STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of BRANDON WILLIAM STOOTS, Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

BRANDON WILLIAM STOOTS,

Respondent-Appellant.

UNPUBLISHED
May 10, 2012

No. 304430
St. Joseph Circuit Court
Family Division
LC No. 2008-015323-DL

Before: WHITBECK, P.J., AND SAWYER AND HOEKSTRA, JJ.

PER CURIAM.

Respondent Brandon Stoots appeals as of right his juvenile adjudication for attempted second-degree criminal sexual conduct.[1] The trial court sentenced Stoots to six months of intensive probation. We affirm.

I. FACTS

At the time of the incident out of which this case arises, Stoots was 14 years old and was babysitting his neighbors' two children, CK and CH. CK was three years old, and CH was one year old. The children's mother and stepfather arrived home and found the trailer door locked. The mother went to the back window and saw Stoots on top of CK. The mother testified that Stoots was completely naked, CK was naked from the waist down, and Stoots' penis was touching CK in the vaginal area. Stoots testified that the entire time he was at the trailer, CK was only wearing a shirt. Stoots testified that he took off all his clothes except his shirt because that is what the parents did and they had told Stoots to try it sometime. Stoots testified that CK was watching television in the parents' bedroom and called Stoots in to watch a commercial. Stoots was on the bed, turned toward CK, and was surprised when the window opened and the

[1] MCL 750.520c(1)(a).

mother started yelling. Stoots testified that he did not have contact with CK, except when he jumped up, his penis may have touched her leg.

At the request of Stoots' parents, Dr. Robert Gray Perra evaluated Stoots. Dr. Perra found Stoots to be emotionally immature, about 10 to 11 years old, and his educational level to be below third grade. Although Dr. Perra described Stoots as educationally, socially, and emotionally delayed, he opined that Stoots was not a predator and that, with counseling, he would "pose no future threat."

On Stoots' motion, the trial court entered an order for evaluation of Stoots' competency and criminal responsibility. In doing so, the trial court appointed Dr. Randy Haugen to perform the evaluation. Dr. Haugen's evaluation included many test results. Stoots ranged from below average, to low to average, in academic skills such as reading and math. Two behavior assessments showed Stoots to "reveal an acceptable profile." Stoots may "externalize blame for problems and utilize acting out as a defense." Stoots showed average abilities though a slight weakness in ability to inhibit impulses when switching activities. As to social perception, the evaluation showed that Stoots possessed average abilities in reading emotional expressions in others, though he made errors in identifying disgust. The evaluation indicated that Stoots could understand the experiences, beliefs, and perspectives of others and that he can relate to how a person might feel in a given social situation. The evaluation found that his risk for future recidivism was low/moderate. However, the psychological evaluation did not address Stoots' ability to understand court proceedings, ability to assist in his defense, or his competency to stand trial in general.

Asserting that Dr. Haugen's evaluation was a general psychological evaluation and not an evaluation relative to competence and criminal responsibility, Stoots filed a notice of insanity defense and again requested an evaluation relative to competence and criminal responsibility.

At a hearing on Stoots' motion for evaluation of competence, the trial court noted that the case had been delayed and that the assessment did not address what the trial court ordered. Stoots argued that the issue of criminal responsibility was especially important and noted that he had educational and developmental delays. The trial court noted that the report was more of a "risk assessment" than an evaluation of criminal responsibility or competency. But the prosecutor argued that even though the report was not what would have been done for an adult evaluation, there were indications in the report that Stoots "tests average, there's no major defects, which I can infer the fact that if there's no major defects in these areas, that he is competent and can move forward with trial." The prosecutor noted that nothing in the report said Stoots was not competent and not criminally responsible and that instead the report stated that Stoots did not have behavior issues.

The trial court acknowledged that the report was missing the "forensic part" and that it did not read the whole report because it did not know if it would be the trier of fact. The trial court stated:

> I read enough, as you said, to show that there's some behavior issues. And—but that—from the testing didn't show that he seemed to have cognitive disability enough not to do the forensic thing.

> So I think if he were to actually make that forensic decisions [sic] that we ask him to, I think that what he . . . would come to the same conclusion you have. And that's sort of where I—where I'm at too.
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> So even though I didn't read the factual part of what he said after, . . . I did read the testing part and I could see—and I read the conclusions to—enough to know that it was really a—because he talks about the fact he's a—a low to moderate risk, and that's sort of where the substance abuse assessment issues comes [sic] in. But then he goes back to the testing and it doesn't really say he didn't have cognitive ability to be able to help.
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> So I think it is as close as we can get for where the state of the law is. And so we're going to—I—I deny [Stoots'] motion and we'll set a jury trial.

