

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN RILEY JONES,

Defendant-Appellant.

UNPUBLISHED

May 21, 1999

No. 206262

Jackson Circuit Court

LC No. 96-075122 FH

Before: Wilder, P.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of gross indecency, MCL 750.338b; MSA 28.570(2), for having sexual intercourse with his wife in the visitors room of the Cotton Correctional Facility. The trial court sentenced defendant as an habitual offender, third offense, MCL 769.11; MSA 28.1083, to five to ten-years' imprisonment. We affirm.

I

Defendant first argues that his sentence is excessive. A trial court's imposition of a particular sentence is reviewed on appeal for an abuse of discretion, which will be found where the sentence imposed does not reasonably reflect the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

We conclude that defendant's sentence is proportionate to the seriousness of the circumstances surrounding the offense and the offender. See *id.* The present conviction constitutes defendant's fourth sex-related offense, and the record reveals that defendant previously had sexual intercourse with his wife in public at another correctional facility. Moreover, a trial court does not abuse its discretion in giving a sentence within the statutory limits established by the Legislature when an habitual offender's underlying felony, in the context of his previous felonies, evidences that the defendant has an inability to conform his conduct to the laws of society. *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997).

II

Next, defendant argues that the trial court improperly scored offense variable 9. However, defendant has failed to present a legally cognizable claim. A putative error in the scoring of sentencing guidelines is not a basis upon which an appellate court can grant relief. *People v Raby*, 456 Mich 487, 499; 572 NW2d 644 (1998); *People v Mitchell*, 454 Mich 145, 175-178; 560 NW2d 600 (1997).

III

Defendant next raises two claims based on the 180-day rule, MCL 780.131; MSA 28.969(1).

A

Defendant claims that the prosecutor failed to bring him to trial within 180 days of his arrest. However, the statutory 180-day period does not begin to run at the time of a defendant's arrest. See *People v Hall*, 147 Mich App 289, 291; 383 NW2d 181 (1985). Accepting the prosecutor's assertion that defendant was charged on December 12, 1995,¹ the 180-day period began to run on that date. After 107 days, the trial court, in an opinion dated March 29, 1996, explicitly quashed the gross indecency information, tolling the running of the 180-day period.² Following the prosecutor's successful appeal to this Court, the trial court again had jurisdiction over the gross indecency charge on April 25, 1997.³ Defendant's trial began on June 25, 1997, sixty-one days later. Therefore, defendant was brought to trial after 168 days, and there was no violation of the 180-day rule.

B

Defendant also asserts that the 1989 amendment to the 180-day rule, which provided that the rule did not apply to criminal offenses committed by prison inmates, is unconstitutional because it changed the purpose of the statute. However, because defendant was brought to trial within 180 days and the rule therefore was not violated, resolution of this issue is unnecessary. See *Taylor v Auditor General*, 360 Mich 146, 154; 103 NW2d 769 (1960). Nevertheless, we briefly note that the Supreme Court has held that, even prior to the amendment of the statute, the 180-day rule did not apply to new offenses committed by a prison inmate. See *People v Smith*, 438 Mich 715, 717-718 (Levin, J.), 719 (Boyle, J.); 475 NW2d 333 (1991).

IV

Next, defendant contends that consensual sexual intercourse between a husband and wife cannot constitute gross indecency. However, this Court has already held otherwise. See *People v Jones*, 222 Mich App 595, 604; 563 NW2d 719 (1997). This issue is thus governed by the law of the case doctrine, which bars reconsideration of an issue by an equal or subordinate court during subsequent proceedings in the same case. *People v Mitchell (On Remand)*, 231 Mich App 335, 340; 586 NW2d 119 (1998). Accordingly, defendant's only option is an application for leave to appeal to our Supreme Court.

Defendant also maintains that the statute is constitutionally void for vagueness. However, beyond the bare assertion, defendant does not explain how the statute is void for vagueness. Because defendant has failed to argue the merits of this allegation of error, this issue is not properly presented for review. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

V

Defendant further argues that the evidence against him was insufficient to support his conviction. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of a crime. *People v McKenzie*, 206 Mich App 425, 428; 522 NW2d 661 (1994).

