

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRYL ULESS SANDERS,

Defendant-Appellant.

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UNPUBLISHED

November 21, 1997

No. 196254

Oakland Circuit Court

LC No. 96-144257 FH

Before: Jansen, P.J., and Fitzgerald and Young, JJ.

MEMORANDUM.

Defendant appeals by right his jury conviction of one of three separate charges, all involving the same victim, of third degree criminal sexual conduct, MCL 750.520d; MSA 28.788(4), following which he was adjudicated a fourth offender, MCL 768.12; MSA 28.1084, and received an enhanced sentence. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first contends that the trial court gave an improper and coercive supplemental instruction to the jury after it reported, for the second time, that it was deadlocked. The record reflects that the jury first reported it was deadlocked only a few hours after it began its initial deliberations. It was reinstructed without objection, then or now, and continued deliberating for the remainder of that afternoon. The following morning, at the jury's request, some of the trial testimony was reread. The jury then deliberated less than two hours before again reporting that it was deadlocked. This time, after defendant stated in open court that he did not wish his counsel to move for a mistrial and preferred to have the jury already selected resolve his fate, a further supplemental instruction was given to the jury, which then deliberated less than an hour before returning its verdict, convicting defendant of one charge and acquitting him of two others.

The charge as given was not the subject of objection at trial, and does not significantly deviate in terms from that approved in *People v Sullivan*, 392 Mich 324, 335, 339, n 19; 220 NW2d 441 (1974). The charge was in no way coercive, and in fact the Court reiterated that no individual juror should yield conscientiously held views and join the others merely to render a verdict, although all jurors were encouraged to honestly reevaluate their positions. We find no error, but if there was error, it was

unpreserved, nonconstitutional error and defendant has failed

to establish the prerequisite prejudice necessary to obtain appellate relief on such an issue, *People v Grant*, 445 Mich 535, 551-552; 520 NW2d 123 (1994), and the issue is waived. *People v Pollick*, 448 Mich 376; 531 NW2d 159 (1995).

Defendant's remaining contention is that he was deprived of the effective assistance of counsel at trial because counsel, beginning with opening argument, brought before the jury defendant's prior criminal record of property and theft crimes. No record was made after trial to inquire of counsel as to the considerations that went into formulating this strategy, or to demonstrate that it could reliably be ascertained before trial that defendant would not be called to testify or that, if he would be called to testify, the prosecution could not impeach him with these prior convictions. Defendant did file a timely motion to remand in this Court, but it was not supported by a prerequisite affidavit of facts by a competent witness (the actual affidavit supplied was signed only by appellate counsel). MCR 7.211(C)(1)(a). This record fails to establish either that no minimally competent criminal defense attorney would utilize the strategy of contrasting defendant's past crimes, and his acknowledgment of them by pleading guilty to each of them, with charges so different in character as those here brought by the prosecution, or that, if such strategy was the product of a dereliction in counsel's performance which fell below the standards of the Sixth Amendment, that defendant was prejudiced thereby. *People v Mitchell*, 454 Mich 145, 169; 560 NW2d 600 (1997). To the contrary, defendant has failed to overcome the presumption that counsel's performance, which did result in outright acquittal on two of three charges, was effective. *Id.* at 156.

Affirmed.

/s/ Kathleen Jansen

/s/ E. Thomas Fitzgerald

/s/ Robert P. Young, Jr.