

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES BONNER,

Defendant-Appellant.

UNPUBLISHED

May 17, 2002

No. 230514

Wayne Circuit Court

LC No. 00-004972

Before: Cooper, P.J., and Hood and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of five counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(A), and two counts of CSC II, MCL 750.520c(1)(A). Defendant also appeals his concurrent sentences of twenty to forty years' imprisonment for each of the five CSC I counts and five to fifteen years' imprisonment for each of the two CSC II counts. His second habitual offender status was reflected in these sentences, pursuant to MCL 777.21(3)(a). We vacate and remand for a new trial.

Defendant argues that he did not effectively waive his right to a twelve-member jury. Specifically, defendant claims his waiver was ineffective because the trial court never informed him of the consequences of refusing to waive it. We review a trial court's determination that a waiver was valid for clear error. *People v Leonard*, 224 Mich App 569, 595; 569 NW2d 663 (1997). However, the meaning of "knowing and intelligent" is a question of law that we review de novo. See *People v Daoud*, 462 Mich 621, 629-630; 614 NW2d 152 (2000).

The Michigan Constitution guarantees the right to trial by a unanimous, twelve-member jury. Const 1963, art I, § 20; *People v Miller*, 121 Mich App 691, 698; 329 NW2d 460 (1982). However, a criminal defendant may stipulate to a jury with fewer than twelve members after being properly advised by the trial court. According to the court rule, a trial court must inform the defendant of the right to have the case decided by twelve jurors and ascertain "that the defendant *understands* the right and that the defendant voluntarily chooses to give up that right as provided in the stipulation." MCR 6.410(A) (emphasis added).

Michigan law permits an oral waiver of the right to a twelve-person jury. See *Attorney General ex rel O'Hara v Montgomery*, 275 Mich 504; 267 NW 550 (1936); *People v Rabin*, 317 Mich 654; 27 NW2d 126 (1947). However, there is no Michigan appellate authority defining exactly what constitutes an "understanding" of the right to a twelve-person jury that is adequate

to support a voluntary waiver. Defendant opines that an effective waiver of a constitutional right must include notice of the consequences of a failure to waive that right in order for the waiver to be knowing and intelligent. This standard comports with our precedents in similar contexts and we find that it is the appropriate standard for an effective waiver of the right to a twelve-member jury.

Waiver of a fundamental constitutional right requires both a specific knowledge of the constitutional right and an intentional decision to abandon the protection. *People v Grimmer*, 388 Mich 590, 598; 202 NW2d 278 (1972), overruled in part on other grounds, *People v White*, 390 Mich 245; 212 NW2d 222 (1973). In *Miller*, *supra* at 704, the defendant's attempted waiver of the right to a unanimous jury was deemed ineffective because he was not informed that a mistrial would result if the jury failed to reach a unanimous verdict. Similarly, in *People v Lawson*, 124 Mich App 371, 374-375; 335 NW2d 43 (1983), an attempted waiver of the right to confront witnesses was not knowing and intelligent where the judge failed to inform the defendant that he could prevent the witness from testifying by telephone and that the jury would be instructed regarding the missing witness.

We also note that our Supreme Court's decision in *Daoud*, *supra* at 642, does not compel a different result. In *Daoud*, the Court held that a valid waiver of one's *Miranda* rights requires only a "very basic understanding" of the rights rather than a comprehension of the consequences of choosing to waive or exercise the rights that the police have properly explained. *Id.* However, as the Court implicitly recognized, a component of a proper police explanation of those rights contains notice of the consequences of a failure to waive them, i.e., "that the state could use what he said in a later trial against him." *Id.* at 643-644; quoting *People v Cheatham*, 453 Mich 1, 29; 551 NW2d 355 (1996).

In the case at bar, defendant was not informed by either the trial court or his attorney that a failure to stipulate would result in a mistrial. Indeed, the judge's remarks seemed to indicate that defendant's only choices were either to stipulate to an eleven-member jury, or insist that the twelfth juror forego her plans to attend a family reunion. This is insufficient information to support a knowing and intelligent waiver of a constitutional right; and accordingly, defendant is entitled to a new trial. See *People v Polhamus*, 59 Mich App 609, 615-616; 230 NW2d 171 (1975).

Because our decision in this case is dispositive, we need not address defendant's remaining allegations of scoring error.

Vacated and remanded for a new trial. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ Harold Hood