

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROSCOE FRANKLIN CUMBERLAND,

Defendant-Appellant.

UNPUBLISHED
October 30, 1998

No. 200280
Ingham Circuit Court
LC No. 96-070116 FC

Before: Talbot, P.J., and McDonald and Neff, JJ.

PER CURIAM.

Defendant appeals as of right from a conviction of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(f); MSA 28.788(2)(1)(f), and assault with intent to do great bodily harm less than murder (assault GBH), MCL 750.84; MSA 28.279. The trial court sentenced defendant to 210 to 480 months for his CSC I conviction and 72 to 120 months for his assault GBH conviction. We affirm.

On appeal, defendant first argues that the trial court erred in denying his request for a jury instruction on aggravated assault as a lesser included misdemeanor offense to the charge of assault GBH. We disagree. The decision whether to give a requested instruction on a lesser misdemeanor offense is a matter of discretion for the trial court and is reviewed on appeal for an abuse of discretion. *People v Steele*, 429 Mich 13, 21-22; 412 NW2d 206 (1987). The failure to give such an instruction constitutes an abuse of discretion if a reasonable person would find no justification or excuse for the ruling made. *People v Malach*, 202 Mich App 266, 276; 507 NW2d 834 (1993).

Among the several conditions that must be satisfied before a defendant is entitled to an instruction on a lesser misdemeanor offense is the requirement that the requested misdemeanor offense be supported by a rational view of the evidence adduced at trial. *People v Stephens*, 416 Mich 252, 262; 330 NW2d 675 (1982). Thus, at a minimum, there must be sufficient evidence to justify a conviction of the lesser misdemeanor offense. *Id.* An essential element of aggravated assault is the infliction of a “serious or aggravated injury” on the victim.¹ See MCL 750.81a; MSA 28.276(1). A serious or aggravated injury is a “substantial bodily [physical] injury or injury

impairment of any bodily part.” *People v Brown*, 97 Mich App 606, 611; 296 NW2d 121 (1980), quoting CJI 17:3:01; see also CJI2d 17.6. In this case, the evidence indicated that the beatings inflicted on the victim resulted in bruises, swelling, and muscular tightness. These injuries were not the sort that required immediate medical treatment, or caused disfigurement or impairment of the victim’s body or health. Cf. *Brown, supra* at 611. Accordingly, a rational view of the evidence adduced at trial would not support an instruction on aggravated assault, and, therefore, the trial court did not abuse its discretion in denying defendant’s request.²

Defendant next argues that his 210 month minimum sentence for the CSC I conviction was disproportionately severe. We disagree. Sentencing decisions are subject to review by this Court on an abuse of discretion standard. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). A sentence constitutes an abuse of the trial court’s discretion if it violates the principle of proportionality. The principle of proportionality requires sentences to be “proportionate to the seriousness of the circumstances surrounding the offense and the offender.” *Id.* at 636.

In this case, defendant’s minimum sentence was within the range recommended by the sentencing guidelines. A sentence within the sentencing guidelines is presumptively proportionate, and can only be disproportionate if unusual circumstances exist. See *id.* at 661; *People v Rivera*, 216 Mich App 648, 652; 550 NW2d 593 (1996). If a defendant believes that such “unusual circumstances” exist, the defendant must present those circumstances in open court to be considered by the sentencing judge before sentencing. *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992). Because defendant failed to do so in this case, this issue has not been preserved for appeal. *Id.* at 506. In any event, given the circumstances of the offense, we would not hold that the trial court abused its discretion.

Affirmed.

/s/ Michael J. Talbot
/s/ Gary R. McDonald
/s/ Janet T. Neff

¹ Conversely, a conviction of the greater offense of assault GBH does not require a showing of actual injury to the victim. See MCL 750.84; MSA 28.279.

² In denying defendant’s request, the trial court explained that the jury could not rationally find defendant innocent of the greater offense and guilty of the lesser offense, because defendant made a claim of self-defense. We are not convinced that defendant’s claim of self-defense had any bearing on his request for an instruction on aggravated assault. Nevertheless, this Court will not reverse where the trial court reaches the right result for the wrong reason. *People v Brake*, 208 Mich App 233, 242, n 2; 527 NW2d 56 (1994).