# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>January 19, 2010 |
| v | No. 287859<br>Branch Circuit Court |
| TIMOTHY ALLEN MILLER,<br><br>Defendant-Appellant. | LC No. 06-108611-FH |

Before: Cavanagh, P.J., and Fitzgerald and Shapiro, JJ.

PER CURIAM.

Following a bench trial, the court convicted defendant of third-degree criminal sexual conduct, MCL 750.520d(1)(b), and sentenced him to a prison term of 95 to 180 months. The trial court denied defendant's motion for a new trial, but granted defendant's motion for resentencing and sentenced defendant to a prison term of 78 to 180 months. Defendant appeals as of right. We affirm.

Pertinent Facts and Procedural History

The then 19-year-old victim was dating and residing with defendant's son, Joshua. On September 11, 2006, defendant, whom the victim had met on two prior occasions, asked her if she would like to run an errand with him. The victim ran the errand with defendant, and the two then went to defendant's parent's house, where he lived, to trade vehicles. At that point, the victim thought that defendant was going to drive her to the home she shared with Joshua. However, defendant drove down some back roads and into an area the victim did not recognize. Defendant then stopped at a store and purchased three 40-ounce beers. The two drove around while the victim consumed two of the beers. When the victim indicated that she had to use the restroom, defendant drove down a dirt road and then onto a "little two track." The victim went into the woods to relieve herself. When she finished, defendant was standing behind her. Defendant grabbed the victim by her arms and spun her around until she could not longer see him. At this point, defendant told the victim that she "was going to be his bitch, and [she] was going to do what he wanted."

Defendant then pushed the victim to the ground and pulled her pants off. The victim unsuccessfully tried to kick defendant off of her. After defendant ejaculated inside her, defendant told her that "[t]his is just between you and me, bitch," and he threatened to kill her if she told anyone. The victim was frightened of defendant, but got back into the vehicle and

allowed him to drive her home. When Joshua arrived home later, the victim told him about the sexual assault. They called 911 and were told to go to the nearest hospital. Joshua and the victim then went to the Three Rivers Area Hospital.

Dr. Robert Hill examined the victim in the emergency room. The victim told him that her boyfriend's father had sexually assaulted her. Dr. Hill described the victim as upset. Dr. Hill examined the victim's pelvic and vaginal areas, and the only findings on that examination were related to a laser surgery the victim had two weeks earlier for warts. The victim had an abrasion on her right knee, but was not otherwise injured.

Michigan State Police Trooper Brandon Oaks attempted to contact defendant for several days after the incident before learning that defendant had fled the area. Trooper Oaks secured an arrest warrant, and subsequently received information that defendant was going to receive a wire transfer of money from a friend via Western Union. Trooper Oaks identified a Western Union in Indiana where defendant was to pick up the money. On September 20, 2006, the Indiana State Police arrested defendant when he attempted to retrieve the money.

Upon taking defendant into custody, Trooper Oaks advised defendant of his *Miranda*[1] rights. Defendant waived those rights. Defendant initially stated he had sexual intercourse with the victim and that it was consensual. Defendant then stated that he knew what he had done was wrong, and he explained that the sexual encounter began as consensual, but at some point the victim stated, "No I do not want to have sex with you." Defendant proceeded to have sexual intercourse with the victim despite the fact that she said no.

I

Defendant first contends that his waiver of trial counsel was constitutionally defective. Appellate courts review a trial court's factual findings surrounding waiver of counsel for clear error. *People v Russell,* 471 Mich 182, 187; 684 NW2d 745 (2004). However, review is de novo to the extent that a ruling involves an interpretation of law or the application of a constitutional standard to uncontested facts. *Id.*

The United States and Michigan Constitutions guarantee the right to counsel at critical stages of the proceedings. US Const, Am VI; Const 1963, art 1, § 20; *People v Anderson (After Remand),* 446 Mich 392, 402; 521 NW2d 538 (1994). The *Russell* Court stated:

> The right to counsel is considered fundamental because it is essential to a fair trial and attaches at the trial stage, which is clearly a critical stage of the proceedings. While a defendant may choose to forgo the assistance of counsel at trial, any waiver of the right to counsel must be knowing, voluntary, and intelligent. In addition, it is a long-held principle that courts are to make every reasonable presumption *against* the waiver of a fundamental constitutional right,

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

> including the waiver of the right to the assistance of counsel. [*Id.* at 187-188 (citations omitted; emphasis in original).]