In a written order denying the motion, the trial court acknowledged that the evaluation process took a long time. The order also stated:

> Dr. Haugen's assessment does not conform to the Court instructions. It is not his fault for the Court system is not accustomed to forensic evaluation on juveniles. That needs correcting but the standards as the Court pointed out in it's [sic] instruction for the assessment are vague. Dr. Haugen completed his standard risk assessment for Brandon Stoots to reoffend for CSC. The Court has seen several of Dr. Haugen's similar assessments. It is very well done but not what the defense attorney requested.
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> . . . [T]he analysis of the assessment does address a lot of the issues of cognitive deficiency that would lead to the inability to form the intent needed to commit the alleged crime. Also [Stoots'] narrative demonstrated ability to help his counselor in his defense. [Stoots'] has a good memory and specific opinions of the incident.

The trial court concluded that Stoots was competent to stand trial and that a jury trial would be scheduled as soon as possible.

Before trial started, Stoots placed on the record his objection to the trial court's denial of his motion for an evaluation as to competency to stand trial. (At sentencing, the trial court noted again that although Dr. Haugen's evaluation did not follow the instructions of what it was supposed to analyze, it indicated that Stoots could assist his attorney in his defense and that Stoots' memory of the event did not show he lacked the ability to understand.)

Stoots also objected to the trial court instructing the jury on both second-degree criminal sexual conduct and attempted second-degree criminal sexual conduct on the basis that the instructions were confusing and could lead to a compromise verdict. The trial court stated that it believed the charge for attempt fit the proofs, but it acknowledged that "the confusion is the specific intent part of it." The trial court also stated, "I think if you think about it, I think the instructions are not that complicated."

Additionally, Stoots filed a "request for consent probation disposition." At sentencing, defense counsel noted that the motion would be more accurately titled "request for dismissal

after deferring disposition." In the request, Stoots argued his crime was not a premeditated act; rather, it was a sexually immature juvenile crossing boundaries. Thus, Stoots argued that, pursuant to MCR 3.943(E), the trial court *could* enter an order of disposition under MCL 712A.18, which would require lifetime registration; however, Stoots pointed out that the trial court also had the option to dismiss the petition without entering an order of disposition under MCL 712A.18. Stoots argued the psychological evaluations indicated a low/moderate risk of recidivism and that lifetime registration was too serious a sanction for the offense, especially if treatment confirmed that Stoots had a low risk to re-offend. Stoots suggested that the trial court not enter a formal order of disposition, adjourn the matter until after Stoots completed voluntary sex offender treatment, and then further assess whether to enter a formal order of disposition.

The trial court stated that its position was to not agree to the consent calendar if the prosecutor objected. Thereafter, the prosecutor placed an objection to the consent calendar on the record, and the trial court denied the motion.

Stoots now appeals.

II. COMPETENCY EXAMINATION

A. STANDARD OF REVIEW

Stoots argues that the trial court erred when it proceeded to trial without an appropriate competency examination. "A claim of competency to stand trial, and the right to a competency determination, implicates constitutional due process protections."[2] This Court reviews de novo issues of constitutional law.[3]

B. LEGAL STANDARDS

This Court has stated that "juveniles have a due process right not to be subjected to the adjudicative phase of juvenile proceedings while incompetent[.]"[4] Yet, there is no court rule or statute that specifically governs making a competency determination in juvenile cases.[5] Nevertheless, the Mental Health Code provisions apply to defendants in criminal proceedings, and "they can serve as a guide for juvenile competency determinations."[6] Although the Mental Health Code is not binding in juvenile matters, "[t]he trial courts should apply the Mental Health Code in making juvenile competency determinations to the extent possible, recognizing that its

[2] *In re Carey*, 241 Mich App 222, 225-226; 615 NW2d 742 (2000).

[3] *Id.*

[4] *Id.* at 226.

[5] *Id.* at 231.

[6] *Id.* at 226.

provisions may sometimes need to be liberally construed or modified for application in this context."[7]

The Mental Health Code provides that there is a presumption that a defendant is competent to stand trial.[8] Further, MCL 330.2020(1) provides that a defendant

> shall be determined incompetent to stand trial only if he is incapable because of his mental condition of understanding the nature and object of the proceedings against him or of assisting in his defense in a rational manner. The court shall determine the capacity of a defendant to assist in his defense by his ability to perform the tasks reasonably necessary for him to perform in the preparation of his defense and during his trial.