Corrections officer Scott Grow testified that he was working in the visiting room at the Cotton Correctional Facility on April 1, 1995. Grow noticed a desk shaking and saw defendant making “thrusting” motions up against it. Grow went around the desk and saw defendant “hunched over” a woman whom Grow subsequently realized was defendant’s wife. Defendant’s wife was bent over, and her skirt was hiked up. Grow could see defendant’s erect penis several inches from and pointing directly at his wife’s exposed vagina. As Grow approached, defendant pulled up his pants and attempted to conceal his penis. Grow observed a moisture on defendant’s penis, which continued to protrude from defendant’s pants as Grow escorted defendant from the visiting room. Grow testified that although he never saw penetration between the couple, it appeared to him that defendant was pulling his penis out of his wife’s vagina. Viewing Grow’s testimony in a light most favorable to the prosecution, we conclude that there was sufficient evidence presented to permit a rational trier of fact to find that the essential elements of the crime were proven beyond a reasonable doubt. See *Wolfe*, *supra*.

Defendant argues that Grow’s account of the incident cannot be believed because of “testimonial inconsistencies.” However, questions of credibility are left to the trier of fact and will not be resolved anew by this Court. *People v Givans*, 227 Mich App 113, 123-124; 575 NW2d 84 (1997).

Defendant also alleges that the prosecutor withheld exculpatory evidence, namely, a videotape of the visitors room made on the day of the incident. Defendant further complains that his request for DNA analysis was denied. We find no error requiring reversal. Grow testified that it was his understanding that the area of the visiting room that defendant was occupying at the time of the incident was not captured on the videotape. Defendant has presented no contradictory evidence. Furthermore, defendant does not explain how DNA analysis would have benefited him.

VI

Defendant next asserts that he was denied the effective assistance of counsel at trial. A defendant that claims that he has been denied the effective assistance of counsel must establish that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant alleges that his trial counsel was ineffective for failing to secure favorable witnesses from the visiting room and for failing to secure the videotape of the visiting room, which defendant asserts would exonerate him. However, defendant has neither identified the witnesses counsel should have called nor presented any evidence that their testimony would have been favorable to him. Furthermore, defendant has presented no evidence that the videotape would have exculpated him. Defendant has therefore failed to establish that, if not for counsel's alleged deficiencies, the outcome of the proceedings would have been different. See *Pickens*, *supra*.

VII

Finally, defendant argues that being convicted under the gross indecency statute, after defendant was punished pursuant to an administrative hearing by the Michigan Department of Corrections, was a violation of his constitutional right against twice being put in jeopardy for the same act or wrong. US Const, Am V; Const 1963, art 1, § 15. A double jeopardy issue constitutes a question of law that is reviewed de novo on appeal. *People v Lugo*, 214 Mich App 699, 705; 542 NW2d 921 (1995).

Defendant's argument has no merit. Administrative punishment of a defendant by the internal process of the Michigan Department of Corrections does not bar a criminal conviction of a defendant arising out of the same act because an internal administrative proceeding does not constitute a criminal prosecution in a court of justice. *People v Bachman*, 50 Mich App 682, 684; 213 NW2d 800 (1973). Federal courts have likewise rejected this argument. See, e.g., *United States v Galan*, 82 F3d 639, 640 (CA 5, 1996). Defendant's prosecution did not violate his right to be free from double jeopardy.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra

¹ The date of the complaint and the earliest date on the warrant are both December 26, 1995. For the purpose of our calculations, however, we will use December 12, 1995, as it is provided by the prosecutor and gives the benefit of fourteen days to defendant.

² In his appellate brief, the prosecutor states that the 180-day period was tolled as of April 18, 1996, when the order incorporating the March 29, 1996, opinion was entered. However, because the prosecutor could not have taken good-faith action toward readying the case for trial in the interim, *People v Bell*, 209 Mich App 273, 278; 530 NW2d 167 (1995), we conclude that the 180-day period was tolled as of March 29, 1996.

³ This Court reinstated the gross indecency charge in an opinion issued April 4, 1997. *People v Jones*, 222 Mich App 595, 604; 563 NW2d 719 (1997). Defendant, following this Court's remand order, had 21 days to file a timely application for leave to appeal. MCR 7.302(C)(4)(a). This Court's opinion becomes effective only after the running of the time for filing of a timely application for leave to appeal to the Supreme Court. MCR 7.215(E)(1)(a). Therefore, the 180-day period continued to be tolled for 21 days after the date of this Court's decision.