# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>November 25, 2008 |
| v | No. 277000<br>St. Clair Circuit Court |
| LARRY JAMES LONSBY, SR.,<br><br>Defendant-Appellant. | LC No. 02-002798-FC |

Before: Wilder, P.J., and Jansen and Owens, JJ.

PER CURIAM.

This case was originally before us in *People v Lonsby*, 268 Mich App 375; 707 NW2d 610 (2005). We reversed defendant's convictions[1] and remanded for a new trial, holding that defendant's rights under the Confrontation Clause, US Const, Am VI, were violated when the serologist who tested defendant's swim trunks did not appear at trial and, instead, a colleague testified concerning the contents of the serologist's written report. Following a second jury trial, defendant was again convicted of one count of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (victim under 13 years old), and two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (victim under 13 years old). He was sentenced to concurrent prison terms of 9 to 30 years for the CSC I conviction and 9 to 15 for the CSC II convictions, with credit for 1,419 days served. Defendant appeals as of right. We affirm his convictions and sentences, but remand for consideration of his ability to pay attorney fees.

Following defendant's first convictions, he brought a motion for a new trial asserting that he had been denied the effective assistance of counsel because trial counsel had failed to investigate and introduce evidence that the complainant had made a previous false claim of rape. The evidence referenced was a 1998 police report. The trial court denied the motion in this regard. However, defendant's argument that the trial court erred by denying this motion is without merit. Defendant *was* granted a new trial—albeit on a different ground—and never even raised the issue of the 1998 police report at his second trial. In short, defendant had every opportunity to raise the issue of the alleged false claim of rape at his second trial, but failed to do

[1] Defendant was convicted following his first trial of the same charges for which he again stands convicted.

so. Defendant may not harbor error as an appellate parachute. *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998).

Defendant again argues that trial counsel was ineffective for failing to investigate and introduce evidence concerning the alleged previous false claim of rape. In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that the result of the proceedings would have been different but for counsel's error. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). We approach this issue with a strong presumption that counsel's actions were the product of sound trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Defendant fails to overcome this presumption.

Evidence of prior false accusations of rape made by a victim may be entered into evidence without violating the rape-shield statute, MCL 750.520j, provided there is concrete evidence establishing the claim is false. *People v Williams*, 191 Mich App 269, 272-273; 477 NW2d 877 (1991). Here, defendant asserts that the 1998 police report conclusively established the falsity of complainant's prior allegation because it indicated that there was no medical evidence of penetration or trauma to the vaginal area. However, the report actually stated that the medical findings were inconclusive as to complainant's claims. Because medical evidence supporting an accusation of rape is not necessary, MCL 750.520h; see also *People v Lemmon*, 456 Mich 625, 642 n 22; 576 NW2d 129 (1998), the fact that a police report does not provide medical evidence to support a claim of rape in no way constitutes definitive proof of the truth or falsity of the claim. Indeed, the 1998 police report established only that an allegation was made; the truth or falsity of that 1998 allegation was apparently never determined. See *Williams*, *supra* at 274. When there has been no showing of falsity, a defendant's offer of proof to establish a previous false accusation of rape is insufficient. *People v Adamski*, 198 Mich App 133, 142; 497 NW2d 546 (1993). Counsel was not ineffective for failing to advocate a meritless position. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

Defendant next argues that the trial court improperly scored offense variable (OV) 13, MCL 777.43, and that trial counsel was ineffective for failing to object to the scoring of OV 13. Specifically, defendant asserts that any points scored for OV 13 must be based on conduct "that occurs for a meaningful period of time," and may not be based on conduct that occurs within "a matter of minutes." However, we have previously upheld the scoring of OV 13 for multiple, contemporaneous felonies arising out of the same incident. *People v Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001). Defendant's argument in this regard is without merit.

In support of his argument concerning OV 13, defendant suggests that the trial court's scoring of both prior record variable (PRV) 7, MCL 777.57, and OV 13 amounted to double punishment for the same conduct. However, where the sentencing guidelines variables are directed at different purposes, a trial court's assessment of points under both variables for the same conduct is proper. *People v Jarvi*, 216 Mich App 161, 164; 548 NW2d 676 (1996). While OV 13 addresses a defendant's pattern of criminal activity, PRV 7 addresses subsequent and concurrent felony convictions, regardless of whether the convictions demonstrate a pattern. It is clear that the Legislature established PRV 7 and OV 13 for distinct purposes, and the trial court was therefore entitled to score both variables on the basis of the same conduct. *Jarvi*, *supra* at 164.

Defendant also suggests that OV 12, MCL 777.42, which addresses "contemporaneous felonious criminal acts," necessarily precludes the scoring of OV 13 for conduct that occurs contemporaneously with the sentencing offense. However, defendant ignores the relevant statutory language of OV 12 and OV 13. For instance, except for offenses related to "membership in an organized criminal group,"[2] no points may be assessed for OV 13 on the basis of the same conduct that has been taken into account in the scoring of OV 12. MCL 777.43(2)(c). Moreover, only conduct that "has not and will not result in a criminal conviction" may be taken into consideration when scoring OV 12. MCL 777.42(2)(a)(*ii*). Quite simply, defendant's two CSC II convictions could not have been taken into account for purposes of scoring OV 12, MCL 777.42(2)(a)(*ii*), and there was accordingly no reason why they could not be considered in the scoring of OV 13, see MCL 777.43(2)(c).