If there is a showing that the defendant may be incompetent, "the court shall order the defendant to undergo an examination . . . relating to the issue of incompetence to stand trial."[9] And, after examination of the defendant, the examiner must submit a written report that "shall" contain:

> (a) The clinical findings of the center or other facility.
>
> (b) The facts, in reasonable detail, upon which the findings are based, and upon request of the court, defense, or prosecution additional facts germane to the findings.
>
> (c) The opinion of the center or other facility on the issue of the incompetence of the defendant to stand trial.
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> (d) If the opinion is that the defendant is incompetent to stand trial, the opinion of the center or other facility on the likelihood of the defendant attaining competence to stand trial, if provided a course of treatment, within the time limit established by section 1034.[10]

C. ANALYSIS

The trial court ordered an evaluation for competency, indicating that there was a showing that Stoots may be incompetent to stand trial. But the completed evaluation was a general psychological evaluation and did not specifically address competency. Nevertheless, "failure to follow a statute or court rule respecting competency determination does not ipso facto entitle a

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[7] *Id.* at 234 n 3.

[8] MCL 330.2020(1).

[9] MCL 330.2026(1).

[10] MCL 330.2028(2).

defendant to a new trial."[11] "Evidence substantiating incompetency-in-fact must establish that there is a violation of rights before a new trial will be ordered."[12]

The evidence Stoots relies on to show incompetence is Dr. Perra's letter, indicating that Stoots was emotionally and educationally delayed. However, Stoots has failed to establish that there is any evidence that his delays impaired his ability to understand the proceedings or participate in his defense. For example, there was no offer of proof that there would be expert testimony that Stoots was incompetent at the time of trial.[13] Nor was there any other documentation (mental health records, jail records, affidavits) that would establish "a bona fide doubt regarding defendant's competency to stand trial."[14]

Thus, even though the general psychological evaluation was insufficient as a competency evaluation and the trial court erred in continuing to trial without a competency evaluation, in the absence of incompetency-in-fact, Stoots is not entitled to a new trial.

III. CRUEL AND UNUSUAL PUNISHMENT

A. STANDARD OF REVIEW

The Sex Offenders Registration Act (SORA)[15] requires that juveniles adjudicated as responsible for attempted second-degree criminal sexual conduct must register on the public sex offender registry once they reach the age of 18.[16] Stoots argues that SORA's lifetime registration requirement causes cruel and unusual punishment as applied to him. Because Stoots did not raise this issue before the trial court, our review is for plain error affecting substantial rights.[17]

B. ANALYSIS

Before determining whether a punishment is cruel and unusual, a "threshold question" is whether the government action constitutes punishment.[18] Usually, punishment "is the deliberate imposition, by some agency of the state, of some measure intended to chastise, deter or discipline

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[11] *People v Lucas*, 393 Mich 522, 528; 227 NW2d 763 (1975) (citation omitted).

[12] *Id.*

[13] Cf. *People v Lloyd*, unpublished opinion per curiam of the Court of Appeals, entered January 25, 2000 (Docket No. 186131), at 4. *People v Green*, 260 Mich App 710, 720 n 5; 680 NW2d 477 (2004) (stating that unpublished opinions are not binding precedent, but this Court may be use them for guidance).

[14] Cf. *Lloyd*, unpub op at 4.

[15] MCL 28.721 *et seq.*

[16] MCL 28.722(b)(iii), (k), (w); MCL 28.723; MCL 28.728.

[17] *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

[18] *In re Ayres*, 239 Mich App 8, 13-14; 608 NW2d 132 (1999).

an offender[.]"[19] "Determining whether government action is punishment requires consideration of the totality of circumstances, and particularly (1) legislative intent, (2) design of the legislation, (3) historical treatment of analogous measures, and (4) effects of the legislation."[20]

In *In re TD*, this Court applied these four factors and, in keeping with "the majority of the binding precedent," held that SORA's registration requirement as applied to juveniles does not constitute punishment even when there is a low risk of recidivism and the juvenile is included in the public database.[21] Stoots has not established circumstances to contradict that SORA does not constitute punishment as applied to him. Thus, *In re TD* controls this issue, and this claim is without merit.

IV. CONSENT CALENDAR

A. STANDARD OF REVIEW

Stoots argues that the trial court erred when it refused to transfer his case to the consent calendar over the prosecutor's objection. "The interpretation of a court rule, like matters of statutory interpretation, is a question of law that we review de novo."[22]

B. ANALYSIS

MCR 3.932(C) provides:

> Consent Calendar. If the court receives a petition, citation, or appearance ticket, and it appears that protective and supportive action by the court will serve the best interests of the juvenile and the public, the court *may* proceed on the consent calendar without authorizing a petition to be filed. No case *may* be placed on the consent calendar unless the juvenile and the parent, guardian, or legal custodian agree to have the case placed on the consent calendar. The court *may* transfer a case from the formal calendar to the consent calendar at any time before disposition.[23]

Because it uses the word "may,"[24] MCR 3.932 grants the trial court discretion to transfer a case to the consent calendar. An abuse of discretion occurs when the outcome the trial court selects is outside the principled outcomes.[25] There is no indication that the trial court's refusal to

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[19] *Id.* at 14 (quotation omitted).

