STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 21, 2008
v	No. 274172 Wayne Circuit Court
CARLOS DURRELL SIMMONS, Defendant-Appellant.	LC No. 06-002286-01

Before: White, P.J., and Hoekstra and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(f) (personal injury). The court sentenced defendant, as a second habitual offender, MCL 769.10, to 46 years, 10 months to 75 years' imprisonment. We affirm in part, vacate the order requiring defendant to repay his court-appointed attorney fees, and remand to the trial court to consider defendant's ability to pay.

Defendant first asserts that he was denied his Sixth Amendment right to assistance of counsel by the trial court's denial of his repeated requests for substitute counsel.[1] We disagree. This Court reviews a claim that a trial court improperly denied a defendant's request for substitution of counsel for an abuse of discretion. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001).

Appointment of substitute counsel is warranted upon a showing of good cause for the substitution and that the substitution will not unreasonably disrupt the judicial process. *People v Bauder*, 269 Mich App 174, 193; 712 NW2d 506 (2005); *Traylor*, *supra* at 462. Good cause is shown where "a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic." *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). A defendant must state any differences of opinion regarding trial tactics with

[1] Defendant's original counsel, Gary Jones, was substituted with David C. Roby, whom defendant complains of in the instant appeal, after defendant complained about Jones's representation of him.

specificity. *Traylor*, *supra* at 463. A defendant's "mere allegation that he lacked confidence in his trial counsel is not good cause to substitute counsel." *Id*.

Defendant argues that when he was sentenced in another case where the same counsel was representing him, he addressed that court regarding his dissatisfaction with counsel's representation. However, there is no indication that defendant expressed dissatisfaction with counsel's representation in this case, and it was made clear at the time that the matter would have to be addressed to the trial judge in the instant case.

In his initial brief on appeal, defendant claims that defense counsel moved to withdraw from defendant's representation in this case on August 1, 2006, August 3, 2006, and September 6, 2006. However, other than one order denying defense counsel's motion to withdraw, dated August 1, and signed by a judge other than the trial judge, there is nothing in the record regarding any such motions or indicating any acrimony between defense counsel and defendant. Nor does the record reflect the basis for the request to withdraw or the reasons for its denial. On this record, the court is unable to state that it was an abuse of discretion to deny the motion.

We further observe that at some point during trial, defendant did ask to address the court outside of the jury's presence and stated that he was not comfortable conferring with his counsel. After a recess, defense counsel stated that defendant thought he overlooked something, and that counsel thought he was wrong from a strategy standpoint. The court allowed additional time for counsel and defendant to consult, and when proceedings resume almost an hour later, the matter was not raised again. Defendant has not shown a legitimate difference in opinion between himself and his counsel, and therefore, he has not shown that the trial court abused its discretion in failing to appoint substitute counsel.

Defendant next argues that he was denied the effective assistance of counsel where his counsel stipulated to the admission of DNA evidence and did not object to sentencing errors. We disagree. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that this performance was so prejudicial that it denied the defendant a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000), quoting *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). A defendant must overcome the strong presumption that his counsel was effective and engaged in sound trial strategy. *Toma*, *supra* at 302. "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). Defense counsel is not ineffective for failing to advocate a meritless position. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Defendant argues that defense counsel's representation fell below an objective standard of reasonableness where counsel did not attempt to investigate the DNA evidence and did not move to have a DNA expert appointed. Further, according to defendant, because of his counsel's failure to investigate, counsel did not have enough information to stipulate to the admission of the DNA evidence.

Defendant's theory of the case was that the sex between defendant and the complainant was consensual. Defense counsel theorized in both opening statement and closing argument that

the complainant was a prostitute and, when defendant did not pay her for her services, she became angry and retaliated by accusing him of rape. Given defendant's theory that the sex was consensual, the DNA on the tissue would presumably match defendant's DNA. Consequently, it would be illogical for defense counsel to refuse to stipulate that defendant's DNA matched that on the tissue or to hire an expert in an attempt to discredit the DNA analysis. We find that defendant has not overcome the strong presumption that defense counsel engaged in sound trial strategy. Further, defendant has not established that had counsel sought a DNA expert, that expert would have discredited plaintiff's DNA evidence.

