the effective assistance of counsel because the trial court only gave newly appointed counsel approximately one-and-a-half hours to confer with him before the beginning of trial. We disagree.

A. Standard of Review

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.* Because there was no *Ginther*¹ hearing held in the trial court, this Court's review is limited to mistakes that are apparent from the lower court record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

B. Analysis

In order to show that counsel was ineffective, defendant must show that counsel's "representation fell below an objective standard of reasonableness," *Strickland v Washington*, 466 US 668, 688; 104 S Ct 2052; 80 L Ed 2d 674 (1984), and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Defendant bears a heavy burden to show that counsel was ineffective, as effectiveness of counsel is presumed. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant cannot overcome the presumption that his counsel was effective or demonstrate that he was prejudiced by counsel's limited time to prepare. Defendant's trial attorney fully participated in jury voir dire, effectively cross-examined the prosecution's witnesses, presented defendant's witnesses, and argued for acquittal before the jury. We also note that defendant was acquitted of two other charges of resisting and obstructing. Moreover, the case was factually very simple and straightforward. Therefore, we

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

conclude that defendant has not overcome the presumption that trial counsel was effective. *People v Noble*, 238 Mich App 647, 661-662; 608 NW2d 123 (1999).

III. DENIAL OF MOTION FOR MISTRIAL

Defendant next claims that the trial court abused its discretion in denying his request for a mistrial after a prosecution witness testified regarding defendant's parole status at the time of his arrest. We disagree.

A. Standard of Review

A trial court's decision to deny a motion for a mistrial is reviewed for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will or a defiance of judgment. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

B. Analysis

We conclude that the mention of defendant's parole status by a witness did not merit a mistrial in this case. A motion for a mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs the defendant's ability to obtain a fair trial. *People v Griffis*, 218 Mich App 95, 100; 553 NW2d 642 (1996). There was no evidence in this case that the prosecutor intentionally violated the order in limine by attempting to elicit information that defendant was on parole. Rather, the prosecutor merely asked the police officer, "What was the purpose of the call [to the convenience store]." Moreover, the trial court immediately ordered that the answer be stricken from the record and instructed the jurors to disregard the testimony. To further protect defendant's due process rights, the court prepared a special verdict form to ensure that defendant's parole status played no part in the jury's deliberations or verdict. Finally, defendant himself testified that he was on parole on direct examination. Therefore, we conclude that the trial court did not abuse its discretion in denying defendant's motion for a mistrial. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001).

III. DEVIATION FROM SENTENCING GUIDELINES

Defendant finally claims that the trial court erred in departing from the recommended minimum range of the sentencing guidelines. We disagree.

A. Standard of Review

Appellate review of a sentence imposed under the guidelines is limited to determining whether the sentence was imposed within the appropriate guidelines range and, if not, whether the departure from the range was based upon a substantial and compelling reason as articulated by the trial court. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231.

B. Analysis

A court may depart from the sentencing guidelines range if it has a substantial and compelling reason to do so, and it states on the record the reasons for the departure. MCL

769.34(3); *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). Factors meriting departure must be objective and verifiable, must keenly attract the court's attention, and must be of considerable worth. *Babcock*, *supra* at 257-258. Defendant's excessive efforts in resisting arrest, his belligerent conduct and threats against the officers, and the fact that he brazenly fondled the breast of a woman who was eight months' pregnant in public were objective and verifiable factors that the trial court properly considered. *Hegwood*, *supra* at 439. These factors provided substantial and compelling reasons for the trial court to depart from the guidelines recommended sentencing range of 5 to 46 months and impose minimum sentences of 66 months. *Babcock*, *supra* at 264.

Affirmed.

/s/ Michael R. Smolenski

/s/ Bill Schuette

/s/ Stephen L. Borrello