

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DWAYNE ANTHONY JOHNSON,

Defendant-Appellant.

UNPUBLISHED

July 19, 1996

No. 174397

LC No. 93-0003414-FH

Before: Murphy, P.J., and O'Connell and M.J. Matuzak,* JJ.

PER CURIAM.

Defendant was charged with two counts of first-degree criminal sexual conduct (CSC-1), MCL 750.520b; MSA 28.788(2). The jury found defendant guilty on one count of CSC-1 and one count of second-degree criminal sexual conduct (CSC-2), MCL 750.520c; MSA 28.788(3). The trial judge sentenced defendant to life imprisonment for the CSC-1 conviction concurrent with a term of 15 to 22½ years' imprisonment for the CSC-2 conviction. Defendant appeals as of right from his convictions and sentences. We affirm.

I

Defendant first argues that his right to a fair trial was infringed by the trial court's jury instructions that allowed the jury to convict him of CSC-1 on less than a unanimous verdict. We disagree. This Court reviews the jury instructions in their entirety to determine whether reversal is warranted. *People v Moldenhauer*, 210 Mich App 158, 159; 533 NW2d 9 (1995). This Court will not find error if the instructions, when taken as a whole, sufficiently protect the defendant's rights. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Our review of the jury instructions given below shows that defendant's right to a unanimous verdict was protected when they were read as a whole.

III

* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant argues next that his sentences are disproportionate. We disagree. In Michigan, a defendant's sentence must be proportionate to the seriousness of the crime and the defendant's prior criminal history. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990). To ensure proportionality, our Supreme Court promulgated sentencing guidelines and made their use mandatory. *People v Brown*, 171 Mich App 401, 403; 429 NW2d 667 (1988). The trial court scored defendant's CSC-1 conviction at a level of III-D. The guidelines' range for this score is fifteen to thirty years or life. Michigan Sentencing Guidelines (2d ed), p 47. Because defendant's life sentence falls within the guidelines' range, it is presumed to be neither excessive nor disparate. *People v Albert*, 207 Mich App 73, 75; 523 NW2d 825 (1994).

Furthermore, our review of the record shows that the life sentence is appropriate under the circumstances. Defendant forced two minor males to sexually assault the female victim. Additionally, defendant has a long criminal history. Moreover, defendant was on parole for a sexually oriented crime that he had committed in Indiana. For all these reasons, we find that the life sentence imposed upon defendant by the trial court fits both the offense and the offender. Correspondingly, we find defendant's life sentence to be proportionate. *People v Eberhardt*, 205 Mich App 587, 591; 518 NW2d 511 (1994).

Nevertheless, defendant asserts that the trial court improperly set his sentence at life after finding that it would have found defendant guilty on two counts of CSC-1. We disagree. The trial court merely noted that it would have found defendant guilty on two counts of CSC, but it had to defer to the jury's decision that defendant was guilty of only one count. Specifically, the trial court stated that it was making this notation to show that defendant's dissatisfaction with his trial attorney was unwarranted. Because defendant's assertion has no factual basis, it is meritless.

Similarly, defendant argues that his sentence for his CSC-2 conviction is disproportionate. We need not consider this proportionality challenge because it concerns the lesser of the two convictions. *People v Sharp*, 192 Mich App 501, 506; 481 NW2d 773 (1992).

III

Defendant argues next that his conviction of CSC-2 must be vacated on the ground that this conviction violates his right to be free from double jeopardy because the CSC-2 conviction was based upon the same occurrence as the conviction for CSC-1. Although defendant did not raise the double jeopardy issue below, we will still review the issue because it involves a significant constitutional question. *People v Lugo*, 214 Mich App 699, 705; 542 NW2d 921 (1995). A double jeopardy issue is a question of law that is reviewed de novo on appeal. *People v White*, 212 Mich App 298, 304-305; 536 NW2d 876 (1995).