[20] *Id.* at 14-15 (quotation omitted).

[21] *In re TD*, 292 Mich App 678, 682, 691; ___ NW2d ___ (2011).

[22] *People v Williams*, 483 Mich 226, 231; 769 NW2d 605 (2009).

[23] Emphasis added.

[24] *People v Brown*, 249 Mich App 382, 386; 642 NW2d 382 (2002).

[25] *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

transfer Stoots' case to the consent calendar was a result outside the range of principled outcomes. The trial court was not required to transfer the matter, it chose to exercise its discretion not to, and we find no abuse of its discretion in so choosing.

V. JURY INSTRUCTION

A. STANDARD OF REVIEW

Stoots argues that the trial court erred when it instructed the jury on both second-degree criminal sexual conduct and attempted second-degree criminal sexual conduct because the instructions were confusing and led to a compromise verdict. This Court reviews de novo a claim of instructional error.[26]

B. LEGAL STANDARDS

Jury instructions must clearly present the applicable law, and include all elements of the charged offenses, and any material issues, defenses, and theories if supported by the evidence.[27] However, "even if there are some imperfections, there is no basis for reversal if the instructions adequately protected the defendant's rights by fairly presenting to the jury the issues to be tried."[28] "Instructions are read as a whole rather than extracted piecemeal to determine whether error requiring reversal occurred."[29]

C. ANALYSIS

We initially note that Stoots' argument presumes that the instruction was erroneous. However, he does not argue that the jury instruction for attempted second-degree criminal sexual conduct failed to present the applicable law or was not properly given based on the facts of this case or the theories of the case as presented by the parties. Therefore, because Stoots does not challenge the applicability of the attempted second-degree criminal sexual conduct jury instruction or raise the issue of whether the instruction was properly given, any argument in that respect is wholly abandoned.[30] In light of this, Stoots' remaining challenges on appeal are that the instruction was confusing and improperly led to jury compromise.

Regarding Stoots' argument that the instruction was confusing, the trial court noted that there could be some confusion as to the specific intent required of attempt, but that, overall, the instructions were not that complicated. Other than the trial court's comments, which were made outside the presence of the jury, the record is void of any indication that the jury found the

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[26] *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005).

[27] *Id.*

[28] *People v Dumas*, 454 Mich 390, 396; 563 NW2d 31 (1997).

[29] *McGhee*, 268 Mich App at 606.

[30] *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

instructions confusing. Additionally, Stoots does not argue, nor is there any evidence, that the jury instructions failed to clearly present the applicable law, include all the elements of the charged offenses, and any material issues, defenses, or theories. Stoots has failed to show that the jury instructions were confusing and require reversal.

Stoots also argues the jury instructions led to a compromise verdict. In *People v Graves*,[31] the Michigan Supreme Court articulated that if there is "sufficiently persuasive indicia of jury compromise" reversal may be warranted

> where the jury is presented an erroneous instruction, and: 1) logically irreconcilable verdicts are returned, or 2) there is clear record evidence of unresolved jury confusion, or 3) as the prosecution concedes in the alternative, where a defendant is convicted of the next-lesser offense after the improperly submitted greater offense.[32]

Stoots does not point to any "persuasive indicia of jury compromise."[33] The record does not support that the verdict is logically irreconcilable, and there is no record evidence of jury confusion. Further, the offense of second-degree criminal sexual conduct was properly submitted because there was evidence supporting it: specifically the mother's testimony that Stoots was on top of CK and Stoots' acknowledgment that his penis may have touched CK. Thus, there is no support that the greater offense was improperly submitted and that Stoots was "convicted of the next-lesser offense after the improperly submitted greater offense."[34] Under these circumstances, Stoots has not established that there was jury compromise.

VI. CONCLUSION

Stoots is not entitled to a new trial even though a competency evaluation was not completed because there is no evidence of incompetency-in-fact. Further, the SORA registration requirements do not constitute punishment, and Stoots' constitutional claim has no merit. The trial court did not abuse its discretion when it denied Stoots' request to transfer the matter to the consent calendar. And the trial court did not err when it instructed the jury on attempted second-degree criminal sexual conduct.

We affirm.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Joel P. Hoekstra

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[31] *People v Graves*, 458 Mich 476, 487-488; 581 NW2d 229 (1998).

[32] *Id.* at 487-488.

[33] *Id.*

[34] *Id.*