Next, defendant argues that defense counsel should have objected to alleged sentencing errors. However, defense counsel did, in fact, object to the claimed sentencing errors, and therefore, defendant's claims are without merit. Defense counsel objected to the scoring of OV 7, aggravated physical abuse, at 50 points by stating, in relevant part:

> In all of the things we associate with torture and sadism and excessive brutality, this offense is egregious as it was according to the jury's conclusion that punishment, that sanction, is already calculated. These extra 50 points are for a different sort of set of circumstances that don't exist in this case.

Defense counsel also objected to the scoring of variables based on facts not found beyond a reasonable doubt by the jury where he stated, regarding the scoring of OV 1, "[T]he prosecution is relying on the lost cell phone as part of the bases [sic]. And the jury did not convict Mr. Simmons of that." Regardless, Michigan law holds that facts used to score sentencing variables do not need to be found beyond a reasonable doubt by a jury. See *People v Drohan*, 475 Mich 140, 159-160; 715 NW2d 778 (2006). Thus, any objection would have been futile, and defense counsel is not required to argue meritless claims. We conclude that defendant was not denied the effective assistance of counsel.

Defendant next argues that the trial court erred in scoring OV 7. We disagree. Generally, this Court reviews a preserved challenge to the scoring of the sentencing guidelines for an abuse of discretion. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002). A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). This Court will uphold the trial court's scoring if there is any evidence in the record to support it. *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003). The interpretation of the statutory sentencing guidelines and legal questions presented by application of the guidelines are reviewed de novo. *Babcock*, *supra* at 253.

Defendant claims that there was insufficient evidence to score 50 points for OV 7 because his actions only involved those necessary for the completion of the crime. Fifty points are assessed under OV 7, aggravated physical abuse, if "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a); *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Defendant did more than what was necessary to commit first-degree CSC. He punched the complainant in the face and threatened to kill her if she did not do as he said. He dragged her into an abandoned building. He threw her on the ground and covered her mouth with his hand to

prevent her from screaming and again threatened to kill her. He forced his penis into her mouth and told her that she had to "swallow whatever came out" or he would kill her. Afterward, he threatened to kill her if she sought help. Two security guards testified that the complainant was scared, exhausted, hysterical, terrified, and was screaming and crying. Defendant engaged in conduct that was deliberately designed to substantially increase the complainant's fear and anxiety by repeatedly threatening to kill her. The record supported a score of 50 points under OV 7, and therefore, the trial court did not abuse its discretion.

Defendant further argues that the trial court erred by scoring offense variables based on facts not found beyond a reasonable doubt. Defendant does not point to any facts or scores, but rather, states that none of the elements of defendant's conviction includes findings related to the scoring of the offense variables. However, a Michigan trial court may use facts that were found by only a preponderance of the evidence to determine a defendant's minimum sentence. *Drohan*, *supra* at 156. The United States Supreme Court case that defendant cites, *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), does not apply to challenges of Michigan's indeterminate sentences. *Drohan*, *supra* at 164. Hence, the trial court did not err in scoring offense variables using facts not found beyond a reasonable doubt.

Defendant next argues that the trial court improperly ordered him to repay court-appointed attorney fees without articulating whether he had the ability to pay. We agree. This Court reviews an unpreserved claim for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

When requiring a defendant to repay the cost of his court-appointed attorney, a sentencing court needs to provide some indication that it considered the defendant's ability to pay, "such as noting that it reviewed the financial and employment sections of the defendant's presentence investigation report," or even by just stating that it considered the defendant's financial status. *People v Dunbar*, 264 Mich App 240, 254-255; 690 NW2d 476 (2004). Furthermore, "[t]he amount ordered to be reimbursed for court-appointed attorney fees should bear a relation to the defendant's *foreseeable* ability to pay." *Id*. at 255 (emphasis in original). The purpose of requiring the court to consider the defendant's ability to pay is to ensure that "repayment is not required as long as [the defendant] remains indigent." *Id*. at 256, quoting *Alexander v Johnson*, 742 F2d 117, 124 (CA 4, 1984). Here, when the court ordered defendant to repay court-appointed attorney fees, it did not discuss defendant's ability to pay. Consequently, the trial court erred.

We affirm defendant's conviction and sentence, but reverse the trial court's order requiring defendant to repay his court-appointed attorney fees and remand for the trial court to consider the attorney fees in light of defendant's ability to pay.[2] We do not retain jurisdiction.

/s/ Helene N. White
/s/ Joel P. Hoekstra
/s/ Bill Schuette

[2] On remand, an evidentiary hearing is not required, rather, the sentencing court can rely on updated financial information provided by the probation department. *Dunbar*, *supra* at 255 n 14.