

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT EDWARD BEAUCHAMP,

Defendant-Appellant.

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UNPUBLISHED  
October 26, 1999

No. 210325  
Dickinson Circuit Court  
LC No. 97-002068 FC

Before: Griffin, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520(1)(b) MSA 28.788(2)(1)(b). He was sentenced to ten to twenty-five years' imprisonment on each count. Defendant appeals as of right. We affirm in part and remand in part.

Defendant first argues that the trial court erred in not permitting a pretrial in camera review of the victim's psychological counseling records. We conclude that the trial court did not abuse its discretion in denying defendant's discovery request.

The discovery of privileged information such as psychological or psychiatric records is governed by MCR 6.201(C). This court rule provides, in pertinent part:

(C) Prohibited Discovery

(1) Notwithstanding any other provision of this rule, there is no right to discover information or evidence that is protected from disclosure by constitution, statute, or privilege, including information or evidence protected by a defendant's right against self-incrimination, except as provided in subrule (2).

(2) If a defendant demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense, the trial court shall conduct an in-camera inspection of the records.

However, a defendant's generalized assertion of a need for privileged information does not establish the threshold showing of a reasonable probability that the requested records contain information material to his defense sufficient to overcome the applicable statutory privilege. *People v Stanaway*, 446 Mich 643, 650; 521 NW2d 557 (1994); see also *People v Fink*, 456 Mich 449; 574 NW2d 28 (1998). Merely arguing that the privileged records might contain inconsistent statements or lead to exculpatory evidence is insufficient to meet the requisite threshold. *Stanaway, supra* at 651. Moreover, a speculative basis as to what the privileged records might contain or how the information might be useful to the defense falls short of meeting the *Stanaway* threshold. *Fink, supra* at 457.

In this case, defendant failed to state any articulable fact that would indicate that the requested privileged psychological counseling records were necessary for the preparation of his defense. Rather, defendant merely argued that the records might have contained information that could be used to impeach the victim, or perhaps some other exculpatory material. This speculative basis for the request lacked any showing of what information the records might contain or how that information could be used favorably in his case. Because defendant's discovery request amounted to a "fishing expedition," the trial court properly determined that the requisite threshold for discovering the contents of the psychological counseling records had not been met.

Defendant next argues that the trial court erred in denying his motions for a directed verdict of acquittal. We disagree. The test for whether a motion for a directed verdict should be granted is whether, viewed in the light most favorable to the prosecution, the evidence is sufficient to permit a rational trier of fact to find the essential elements of the offense were proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 377; 285 NW2d 284 (1979). The trial court must avoid weighing the evidence or determining whether testimony favorable to the prosecution is to be believed; these concerns are to be resolved in favor of the prosecution. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992). We review the denial of a motion for a directed verdict de novo. *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995).

The elements required to convict defendant of CSC I were: (1) that defendant penetrated the victim's vagina with his penis; (2) that the victim was between thirteen and sixteen years old at the time of the acts; and (3) that the victim was defendant's daughter. The elements of age and familial status were not disputed; only the element of sexual penetration was at the heart of defendant's motions for directed verdict. We conclude that the trial court properly declined to weigh the credibility of the witnesses presented at trial. Moreover, we are satisfied from a review of the record that there was sufficient evidence, when viewed in the light most favorable to the prosecution, establishing that defendant committed at least three acts of vaginal penetration involving the victim.

Defendant also argues that two sentencing guidelines offense variables were improperly scored. However, we do not review the scoring of the sentencing guidelines. *People v Mitchell*, 454 Mich 145, 173-178; 560 NW2d 600 (1997).

Defendant next contends that he was not afforded a formal hearing to determine his competency to stand trial. On a showing that a defendant may be incompetent, the trial court must order the defendant to undergo an examination by the center for forensic psychiatry or other certified facility.

MCL 330.2026; MSA 14.800(1026). After the examination is completed, a report of the clinical findings is to be submitted to the trial court. MCL 330.2028; MSA 14.800(1028). With regard to conducting a formal hearing to determine competency, MCL 330.2030; MSA 14.800(1030) provides in pertinent part:

(1) Upon receipt of the written report, *the court shall cause the defendant to appear in court and shall hold a hearing within 5 days* or upon the conclusion of the case, proceeding, or other matter before it, whichever is sooner, unless the defense or prosecution for good cause requests a delay for a reasonable time.

(2) *On the basis of the evidence admitted at the hearing*, the court shall determine the issue of the incompetence of the defendant to stand trial. [Emphasis added.]

Further, MCR 6.125(E) states:

*A competency hearing must be held within 5 days of receipt of the report required by MCL 330.2028; MSA 14.800(1028) or on conclusion of the proceedings then before the court, whichever is sooner, unless the court, on a showing of good cause, grants an adjournment.* [Emphasis added.]

Once the issue of a defendant's competency has been sufficiently raised, defendant is entitled to a competency hearing. *People v Newton (After Remand)*, 179 Mich App 484, 488; 446 NW2d 487 (1989). The right to have a competency hearing, conducted in accordance with the statutory and court rule requirements, cannot be waived by the defendant or his counsel. *People v Livingston*, 57 Mich App 726, 736; 226 NW2d 704 (1975). It must be emphasized that there is a distinction between the waiver of the right to present evidence at a competency hearing and a waiver of the right to the hearing itself; the former is recognized, the latter is not. *Id.* Failure to hold a formal competency hearing is error. *People v Ponder*, 57 Mich App 94, 97; 225 NW2d 168 (1974).

Although it is clear error for a trial court to fail to hold a timely competency hearing, this alone does not automatically entitle a defendant to a new trial or reversal of his conviction. *People v Vokes*, 134 Mich App 62, 64; 349 NW2d 819 (1984); *Ponder, supra* at 97-98. A remand for a *nunc pro tunc* competency hearing may be a proper remedy. *Vokes, supra* at 64. Because our review of the record fails to demonstrate that the trial court conducted a formal competency hearing, we remand for a *nunc pro tunc* competency hearing. If the trial court finds that defendant was competent at the time of his trial, defendant's convictions are affirmed. If, however, the trial court finds that defendant was incompetent at the time of trial or if the court is unable to adequately determine defendant's competency to stand trial at the time, then the court shall set aside defendant's convictions and grant a new trial. See *Ponder, supra* at 94; *Livingston, supra* at 726.

Affirmed in part and remanded in part to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard Allen Griffin

/s/ David H. Sawyer

/s/ Michael R. Smolenski