STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRUCE WADE MORGAN,

Defendant-Appellant.

UNPUBLISHED
January 9, 1998

No. 199123
Livingston Circuit Court
LC No. 95-009079-FC

Before: Markey, P.J. and Michael J. Kelly and Whitbeck, JJ.

PER CURIAM.

Defendant was convicted by jury of three counts of third-degree criminal sexual conduct ("CSC III"), MCL 750.520d(1)(b); MSA 28.788(4)(1)(b), one count of first-degree criminal sexual conduct ("CSC I"), MCL 750.520b(1)(f); MSA 28.788(1)(f), and one count of attempted CSC III, MCL 750.92; MSA 28.287. He was sentenced to concurrent terms of seven to fifteen years' imprisonment for each CSC III conviction, twelve to twenty-five years for the CSC I conviction, and two to five years for the attempted CSC III conviction. The convictions arose from an incident in which the complainant asserted that she was subjected to multiple incidents of forcible or coerced sexual penetration by defendant and one George Beebe ("Beebe"). Defendant appeals as of right. We affirm.

I

Defendant argues that the trial court erred in scoring Offense Variable ("OV") 12 (number of criminal sexual penetrations) and Prior Record Variable ("PRV") 7 (subsequent/concurrent felony convictions) of the sentencing guidelines. The defense contends that counting the same acts of which defendant was convicted as multiple penetrations under OV 12 and as multiple convictions under PRV 7 constitutes improper "double scoring." Essentially, defendant argues that the trial court erred by misinterpreting or misapplying the sentencing guidelines. However, appellate relief is not available for a claim that sentencing guidelines variables have been misinterpreted or misapplied. *People v Mitchell*, 454 Mich 145, 176-178; 560 NW2d 600 (1997). Accordingly, we are precluded from providing review or relief based on this issue.[1]

II

Defendant next essentially argues that the trial court erred by instructing the jury that first time offenders are treated more leniently than other offenders. Apparently, defendant's premise is that this may have made the jury more apt to convict him as he testified at trial that he had no prior convictions.

Beebe was called as a witness by the prosecution. He had pled no contest to a charge of CSC I as a juvenile in connection with the incident underlying this case. Part of the plea agreement was that Beebe would not be tried as an adult. Defense counsel asked Beebe on recross-examination whether Beebe knew that life imprisonment would have been a possibility if Beebe had been convicted of CSC I as an adult. In response, the prosecutor asked Beebe on redirect examination whether Beebe had been told "about the lenient treatment that is given the first time offenders, who appear in the adult Court."[2] Defense counsel objected to this question. Eventually, the trial court instructed the jury that multiple factors are considered in sentencing a person convicted of a crime including the person's prior record. The trial court further stated:

> People who have been convicted before, are not treated the same way as people who are treated with – who have not been convicted before. That is a fair statement to say. Whether it's lenient or not, is a matter of, I suppose of how one views it, but first time offenders are not treated the same way as multiple offenders or second or third or fourth time offenders, leave it at that. That is a statement of the law, and it's an accurate statement of the law, I believe.

Although defendant did not object to the above comments at the time that they were given, defense counsel later moved for a mistrial, apparently in part based on the above comments by the trial court. Even assuming arguendo that this issue is properly preserved for review, we do not find grounds for reversal. Jury instructions are reviewed in their entirety to determine if there is error requiring reversal. *People v Davis*, 216 Mich App 47, 54; 549 NW2d 1 (1996). Even if instructions are imperfect, there is no error if the instructions fairly present the issues to be tried and sufficiently protect the defendant's rights. *Id.*

Here, in context, the trial court's instructions or comments tended to minimize the importance of a person's prior record in sentencing by accurately enumerating it as one of many factors to be considered. We conclude that the comments at issue merely reflected what any reasonable juror would already suppose: that, all other things being equal, an offender with a prior criminal record would tend to receive a harsher sentence than one without a prior record. Accordingly, we find that the comments by the trial court at issue fairly discussed the matter of Beebe's possible penalty if tried as an adult and did not constitute error requiring reversal.[3] Thus, we similarly conclude that the trial court did not abuse its discretion, *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995), by denying defendant's motion for a mistrial on this basis.

Affirmed.

/s/ Jane E. Markey
/s/ Michael J. Kelly
/s/ William C. Whitbeck

[1] In fairness to appellate defense counsel, we note that defendant's brief was filed before *Mitchell* was decided.

[2] Rather clearly, this question referred to possible leniency for *Beebe*. To infer from this that the jury would conclude that *defendant* would be treated leniently if convicted is, charitably, somewhat questionable.

[3] It is true that neither a trial court nor counsel should address the disposition of a defendant after the verdict in a case. *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997). However, neither the prosecution nor the trial court specifically addressed defendant's disposition; rather, the discussion was the penalty to which *Beebe* may have been subjected if *Beebe* had not entered the plea bargain. We do not consider the trial court to have improperly addressed defendant's disposition merely based on the attenuated possibility that the jury may have inferred from the court's comments that defendant may have been treated more leniently as a first time offender. This is particularly so given that *the defense* initially injected the matter of *Beebe's* possible penalty if he had been convicted of CSC I as an adult.