

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAWRENCE BIGBY,

Defendant-Appellant.

UNPUBLISHED

March 12, 2002

No. 226308

Wayne Circuit Court

LC No. 99-007375

Before: Whitbeck, C.J., and Markey and K. F. Kelly, JJ.

PER CURIAM.

Defendant appeals of right from his jury trial convictions for two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a). Originally, the trial court sentenced defendant to 210 to 300 months' imprisonment for both counts. This Court remanded to allow defendant to file a motion for resentencing because the original sentences violated the two-thirds rule enunciated in *People v Tanner*, 387 Mich 683, 689-690; 199 NW2d 202 (1972). At resentencing, the trial court resentenced defendant to 198 to 300 months' imprisonment. We affirm.

I. Basic Facts and Procedural History

On July 16, 1999, the twelve-year-old victim went with his grandmother to visit his great-grandmother at her apartment complex. At approximately 3:00 p.m., the victim's great-grandmother asked him to go to the laundry room and retrieve her clothes from the dryer. Shortly after the victim arrived at the laundry room, defendant walked in. While the victim retrieved his great-grandmother's clothes, defendant began to ask him questions. Thereafter, defendant took the victim by the hand, directed him into a utility room, and sexually assaulted him.

After the victim disappeared for ten or fifteen minutes, the victim's grandmother proceeded into the laundry room where she observed the victim emerge from the utility room. The victim's grandmother then peered into the utility room wherein she observed an unidentifiable figure. After she and the victim left the laundry room and they began walking down the hallway, the victim advised of defendant's conduct. The victim's grandmother then turned around and proceeded back into the laundry room where defendant stood folding his clothes. At this time, and very shortly after the assault occurred, the victim's grandmother confronted defendant in the victim's presence. When the police arrived, the victim was shown a

photograph of defendant for identification purposes prior to defendant's arrest. The victim testified that the police actually had two photographs, but he was shown only one.

The jury convicted defendant on two counts of first-degree criminal sexual conduct. Defendant appeals of right and we affirm.

II. The *Tanner* Rule

First, defendant contends that his sentence violated the two-thirds rule enunciated in *Tanner, supra*, when it originally sentenced defendant to 210 to 300 months' imprisonment. In *Tanner*, the court held that any sentence providing for a minimum that exceeds two-thirds of the maximum is an improper sentence violative of the intermediate sentencing act. *Id.* at 689. In the case at bar, the trial court's original sentences violated the two-thirds rule by precisely ten months.

On remand, the trial court resentenced defendant to a minimum of 198 months' imprisonment on both counts. We find this sentence imposed on remand complies with the rule enunciated in *Tanner, supra*.

II. Ineffective Assistance of Counsel

Defendant also argues that he was denied the effective assistance of counsel because his attorney did not move to suppress the victim's in-court identification of defendant. To set forth a viable claim for the ineffective assistance of counsel, defendant must establish deficient performance by counsel and a reasonable probability that but for that deficiency, the result would have been different. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999) citing *People v Johnson*, 451 Mich 115; 545 NW2d 637 (1996). Pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), claims for ineffective assistance of counsel should be raised by a motion for a new trial or evidentiary hearing. In the case at bar, defendant brought a motion for a new trial and raised this issue. Ultimately, the trial court denied defendant's motion.

Defendant maintains that by showing the victim one photograph of defendant before defendant's arrest, the police impermissibly tainted the victim's subsequent in-court identification and that trial counsel was ineffective by failing to move to suppress that identification. We disagree.

Photographic identification procedures violate a defendant's due process rights if they are so impermissibly suggestive as to give rise to a substantial likelihood that there will be a misidentification. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). An improper suggestion may arise when a witness is shown only one person or a group in which one person is singled out in some way. *Id.* In this case, it is unclear from the record whether the police had one or two photographs of defendant; however, the record is clear that the police only showed the victim one photograph. This alone may be impermissibly suggestive; however, our inquiry does not end there. We must further determine whether there was an independent basis for the in-court identification. *Id.* at 114-115.

The independent basis inquiry requires a factual analysis, and the validity of a witness' in-court identification must be viewed in light of the totality of the circumstances. *Gray, supra*

at 114-115. There are several relevant factors to consider when examining the totality of the circumstances, such as the opportunity for the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of a prior description, the witness' level of certainty at the pretrial identification procedure, and the length of time between the crime and the identification. *People v Colon*, 233 Mich App 295, 304-305; 591 NW2d 692 (1998).

In this case, the witness was the victim of a sexual assault. Although the victim never observed defendant before the incident, defendant engaged in a conversation with the victim wherein defendant asked him several questions. Additionally, the victim gave a general description of the perpetrator noting in particular that the perpetrator had braids. Finally, the incident occurred at 3:00 p.m., and the witness indicated that the main portion of the laundry room was lighted. Thus, there was an independent basis for the witness' in-court identification of defendant. In view of the foregoing, we conclude that defendant has not overcome the onerous presumption of effective assistance. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Moreover, defendant failed to demonstrate that but for trial counsel's alleged deficiency, the result would have been different. See *Hoag, supra* at 6.

III. The Articulation Requirement

Finally, defendant contends that the trial court abused its discretionary authority by failing to articulate the reasons for the sentence imposed. We disagree.

Defendant is correct that the trial court must articulate its reasons for imposing a sentence on the record at the time of sentencing. *People v Triplett*, 432 Mich 568, 570-571, 573; 442 NW2d 622 (1989). The purpose of the articulation requirement is to aid appellate review and to avoid injustice on the basis of error at sentencing. *People v Terry*, 224 Mich App 447, 455; 569 NW2d 641 (1997). A trial court's express reliance on the sentencing guidelines when passing sentence will satisfy the articulation requirement. *People v Lawson*, 195 Mich App 76, 77; 489 NW2d 147 (1992). In addition, the articulation requirement may also be satisfied if it is clear from the context of the remarks preceding the sentence that the trial court relied on the sentencing guidelines. *Id.* at 78.

In the instant case, a review of the record reveals that the trial court ensured that the scoring of the offense variables were proper under the guidelines. Indeed, defense counsel indicated that the scoring was in fact proper. Thereafter, defense counsel requested that the trial court sentence defendant at the low end of the guidelines. The prosecution then asked the court to sentence defendant at the high end of the guidelines. These remarks immediately preceded the sentences imposed by the trial court.

This case is factually identical to *Lawson*. In that case, this Court held that the trial court satisfied the articulation requirement where the trial court imposed sentence immediately following the prosecutor's request for a sentence at the high end of the guidelines and defense counsel's ensuing request for sentence at the low end of the guidelines. *Lawson, supra* at 78. Further, at resentencing, the trial court indicated that the original sentence was based on the guidelines which also satisfied the articulation requirement. On the record here before us, we find that the trial court satisfied the articulation requirement.

Affirmed.

/s/ William C. Whitbeck

/s/ Jane E. Markey

/s/ Kirsten Frank Kelly