

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

EDWARD PATRICK BROWN,

Defendant-Appellant.

UNPUBLISHED

December 11, 2001

No. 221313

Grand Traverse Circuit Court

LC No. 98-007737-FC

Before: Wilder, P.J., and Griffin and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted on two counts of third degree criminal sexual conduct, MCL 750.520d(1)(b). Defendant appeals as of right from his conviction and sentence of 15 to 22½ years' imprisonment. We affirm.

Defendant first argues that he was denied his right to a unanimous verdict because the trial court coerced one juror into agreeing with the verdict. We normally review a claim of jury polling irregularity only for manifest injustice, when the defendant has lodged no objection at trial. *People v Lewis*, 98 Mich App 142, 145; 296 NW2d 209 (1980). However, because defendant is alleging a violation of his constitutional rights, we review this unpreserved issue de novo for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999); *People v Echavarria*, 233 Mich App 356, 358; 592 NW2d 737 (1999). We review claims of coerced verdicts case by case, considering all the facts and circumstances, as well as the particular language used by the trial court. *People v Malone*, 180 Mich App 347, 352; 447 NW2d 157 (1989).

Here, defendant claims that one juror expressed disagreement with the verdict, and only expressed consent after the trial court's coercive examination, conducted during the polling of the jury panel. Defendant relies on *People v Booker (After Remand)*, 208 Mich App 163; 527 NW2d 42 (1994), to support his argument that questioning the juror in front of the jury panel was inappropriate and that the trial court thereby denied defendant due process and a fair trial. We disagree that *Booker* is controlling in the instant case. Our review of the record reveals that the disputed juror did not express disagreement with the verdict. Rather, the juror expressed agreement with the verdict three separate times. Further, we find nothing coercive in the trial court's questioning.

Defendant also relies on *Jenkins v United States*, 380 US 445; 85 S Ct 1059; 13 L Ed 2d 957 (1965), and *Malone, supra*, to support his argument that the trial court coerced the juror into agreeing with the verdict. However, neither *Jenkins* nor *Malone* is applicable because the jury in the instant case was able to reach a verdict and because the trial court did not instruct the jury that it must reach a decision. Likewise, defendant's reliance on *People v Engle*, 118 Mich 287, 291; 76 NW 502 (1898), is misplaced because the trial court gave no instruction that could be interpreted as having the effect of persuading the juror to put aside her convictions and be persuaded by the majority. In addition, the trial court did not discourage further deliberations. Defendant has not demonstrated that he was denied his right to a unanimous verdict.

Defendant next argues that his trial counsel rendered ineffective assistance. Because defendant failed to move for a new trial or file a motion for a *Ginther*¹ hearing, our review of this issue is limited to mistakes apparent on the existing record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). Defendant argues that his initial statements to a state police trooper were involuntary and should have been quashed because the state trooper did not read defendant his *Miranda*² rights. Further, defendant argues that his subsequent statements to investigating officers should have been quashed as fruit of the poisonous tree. However, defendant fails to identify which statements should have been quashed. Defendant also fails to cite any authority to support his position that counsel was ineffective for failing to quash defendant's statements and for failing to move for a *Walker*³ hearing challenging those statements.

The record does not reflect that the state police trooper read defendant his *Miranda* rights before he questioned defendant. However, *Miranda* warnings are not required unless the accused is subjected to a custodial interrogation. *People v Hill*, 429 Mich 382, 384; 415 NW2d 193 (1987). Under a totality of the circumstances, we conclude that defendant was not subjected to a custodial interrogation when questioned by the state police trooper. There is nothing in the record to indicate that defendant did not believe he was free to leave. Defendant was not placed under arrest, the length of the questioning was brief, and defendant did not provide inculpatory statements to the state trooper. In fact, each time defendant spoke to the trooper, he denied having sex with the victim. We conclude that trial counsel lacked valid grounds to move to quash any of defendant's statements to the state trooper.

Because defendant has failed to establish that his initial statements to the trooper were improperly obtained, defendant cannot maintain that his subsequent statements to other police officers were fruit of the poisonous tree. Defendant has not established that any statements he made to the police should have been quashed. Thus, trial counsel's failure to move to quash defendant's statements and his failure to object to testimony regarding these statements at trial did not constitute ineffective assistance.

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

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

³ *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

Finally, defendant argues that the trial court abused its sentencing discretion when it imposed a term of 15 to 22½ years' imprisonment. Defendant argues that the sentence is disproportionate to the offenses and the offender, especially because the sentence imposed exceeded the sentence recommended under the guidelines. We note that defendant was sentenced as a second habitual offender, MCL 769.10. The sentencing guidelines do not apply to habitual offenders, and this Court may not consider the guidelines when reviewing the sentence of an habitual offender. *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). This Court reviews an habitual offender's sentence solely for an abuse of the trial court's discretion. *People v Hansford (After Remand)* 454 Mich 320, 324; 562 NW2d 460 (1997).

On the facts of this case, we conclude that the sentence imposed by the trial court was a reasoned response to the seriousness of defendant's crime and to his criminal record. This is particularly true in light of defendant's previous conviction for an extremely similar offense involving another female victim. We cannot say that the trial court abused its discretion in sentencing defendant.

Affirmed.

/s/ Kurtis T. Wilder

/s/ Richard Allen Griffin

/s/ Michael R. Smolenski