

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WALTER GARNER,

Defendant-Appellant.

UNPUBLISHED
December 5, 2000

No. 215977
Oakland Circuit Court
LC No. 98-160449-FC

Before: Bandstra, C.J., and Fitzgerald and D. B. Leiber*, JJ.

MEMORANDUM.

Defendant appeals as of right from jury convictions of two counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), one count of second-degree criminal sexual conduct, MCL 750.520c; MSA 28.788(3), and one count of assault with intent to commit sexual penetration, MCL 750.520g; MSA 28.788(7), for which he was sentenced to concurrent prison terms of twenty-five to fifty years', ten to fifteen years', and six to ten years', respectively. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's sole claim on appeal is that the trial court erred in excusing a juror who was unable to attend the second and final day of trial due to car trouble. We review the court's decision for an abuse of discretion. *People v Dry Land Marina, Inc*, 175 Mich App 322, 325; 437 NW2d 391 (1989).

The court was authorized to excuse a juror for "any condition" which, in its opinion, "justifies the excusal" of any juror impaneled to hear the case. MCL 768.18; MSA 28.1041. Defendant contends the juror's car trouble, which might have necessitated a two-hour delay while the juror was picked up and brought to court, did not justify his excusal, citing *United States v Araujo*, 62 F3d 930, 936-937 (CA 7, 1995). We find defendant's reliance on *Araujo* to be misplaced. Transportation problems which will cause a juror to miss at most a day of deliberations do not constitute good cause sufficient for excusing a deliberating juror and allowing the case to be decided by the remaining eleven jurors under FR Crim P 23(b). *Id.*; *United States v Tabacca*, 924 F2d 906, 914-915 (CA 9, 1991). In this case, the jury had not begun deliberations and twelve jurors were available to decide the case. Even if we were

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

disposed to find an abuse of discretion, reversal is not required because defendant has failed to establish that he suffered any prejudice due to the fact that the missing juror was not available to possibly participate in deliberations. *People v Weatherspoon*, 171 Mich App 549, 560; 431 NW2d 75 (1988); *People v Clyburn*, 55 Mich App 454, 457; 222 NW2d 775 (1974).

Affirmed.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Dennis B. Leiber