Both the United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15. We note that defendant's argument is based upon the multiple punishment for the same offense branch of this right. The purpose

of this branch is to protect the defendant's interest in not enduring more punishment than was intended by the Legislature. *Lugo, supra* at 705-706. The protection is a limitation on the courts and prosecutors, and not on the Legislature's power to define crimes and fix punishments. *Id.* Nevertheless, a double jeopardy inquiry is unneeded in situations where the accused is being punished for two distinct occurrences where one has ended before the second one has begun. *Id.* at 708. In the case at hand, the evidence clearly shows that the assault on the female victim using the first boy ended before the second assault utilizing the other boy commenced. Because the CSC-2 conviction was based upon the second assault, no double jeopardy violation can be found.

IV

Defendant also argues that his right to due process was violated when the prosecutor sought and the circuit court granted a remand to district court so a second preliminary examination could be held to preserve a previously unavailable witness' testimony. We disagree. No person shall be deprived of liberty without due process of law. US Const, Am V; Const 1963, art 1, § 17. Underlying the right of due process are the principles of fair play and fundamental fairness. *Building Owners Ass'n v Public Service Comm*, 131 Mich App 504, 513; 346 NW2d 581 (1984), aff'd 424 Mich 494; 383 NW2d 72 (1986). The process due in criminal cases depends on the facts in each case. *In re Meissner*, 358 Mich 696, 698; 101 NW2d 243 (1960). Generally, it requires reasonable notice of the charge and an opportunity to be heard. *People v Eason*, 435 Mich 228, 233; 458 NW2d 17 (1990). Nevertheless, successive prosecutions brought to either harass the defendant or "judge shop" can violate a defendant's due process rights. *People v Peeples*, 178 Mich App 743, 746; 444 NW2d 248 (1989).

Regarding the prosecutor's motion to remand the case at hand for a second preliminary examination, we find no violation of defendant's due process rights. The circuit court followed the proper procedure in such a situation by remanding the matter to the same district court judge. Moreover, the mere fact that the second preliminary examination exposed defendant to greater charges does not automatically equate to harassment. *People v Walls*, 117 Mich App 691, 698; 324 NW2d 136 (1982). We find this statement of the law to be especially true here because the increased charges stemmed from the additional testimony adduced at the second preliminary examination. Last, the illness of defendant's first trial counsel does not change this evaluation.

In respect to the circuit court's remand of the matter to district court, we likewise find that no violation occurred. A circuit court may remand an action to district court to enable the prosecution to present additional evidence without making a finding that the district court abused its discretion in binding over the defendant. *People v Staffney*, 187 Mich App 660, 662; 468 NW2d 238 (1991). Clearly, the remand in question falls within this rule.

V

Defendant next argues that his right to a fair trial was violated by his first trial counsel's ineffective assistance when he failed to move to suppress defendant's statement to the police. We disagree. This Court reviews de novo the record below to determine whether the defendant was prejudiced by the alleged ineffective assistance of counsel as to deprive the defendant of a fair trial. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). Because defendant failed to move for a new trial or for an evidentiary hearing, this Court's review is limited to errors apparent on the record. *People v Moseler*, 202 Mich App 296, 299; 508 NW2d 192 (1993).

Contrary to defendant's assertion, an attorney's failure to move for a hearing on the voluntariness of a statement does not automatically equate to ineffective assistance. *People v Means (On Rem)*, 97 Mich App 641, 647-648 n 1; 296 NW2d 14 (1980). To establish a claim that the assistance of one's counsel was ineffective, the defendant must first show that counsel's assistance fell below the objective standard of reasonableness. *Barclay, supra* at 672. In other words, the defendant must overcome the presumption that his counsel's actions were the product of sound trial strategy. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). Our review of the record shows that defendant cannot overcome this presumption. Defendant merely challenged the making of the statement. In such a case, the jury must decide whether the defendant indeed made the statement. *People v Neal*, 182 Mich App 368, 371; 451 NW2d 639 (1990). This fact question rendered any motion futile. We do not require defense counsel to make such futile motions. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). The assistance of defendant's trial counsel was not ineffective.

Affirmed.

/s/ William B. Murphy

/s/ Peter D. O'Connell

/s/ Michael J. Matuzak