STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 23, 2008
v	No. 281544 Calhoun Circuit Court
RICKY SCOTT ROE, Defendant-Appellant.	LC No. 07-001800-FC

Before: Murray, P.J., and Markey and Wilder, JJ.

PER CURIAM.

Defendant was by a jury of five counts of criminal sexual conduct in the first degree (CSC I), the victim being under 13 years of age, MCL 750.520b(1)(a), and was sentenced to concurrent terms of 40 to 60 years in prison. Defendant appeals by right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The twelve-year-old twins of defendant's former girlfriend testified that when they were six years old, defendant repeatedly engaged in oral-vaginal sex with them, and that he had once "stuck something inside of us." One twin testified that she felt skin with hair at the time[1] and that defendant repeatedly made her engage in oral-penile sex. Following an interview at the police station, defendant made a written statement acknowledging oral/vaginal contact with both girls and oral/penile penetration with one girl.

Defendant first argues that the trial court erred in denying his request for a forensic competency examination before trial. MCL 330.2026(1) requires such an examination "[u]pon a showing that the defendant may be incompetent to stand trial." In *People v Mowrey*, 63 Mich App 676, 678; 235 NW2d 23 (1975), this Court stated:

> Competency to stand trial and mandatory referral to the center for forensic psychiatry for determination of that issue is governed by a specific statute. [MCL 767.27a, which was replaced by MCL 330.2026(1), which is substantially similar]. This does not mean, as we held in *People v Sherman Williams*, 38 Mich

[1] Defendant was acquitted of two counts of CSC I involving penile-vaginal penetration.

> App 370; 196 NW2d 327 (1972), that simply requesting such referral automatically mandates the entry of an order compelling it. There must be some minimal showing that the accused cannot effectively communicate with his counsel, and his inability to assist in his own defense.

This "minimal showing" is consistent with the statutory requirement for "a showing" and the "bona fide doubt" that had to be shown under the former MCL 767.27a to trigger to a judge's duty to raise competency as an issue. See *People v Whyte*, 165 Mich App 409, 412; 418 NW2d 484 (1988). The bona fide doubt determination was reviewed for an abuse of discretion. *Id*. It follows that this standard would also govern a determination as to whether there was a sufficient "showing that the defendant may be incompetent to stand trial" such that a referral for a forensic examination would be required.

Defense counsel presented no evidence of retardation, mental illness, or the presence of a bullet in defendant's brain. He asserted, however, that defendant was confused, could not recall the alleged events with clarity, had spoken of an "alternate reality" during a police interview, and had in a "disorganized and markedly irrational" letter asked his son to pay the victims in an apparent attempt to persuade them to change their testimony. Counsel also claimed defendant's answers to his questions made no sense and that defendant could not follow or track their conversations. Counsel said defendant wanted him to interview somebody whom the girls had "teased or beat or harassed or something" even though he had advised this evidence would be irrelevant. Counsel argued that these factors, together with defendant's history of drug abuse and the possibility that a bullet might be affecting defendant's mental status, warranted a forensic evaluation.

In denying defendant's motion, the trial court concluded that defendant had not raised a bona fide doubt as to his competency. The court said that the letter, although possibly foolish, was coherent and rational and showed that, in the absence of anything else, defendant wanted to undermine the witnesses' testimony. The court noted there were various reasons a defendant might not be forthright with his attorney, but no evidence showing mental illness, mental retardation, the alleged bullet, or some other malady. We conclude that the trial court did not abuse its discretion in so holding. Counsel's concerns might have raised a question, but the examples of communication problems were not compelling. Although the concern might have been genuine, it did not amount to "a showing that he might be incompetent to stand trial" or give rise to "a bona fide doubt."

Defendant renewed his motion for an evaluation after testifying at trial, asserting that the court had now seen defendant's "marked confusion." The trial court found no evidence of incompetency. We agree. There was no indication of confusion on direct examination. Although defendant's testimony on cross-examination was faltering and incriminating, it appears to have been the result of the cross-examination. Consistent with the trial court's ruling, defendant seemed well oriented and coherent. Accordingly, we find no abuse of discretion.

Defendant next argues that the trial court erred in scoring Offense Variable 11 at 50 points for multiple penetrations during a single incident. He acknowledges that there was no objection. When a sentence is outside the appropriate guidelines range and no scoring issue was raised at sentencing, we review for plain error affecting the outcome. *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004).

One twin testified that on one occasion after defendant penetrated her vagina with his tongue, she saw defendant do the same thing to her twin and saw his penis penetrating her twin's mouth. Thus, even if the penetrations must relate to only one victim, the testimony established two penetrations of one twin during a single episode. Consequently, defendant would not have been entitled under any circumstance to a score of less than 25 points. See MCL 777.41(1). And his offense variable score could have not been less than 105 points. This score would have remained in the same guidelines range. See MCL 777.62. Accordingly, there was no plain error since the outcome would not have changed.

We affirm.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Kurtis T. Wilder