We conclude that OV 13 was properly scored in this case. Trial counsel was not ineffective for failing to raise a meritless objection to the scoring of OV 13. *Kulpinski*, *supra* at 27.

We also reject defendant's assertion that the trial court erroneously scored ten points for OV 4, MCL 777.34. A court may assess ten points for OV 4 if serious psychological injury occurred to the victim that may require professional treatment, although treatment need not actually be sought in order for these points to be assessed. MCL 777.34(2). Defendant concedes that complainant is receiving ongoing psychological treatment and is on psychological medication, but asserts that evidence should have been submitted that the treatment is actually related to defendant's actions. However, complainant testified at trial that she was scared while defendant was assaulting her. This Court has previously held that the record supports scoring ten points for OV 4 when a witness testifies to being in fear during the event in question. *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004). Therefore, further evidence related to complainant's treatment was unnecessary.

Defendant also argues that the trial court erred by failing to grant a new trial or hold an evidentiary hearing on the ground that he was incompetent at the time of his second trial. We disagree. MCL 330.2020(1) provides:

> A defendant to a criminal charge shall be presumed competent to stand trial. He 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.

A criminal defendant is presumed competent unless facts are presented to raise a bona fide doubt as to his competency. *People v Harris*, 185 Mich App 100, 102; 460 NW2d 239 (1990). When there is evidence that a defendant may have been incompetent during trial, the issue must be

[2] This exception is not applicable in this case.

resolved even when the evidence arose after the trial. *People v Blocker*, 393 Mich 501, 510; 227 NW2d 767 (1975). A trial court must order the defendant to undergo a competency examination if there is a showing that the defendant might be incompetent. MCL 330.2026; *In re Carey*, 241 Mich App 222, 232; 615 NW2d 742 (2000).

Defendant asserts that the evidence provided at the motion hearing, which included an affidavit from appellate counsel and letters from family members drafted several months after his second trial, was sufficient to raise a bona fide doubt as to his competency. Appellate counsel's sworn affidavit indicated that defendant was in a state of confusion during their meeting several months after the conclusion of defendant's second trial. While we credit the genuineness of counsel's concern for his client, his affidavit simply did not raise a bona fide doubt as to defendant's competency *at the time of trial*. For example, appellate counsel averred that months after defendant's second conviction, defendant could not recall the details of the plea that was offered. However, defendant was questioned on the record after jury selection on the subject of the plea offer. Defendant indicated at that time that he understood the terms of the plea offer. Defendant also acknowledged at that time that the guidelines range would be significantly lower if he accepted the offered plea, and that if he rejected the plea offer, he might face a much longer sentence upon conviction.

Defendant also offered letters drafted by his wife and sister-in-law, which described his behavior during the second trial. These letters suggested that defendant was very confused at the trial and uncharacteristically stared and picked at his fingers during and after the proceedings. However, such letters are hearsay and are inadmissible unless they fall under an exception to the hearsay rule. See *Garey v Kelvinator Corp*, 279 Mich 174, 187; 271 NW 723 (1937). None of the hearsay exceptions listed in MRE 803 or MRE 804 applies in this situation. While MRE 1101 provides exceptions to the application of the rules of evidence, including the hearsay rules, a competency hearing is not covered by MRE 1101. It is therefore unclear how the letters from defendant's wife and sister-in-law could have been used even if there had been a competency hearing.

In any event, the letters did not establish that, at the time of trial, defendant was "incapable . . . of understanding the nature and object of the proceedings . . . or of assisting in his defense in a rational manner." MCL 330.2020(1). Defendant's sister-in-law wrote that defendant was "very confused," that he "cried a lot," that he "pulled and played with his finger," and "seemed like he was somewhere else." Defendant's wife wrote that defendant was "detached and confused," that he "was not himself" and "could not remember things," that he would "pick at his fingers," and that "he seemed like he was not even there." These observations provide little or no concrete evidence of defendant's mental condition at the time of trial, and do not establish that defendant was incompetent under MCL 330.2020(1). That defendant may have been confused, may have cried, and may have played with his fingers does not mean that he could not understand what was going on. Further, defendant testified on his own behalf for over an hour, undergoing both direct and cross-examination. Defendant's testimony lacked any indication that he did not understand the questions being asked or the significance of the proceedings.

Defendant failed to raise a bona fide doubt regarding his competency during the second trial. The trial court did not err by refusing to grant a new trial on this ground or to order a competency hearing.

Lastly, we agree with defendant that a remand is necessary for consideration of his ability to pay attorney fees. In *People v Dunbar*, 264 Mich App 240, 254-255; 690 NW2d 476 (2004), this Court held that a trial court must provide some indication that it has considered a defendant's present and future ability to pay before assessing fees for the reimbursement of the defendant's attorneys. When there is no record evidence of such consideration, a remand is required. In the instant matter, the trial court assessed attorney fees, yet no mention was made on the record concerning defendant's present or future ability to pay. We remand for reconsideration of this matter. On remand the trial court may make its determination without holding an evidentiary hearing, but must provide some indication that it considered the issue. *Id*.

Defendant's convictions and sentences are affirmed, but we remand for consideration of defendant's ability to pay attorney fees. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Kathleen Jansen
/s/ Donald S. Owens