Further, the defendant must be made aware of the dangers and disadvantages of self-representation. *Id.* at 189. The trial court must also satisfy the requirements of MCR 6.005(D), which provide:

> The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first
>
> (1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and
>
> (2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

In *People v Adkins (After Remand)*, 452 Mich 702, 726; 551 NW2d 108 (1996), overruled in part on other grounds by *People v Williams*, 470 Mich 634, 641 n 7; 683 NW2d 597 (2004), our Supreme Court clarified that only substantial compliance with these requirements is necessary for an effective waiver. Substantial compliance requires that the court discuss the constitutional requirements of an effective waiver and the substance of MCR 6.005(D) "in a short colloquy with the defendant, and make an express finding that defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures." *Id.* at 726-727.

First, defendant argues that his waiver was not unequivocal because he was forced into self-representation because defense counsel unilaterally determined defendant was not indigent and was able to retain counsel. The record does not support defendant's claim.

Attorney Kimble was originally appointed to represent defendant. After Kimble moved to withdraw as counsel, attorney Goodman was appointed to represent defendant. Goodman was successful in having defendant's bond reduced, and defendant was released from jail on bond. Sometime thereafter, Goodman filed a motion for a bench trial and to withdraw as counsel, asserting that defendant was gainfully employed full-time and not indigent. The trial court granted the motion after noting that defendant had telephoned the court and consented to Goodman withdrawing, but indicating that he needed time to hire an attorney. The court then set the case for a final status conference, and indicated that he wanted defendant to appear and "reveal the status of his hiring an attorney."

Following the final pretrial conference, the prosecutor wrote a letter to defendant indicating "it is your intention to represent yourself at Trial." At the commencement of trial, the following colloquy occurred:

> THE COURT: Thank you. And, just so that the record is absolutely clear, let me advise you, as we have on several occasions, that you do have the right to be represented by an attorney. If you could not afford one the Court would appoint one

to represent you. You previously had determined not to be indigent, and it is your decision at this point to proceed without an attorney?

MR. MILLER: Yes, sir.

* * *

THE COURT: Okay. And, again, you do understand, as we had discussed at the last pretrial conference, the difficulties inherent in representing yourself, and taking all of those things into consideration – I don't' know if you had a chance to watch a trial, as I suggested perhaps, over in St. Joseph County. But you may have gotten a hint if you watched any hearings or a trial how difficult it is at this point.

MR. MILLER: I find that a presentation is very important.

THE COURT: Okay.

MR. MILLER: And the facts backing that presentation as well.

THE COURT: Thank you. And, just so that the record is absolutely clear, there had been discussions at the last pretrial conference and several before – and I think Ms. Norris had made a plea offer or was willing to do so. And it was your decision to proceed to trial, adhering to the presumption of innocence, feeling that no offer was going to be sufficient to get you to enter a plea, and that is correct?

MR. MILLER: That is correct, your Honor.

Following his conviction, defendant wrote a letter to the judge in which he asserted, "I'm second guessing this decision [to represent himself.]" Defendant moved for a new trial and for resentencing, asserting that the record did not establish that the trial court advised defendant of the dangers and disadvantages of self-representation." The trial court denied the motion for a new trial, finding that

> The history of this case is such that the information was filed on October 10th, of 2006. We then scheduled, on October 18th, was sent out for October 27th a pretrial conference. At that point Attorney Kimble had been appointed to represent Mr. Miller.
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> Thereafter, on the 1st of November, apparently for a conflict, Mr. Goodwin, Attorney Goodwin, was substituted in for Mr. Kimble, and the matter was scheduled for another pretrial conference on November 13th. . . .
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> And the matter then was set again for January 5th. Once more it was reset again in approximately 30 days for testing.
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> Thereafter, the matter was scheduled for a pretrial conference on February 9th. Notice sent to Mr. Goodwin and the Prosecutor's Office.

