STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BOBBY DUANE JOHNSON,

Defendant-Appellant.

UNPUBLISHED
March 3, 1998

No. 195180
Cass Circuit Court
LC No. 95-008392 FH

Before: Hood, P.J., and MacKenzie and Murphy, JJ.

PER CURIAM.

Defendant was convicted by a jury of breaking and entering an unoccupied building with intent to commit larceny, MCL 750.110; MSA 28.305, and unlawful driving away of an automobile, MCL 750.413; MSA 28.645. As an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, he was sentenced to serve enhanced prison terms of twelve to thirty years, and six to fifteen years, respectively. He appeals as of right and we affirm.

This case arises from a break-in at a marina office in which a set of keys was taken and a pickup truck was driven away. State police troopers recovered a boot print inside the office; footwear identification expert James Bullock matched the print to a pair of boots defendant allowed investigating Trooper John Figurski to remove from defendant's trailer.

Defendant first argues that the trial court erred in denying his motion to suppress his boots as evidence. Defendant argues that his consent to turn over the boots was invalid because he was not read his *Miranda*[1] rights, and because his consent was coerced. We find no merit to these claims.

In reviewing suppression hearing findings, this Court will defer to the trial court's findings of historical fact, absent clear error. *People v Cheatham*, 453 Mich 1, 29-30 (Boyle, J.), 44 (Weaver, J.); 551 NW2d 355 (1996); *People v Mendez*, 225 Mich App 381, 382; 571 NW2d 528 (1997). The ultimate question whether a constitutional violation has occurred is a mixed question of fact and law which must be answered independently by the reviewing court after de novo review of the record. *Id.*

Contrary to defendant's arguments, this is not a *Miranda* case. The need for *Miranda* warnings arises from a person's Fifth Amendment privilege against self-incrimination, while the Fourth Amendment protects a person's right to privacy and right to be let alone. In *Schmerber v California*, 384 US 757, 764; 86 S Ct 1826; 16 L Ed 2d 908 (1966), the Court explained the distinction:

> It is clear that the protection of the privilege [against self-incrimination] reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers. On the other hand, both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling "communications" or "testimony," but that compulsion which makes a suspect or accused the source of "real or physical evidence" does not violate it.

Thus, where a consent to search is obtained without invocation of *Miranda* warnings, no possible violation of the Fifth Amendment privilege can arise because a consent to search is not "evidence of a testimonial or communicative nature." *United States v Faruolo*, 506 F2d 490, 495 (CA 2, 1974), citing *Schmerber, supra* at 761; *United States v Payne*, 119 F3d 637, 643 (CA 8, 1997). See also *People v Reed*, 393 Mich 342, 366; 224 NW2d 867 (1975) (absence of *Miranda* warnings does not invalidate a voluntary consent to search); *People v Brown*, 127 Mich App 436, 443; 339 NW2d 38 (1983).

Although *Miranda* warnings are not a prerequisite to a valid consent to search, the absence of warnings is a factor to be considered in determining whether a person's consent to search was voluntary. *Payne, supra* at 643. Whether a consent to search was in fact voluntary, or the product of duress or coercion, is to be determined from the totality of the circumstances. *Schneckloth v Bustamonte*, 412 US 218, 248-249; 93 S Ct 2041; 36 L Ed 2d 854 (1973); *Reed, supra* at 364.

Defendant's claim that his consent was coerced is unavailing. Defendant testified at the suppression hearing that the *sole* reason he consented to the removal of his boots from his trailer was because he believed that if he did not consent, his parole officer, David Willson, would charge him with violating parole by failing to report an earlier conversation with Trooper Figurski. We accord deference to the trial court's specific finding that the testimony of the officer was credible and that defendant's testimony was not credible. See *Brown, supra* at 442-443 (whether valid consent was given is primarily a question of credibility). Moreover, any "threat" by Willson to charge defendant with a parole violation was within the scope of his duty as defendant's parole officer, and does not lend support to defendant's claim that his consent to turn over his boots was coerced.

