STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEPHEN RAVENE TERRY,

Defendant-Appellant.

UNPUBLISHED
May 22, 1998

No. 198656
Genesee Circuit Court
LC No. 96-053719-FH

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

PER CURIAM.

Defendant was convicted following a jury trial of two counts of armed robbery, MCL 750.529; MSA 28.797; one count of first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2); and possession of a firearm during the commission of a felony, MCL 750.227b(1); MSA 28.424(2)(1). Defendant was subsequently found guilty by the court of being an habitual offender, second offense, MCL 769.10; MSA 28.1082. He was sentenced to twenty to fifty years' imprisonment for each of the two armed robbery convictions, ten to thirty years' imprisonment for the home invasion conviction, and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

Defendant first argues that he was denied the effective assistance of counsel and a fair trial because his trial counsel failed to voir dire the jury on the issue of racial bias. Defendant argues that voir dire on the issue was necessary because he was black, but his victims were white and the jury was composed of all white persons. We find that defendant's argument is completely without merit. Defendant's trial counsel specifically asked the potential jurors if there was anyone present who could not put racial issues aside. No one responded. The lack of response indicates that none of the jurors felt that they would have difficulty in determining the issues without regard to race. Because the jury was asked to identify whether they could put aside racial considerations, we find that there was no ineffective assistance of counsel with regard to the jury voir dire. In addition, we note that defendant's substitute counsel corrected defendant's original argument, which was based on two misconceptions. The victims in this case were black, not white. Moreover, the jury was not comprised of all white jurors. Two of the jury's members were black.

Defendant also argues that he was denied a fair trial because the court failed to instruct the jury that its verdict must be unanimous. Because defendant did not request the instruction or object to the instructions as given, this issue has not been preserved for appellate review absent manifest injustice. *People v Johnson*, 187 Mich App 621, 628; 468 NW2d 307 (1991). A review of the record indicates that manifest injustice did not result from the court's failure to give the instruction. The court notified the jury during its introductory comments that the prosecutor had to convince each and every juror of defendant's guilt beyond a reasonable doubt. Thus, there was notice that the verdict must be unanimous . In addition, after the foreman read the verdict, the jury was polled at defense counsel's request. Each member agreed with the verdict as read by the foreman. Thus, the verdict in this case was actually unanimous. We find that the trial court's failure to give a unanimity instruction was not error requiring reversal under the facts of this case. See *People v Sanford*, 402 Mich 460, 480; 265 NW2d 1 (1978).

Defendant also argues that the court erred in refusing to enforce a plea agreement that he had reached with the prosecutor. He claims that there was an agreement that the prosecutor would reduce the charges against him in return for his cooperation in apprehending a third suspect from the armed robbery.

We disagree that the alleged plea agreement should have been enforced. Based on the record, we find that there was no enforceable agreement between the prosecutor and defendant because no agreement was placed on the record and defendant has not provided evidence of a written plea agreement signed by the prosecutor. MCR 2.507(H) requires agreements to be made in open court or reduced to writing in order to be enforceable. This court rule applies in criminal cases. See *People v Mooradian*, 221 Mich App 316, 319; 561 NW2d 495 (1997) and *People v Sawyer*, 215 Mich App 183, 195-196; 545 NW2d 6 (1996). In *Mooradian*, it was applied to a plea bargain agreement.

More importantly, on the first day of trial, the prosecutor informed the court that the parties had tried to reach a plea agreement, wherein defendant's charges would be reduced if he identified and testified against a third suspect, but had not. Defendant did not argue at that time that an enforceable agreement had been reached or that he had complied with the terms of such an agreement. By the time of trial, the police had not found the third suspect, or even obtained his legal name. Defendant certainly never testified against the other suspect and could not have done so where the suspect was not yet identified. Because it is apparent from the record that no enforceable plea agreement was reached and that defendant had not done what would have been required under such an agreement, defendant was not entitled to benefit from any alleged promises. There was no obligation on the part of the prosecutor to reduce the charges, and he did not abuse his power when he refused to do so. Accordingly, the court did not err in failing to enforce the alleged agreement.

In so ruling we note that this case is unlike *People v Jackson*, 192 Mich App 10; 480 NW2d 283 (1991). In *Jackson*, although the agreement was not reduced to writing and was not placed on the record, there was no dispute that there was an agreement between the police, the prosecutor and the defendant. The undisputed agreement was that defendant would not be prosecuted if she cooperated. Moreover, obtaining a written agreement under the circumstances presented in that case, where the police were in pursuit of a suspect at the time the original offer was made, was not a realistic possibility.

Here, unlike the parties in *Jackson,* the parties dispute that there was a plea agreement, and the record confirms that no enforceable agreement was ever reached.

We also find no merit in defendant's contention that because he cooperated with the police and informed them of everything he knew, he was prejudiced. Defendant argues that by cooperating with the police, he limited the defenses available to him at trial. He offers no explanation or authority to support this position, and we can think of none. Moreover, there is no evidence to support his contention that the police were motivated to prosecute him more vigorously simply because he cooperated with them. The police had a strong case, including victim identification, against defendant. There is no evidence that his cooperation made their case stronger, or that statements made by him when cooperating with the police were used against him at trial. Finally, we find no merit to defendant's argument that by giving the police information, which was useless and did not lead to the arrest or trial of any other suspect, he exposed himself to the "well-known dangers of being an informer."

Finally, defendant argues that his sentence was disproportionate. We disagree. A sentence must be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). It is therefore appropriate for the sentencing court to review the nature of the offense and the background of the offender. *Id.* at 651. In addition, because defendant was sentenced as an habitual offender, the sentencing guidelines are irrelevant and will not be considered by this Court in reviewing defendant's sentence. *People v Edgett*, 220 Mich App 686, 694; 560 NW2d 360 (1996). Under the circumstances, we find that the sentence imposed was proportionate to the offense and the offender. *Milbourn*, *supra* at 636.

During the robbery, defendant and the other, unidentified suspect forced their way into the victims' home. At gunpoint, they tied the victims up and forced one of them to undress. The other victim was sexually assaulted by the other suspect during the robbery. Numerous items of personal property were then taken from the home. Defendant had a prior criminal record, with convictions for the possession of illegal drugs, and was on parole at the time he committed the offenses in this case. In addition, he had previously violated probation and parole. Thus, he has demonstrated little potential for rehabilitation.

Affirmed.

/s/ Harold Hood
/s/ Barbara B. MacKenzie
/s/ Martin M. Doctoroff