> The pretrial, at that point, was scheduled once more briefly in two weeks. Apparently there had been some plea discussions. And the prosecutor wanted an opportunity to speak to the victim once more.
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> On March 2nd, the case was scheduled again. The Court, at that point, did amend the bond, allowing it to be $25,000 cash surety or 10 percent. And it is the Court's understanding that Mr. Miller was able to be released on bond.
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> The matter was set for a jury trial to commence on June 25th, and for two days. . . . Thereafter, Mr. Goodwin filed a motion on April 24th asking to withdraw as counsel, having represented that Defendant, Mr. Miller, was by then gainfully employed and not indigent. The matter was scheduled for a hearing. And it appears that Mr. Miller may have called in saying that he had no objection, but needed, as Mr. Smith indicated in his brief, some additional time to hire an attorney.
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> The Court's next entry indicates that the matter would then be set – the jury would be reset in September, with a final pretrial conference in late August. . .
>
> I went through this litany of events because, though correctly Mr. Smith indicates that those pretrial conferences were in chambers and not on the record, in – not – if not all, most of those, the Court reiterated to Mr. Miller the necessity of – or the wisdom, at least, of being represented by Counsel. And advised him, again, before the bench trial that, in suit as to this right to be represented, on the record did not again inquire into his financial circumstances.
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> The Court felt at that time that Mr. Miller understood very clearly the implications of representing himself. And, indeed, I think before maybe the consequences fully dawned on him, almost relished the opportunity. And, as the transcript I reviewed reveals, did a more than adequate job as compared to anyone else who might represent themselves. Mr. Miller being an intelligent individual, I believe that he did a very good job for an untrained person in representing himself at trial.
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> All of this having been said, the Court having reviewed the matters raised by Mr. Smith in the brief, the court, nevertheless, feels that Mr. Miller had been appropriately advised of his right to counsel, had been determined not to be indigent. And chose, therefore, to represent himself at trial.

A review of the record reveals that defendant did not challenge Goodwin's assertion that defendant was employed and capable of retaining counsel. In fact, defendant asked for time to hire an attorney. Additionally, before the trial began, the trial court informed defendant that he had the right to be represented by an attorney. After being informed of this right, defendant was asked if it was his decision to proceed without an attorney and defendant answered, "Yes, sir." Because defendant clearly stated that he wished to proceed without an attorney, because defendant never challenged his appointed counsel's representation that defendant was not indigent, and because defendant never requested another appointed counsel, defendant's waiver was unequivocal.

Defendant asserts, nonetheless, that he did not knowingly, intelligently, and voluntarily assert his right to self-representation because the trial court failed to advise defendant on the record of the risks of self-representation. "The trial court must make the *pro se* defendant aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." *Anderson, supra* at 368.

The record of the arraignment reveals that the court advised defendant of the charge against him and of the possible maximum penalty. We do not know exactly what the court said to defendant during the unrecorded pretrial conferences with regard to his assertion of the right to self-representation. On the record, however, defendant clearly stated that he was aware of his right to be represented by an attorney and that he wanted to proceed without an attorney. After the trial court stated that he had discussed with defendant at the last pretrial hearing the difficulties inherent in self-representation, defendant again expressed his desire to represent himself. At the hearing on the motion for a new trial, the trial court indicated that it had discussed with defendant the implications of representing himself, and that it was satisfied that defendant clearly understood these implications. From these facts, we conclude that the court substantially complied with the requirements for waiver. The court had a colloquy with defendant and defendant asserted his clear preference to waive counsel. This was sufficient under *Adkins, supra.* Under the totality of the circumstances, we conclude that there was a valid, unequivocal waiver of counsel.

Defendant maintains that substitute counsel should have been appointed after his second appointed counsel withdrew, and a hearing should have been conducted to determine if defendant was able to pay for representation. We disagree. "[T]he indigent are constitutionally entitled to be represented by counsel when prosecuted for a crime by the state, even though they lack the financial means to hire an attorney, and that the state has an obligation to provide them counsel." *Duncan v State*, 284 Mich App 246, 261; 774 NW2d 89 (2009). Pursuant to MCR 6.005(B), if a defendant "requests an attorney and claims financial inability to retain one, the court must determine whether the defendant is indigent." In the present case, no such request was made. In fact, a review of the record reveals that defendant requested time to retain his own counsel at his own expense and did not contest defense counsel's assertions that defendant was not indigent. Because no request was made for appointed counsel at any point after defense counsel withdrew, there was no need for the trial court to determine if defendant was indigent or to appoint counsel. MCR 6.005(B).