Defendant also argues -- in the context of his *Miranda* argument -- that he was intimidated by the presence of three troopers and two parole officers when he allowed the boots to be removed from his trailer. Considered in the proper context of whether his consent was voluntarily given, this Court finds no undue coercion. The mere presence of a large number of officers is not coercive per se. *Reed,*

supra at 366. Legitimate reasons were presented for the presence of parole officer David Griffin and Troopers Rodgers and McCarthy. Moreover, according to their suppression hearing testimony -- which the trial court found to be credible -- Rodgers, McCarthy, and Griffin stayed near their vehicles, casually conversing, while Trooper Figurski spoke with defendant near the trailer. Thus, their presence was neither intimidating nor coercive.

In sum, we hold that defendant's *Miranda* rights were not implicated and his consent to turn over his boots was voluntarily given. Accordingly, defendant's motion to suppress was properly denied.

Defendant next argues that, absent the boot evidence, there was insufficient evidence to sustain his conviction. Because we have concluded that the motion to suppress the boots as evidence was properly denied, this issue is without merit.

Defendant also argues that the trial court's instructions to a juror, who expressed doubt about the verdict during polling, coerced the juror into voting to convict. Because defendant did not raise a timely objection to the court's instructions, but rather raised the issue for the first time in a post-trial motion for new trial, appellate relief on this issue is precluded absent a showing of manifest injustice. *People v Seabrooks*, 135 Mich App 442, 454; 354 NW2d 374 (1984); *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). We find no manifest injustice.

Where a jury is polled and one juror expresses disagreement or doubt about the verdict, the jury must be sent out for further deliberations. MCR 6.420(C)(1); *People v Booker*, 208 Mich App 163, 168-169; 527 NW2d 42 (1994); *People v Bufkin*, 168 Mich App 615, 617; 425 NW2d 201 (1988). Here, the trial court properly instructed the jury to resume deliberations once the juror expressed doubt about the verdict. Contrary to defendant's claim, the court did not single out the juror nor did it coerce the juror into aligning his verdict with those of the other jurors. Accordingly, no manifest injustice has been shown.

Defendant next contends that the trial court abused its discretion in refusing the jury's request for transcripts of the testimony. Where, as here, defendant fails to object to the manner in which the trial court responds to a jury's request for review of trial testimony, appellate relief is precluded absent a showing of outcome determinative prejudice. *People v Watroba*, 450 Mich 971; 547 NW2d 649 (1996), citing *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Here, the trial court's response to the jury's request -- which came very quickly after deliberations began and was unreasonably broad -- was appropriate pursuant to MCR 6.414(H) and *People v Howe*, 392 Mich 670; 221 NW2d 350 (1974), and, on this record, defendant has failed to otherwise establish any prejudice. *Grant*, *supra* at 552.

Defendant also claims that the trial court abused its discretion in imposing an enhanced sentence of twelve to thirty years for his breaking and entering conviction. We disagree. The trial court considered proper factors, including defendant's "total inability to live by society's rules" -- as reflected by his extensive criminal record -- and the serious nature of the current offenses. Accordingly, we find no abuse of discretion. See *People v Hansford*, 454 Mich 320, 323-324; 562 NW2d 460 (1997).

Finally, defendant asserts that he was denied effective assistance of trial counsel, and requests this Court to remand for an evidentiary hearing. This Court has denied defendant's two previous motions to remand on the ground that he failed to demonstrate by sufficient affidavit or offer of proof the necessary facts to justify remand for an evidentiary hearing on his claims of ineffective assistance of counsel. MCR 7.211(C)(1)(a). At this point, defendant still has not provided this Court with a sufficient affidavit or offer of proof as to (1) the proposed testimony of Joanna Perez, who was listed in the pretrial notice of alibi defense, but who was not called to testify at trial, (2) the proposed testimony of an expert witness who would rebut the prosecution's footwear expert, or (3) the defendant's presence in front of the jury while in prison clothes. Because defendant's remand request is wholly based on speculation and conjecture, we decline to grant appellate relief on this issue.

Affirmed.

/s/ Harold Hood
/s/ Barbara B. MacKenzie
/s/ William B. Murphy

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).