II

Defendant argues that the trial court made several errors in the scoring of the sentencing guidelines. This Court reviews a trial court's sentencing determinations and scoring decisions for an abuse of discretion to determine if evidence presented at trial sufficiently supports the particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002); *People v Cain*, 238 Mich App 95, 130; 605 NW2d 28 (1999). Further, "scoring decisions for which there is any evidence in support will be upheld." *Hornsby, supra* at 468.

First, defendant contends that Offense Variable (OV) 3 was misscored at ten points because there was no evidence that the victim suffered a bodily injury requiring medical treatment. We agree. MCL 777.33(1)(d) provides that OV 3 may be scored at ten points if "[b]odily injury requiring medical treatment occurred to a victim." "'Requiring medical

treatment' refers to the necessity for treatment and not the victim's success in obtaining treatment." MCL 777.33(3). Here, the victim testified that she suffered a bruise on her ankle, and that she went to the hospital because the 911 dispatcher directed her there. She testified that she "wasn't hurt too bad." The emergency room doctor testified that he only noted that the victim had an abrasion on her right knee, but he was unaware as to how this injury occurred. The doctor found no evidence of an acute injury to the genital area. Contrary to the prosecutor's arguments, there is no evidence in the record that the victim received any medication or treatment for her vaginal area. Given these facts, there is no basis for the trial court's finding that the victim's injuries required medical treatment. Consequently, the trial court abused its discretion when it scored OV 3 at 10 points. However, reversal is unnecessary because subtracting 10 points from the OV score does not change the minimum sentencing range. MCL 777.16y; MCL 777.63. Thus, the error was harmless. *People v Mutchie*, 251 Mich App 273, 274; 650 NW2d 733 (2002).

Second, defendant contends that OV 10 was misscored at 15 points because the victim was not suffering from any apparent disability or susceptibility and did not meet the statutory definition of a vulnerable victim. We disagree. OV 10 relates to "exploitation of a vulnerable victim." MCL 777.40(1). Fifteen points are scored where "[p]redatory conduct was involved." MCL 777.40(1)(a). "Predatory conduct" is defined as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). In interpreting OV 10, the Michigan Supreme Court held that points should be assessed "only when it is readily apparent that a victim was 'vulnerable,' i.e., was susceptible to injury, physical restraint, persuasion, or temptation." *People v Cannon*, 481 Mich 152, 158; 749 NW2d 257 (2008). The predatory conduct must have occurred before the commission of the offense, it must have been "directed at a victim," and its primary purpose must have been victimization, i.e., "causing that person to suffer from an injurious action or to be deceived." *Id.* at 160-161.

The first question that must be answered is whether defendant engaged in conduct before the sexual assault. "Both the timing and the location of an assault are factors of predatory conduct before the offense, which conduct includes watching a victim and waiting for any chance to be alone with her at a separate location." *People v Apgar*, 264 Mich App 321, 330; 690 NW2d 312 (2004). In *Apgar*, *supra*, this Court considered whether OV 10 was appropriately scored at 15 points. The defendant was convicted for sexually assaulting a 13-year-old girl. *Id*. at 323. Evidence at trial established that the victim willingly agreed to go to the store with the defendant and his two friends. *Id*. "The victim testified that they drove around for several hours while she was forced to smoke marijuana because a sharp knife-like object was pressed against her neck." *Id*. at 323-324. Then, she was taken to a bedroom in an unfamiliar home where the defendant sexually assaulted her. *Id*. at 324. This Court noted that the victim was forced to smoke more marijuana before engaging in the sexual act. *Id*. at 330. Based on this evidence, this Court concluded there was sufficient evidence to support the 15 point score for OV 10. *Id*.

Here, the timing and location of the sexual assault are evidence of predatory conduct. As in *Apgar*, *supra*, the victim went with defendant upon his request, defendant supplied intoxicants to her, and defendant then took her to a separate and isolated location to commit the sexual assault. However, predatory conduct alone is not sufficient to score this offense variable; rather, there must also be evidence that the victim was vulnerable. *Cannon*, *supra* at 165. "[P]oints

should be assessed under OV 10 only when it is readily apparent that a victim was 'vulnerable,' i.e., was susceptible to injury, physical restraint, persuasion, or temptation." *Id*. at 158.

> Factors to be considered in deciding whether a victim was vulnerable include (1) the victim's physical disability, (2) the victim's mental disability, (3) the victim's youth or agedness, (4) the existence of a domestic relationship, (5) whether the offender abused his or her authority status, (6) whether the offender exploited a victim by his or her difference in size or strength or both, (7) whether the victim was intoxicated or under the influence of drugs, or (8) whether the victim was asleep or unconscious. The mere existence of one of these factors does not automatically render the victim vulnerable. [*Cannon, supra* at 158-159.]

There is no evidence in the record that the victim suffered from a physical disability, that a domestic relationship existed between defendant and the victim, that defendant abused his authority status, that defendant exploited a difference in size or strength, or that the victim was asleep or unconscious. Though the prosecutor argued at resentencing that the victim appeared to have some sort of mental limitation, the degree of the limitation was never established. Observations of the victim's behavior at trial are not sufficient to justify the scoring of OV 10. There must be record evidence. See *People v Endres*, 269 Mich App 414, 417-418; 711 NW2d 398 (2006) ("Despite the trial court's determination that there 'appears to be some basis to have scored' OV 3 at five points, we find that such an assessment was erroneous when there was no record evidence to support the score.").

However, the record indicates that defendant was 44 years old and the victim was 19 years old at the time of the offense. Defendant purchased two, 40-ounce beers that the victim consumed before she was sexually assaulted. The significant age difference and the consumption of 80 ounces of alcohol rendered the victim susceptible to injury or physical restraint. The fact that the alcohol was provided to the victim by defendant, and that defendant then proceeded to take her to an isolated location, supports a finding that defendant engaged in pre-offense conduct directed towards the victim, who was vulnerable, with the purpose of victimizing her. Scoring decisions for which there is any evidence in support will be upheld." The evidence was sufficient to justify the score of 15 points for OV 10.[2] *Hornsby, supra* at 468.

Third, defendant complains that OV 19 was misscored at 10 points because there was no evidence that defendant interfered with the administration of justice. We agree. OV 19 scoring is based on whether defendant "is a threat to the security of a penal institution or court or interfere[d] with the administration of justice or the rendering of emergency services." MCL 777.49. To score OV 19 at ten points, there must be evidence that "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49(c).

[2] Even though OV 8, MCL 777.38 (victim asportation), was scored for defendant's asportation of the victim, there is no basis for defendant's argument that OV 10 could not be scored based in part on the same facts. In *Apgar, supra* at 329-330, this Court upheld the scoring of both OV 8 and OV 10 despite the fact that both of the scores considered the facts that the defendant asported his victim to another location.

"Conduct that occurs before criminal charges are filed can form the basis for interference, or attempted interference, with the administration of justice, and OV 19 may be scored for this conduct where applicable." *People v Barbee*, 470 Mich 283, 288; 681 NW2d 348 (2004). However, "[o]ffense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable." *People v McGraw*, 484 Mich 120, 133-134; 771 NW2d 655 (2009).

In *McGraw*, the Court considered whether offense variables should be scored based solely on conduct that occurred during the sentencing offense or on conduct that occurred after the sentencing offense. In that case, the trial court scored ten points for OV 9, MCL 777.39 (number of victims), because the trial court concluded that the defendant placed at least two victims in danger when he fled from police. *Id*. at 123. This Court held that "a defendant's conduct after an offense is completed does not relate back to the sentencing offense for purpose of scoring offense variables unless a variable specifically instructs otherwise." *Id.* at 122. Thus, this Court concluded that the defendant's flight from the police after breaking and entering a building was not a permissible basis for scoring OV 9. *Id.*

Similarly, in the present case, the plain language of MCL 777.49 does not permit a consideration of conduct that occurred after the sentencing offense was complete. Evidence was presented that defendant sexually assaulted the victim, drove her home, and then, at some point later in the day, fled the state. The trial court made it clear at resentencing that defendant's decision to flee the state influenced the scoring of the guidelines. Pursuant to *McGraw, supra,* this was impermissible. However, resentencing is unnecessary because the sentencing guideline grid does not change even with the removal of 10 points for OV 3 and 10 points for OV 19. MCL 777.16y; MCL 777.63. Thus, any error is harmless. *Mutchie, supra* at 274.

Affirmed.

/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald
/s/ Douglas B. Shapiro