STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 26, 2010
v	No. 293574 Alpena Circuit Court
DEANDRE MAURICE ANDERSON, Defendant-Appellant.	LC Nos. 09-002558-FC and 09-002559-FC

Before: MURPHY, C.J., and BECKERING and M.J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of first-degree home invasion, MCL 750.110a(2), and first-degree criminal sexual conduct (CSC 1), MCL 750.520b(1)(c) (sexual penetration occurring under circumstances involving another felony), which two crimes pertained to one female victim, and he appeals his bench trial conviction of third-degree criminal sexual conduct (CSC 3), MCL 750.520d(1)(b) (force or coercion used to accomplish sexual penetration),[1] which crime pertained to another female victim that was committed a week later. Initially, the prosecution pursued two separate cases, one for each victim, but the cases were later consolidated for a single bench trial; defendant waived his right to a jury trial. The victims knew each other and both had previously been involved in sexual-romantic relationships with defendant. There was sufficient evidence at trial to support the verdicts; there is no argument to the contrary. Defendant represented himself in proceedings following the circuit court arraignment, including the trial, and he did so with the presence of standby counsel. Defendant was sentenced to 50 months to 20 years' imprisonment on the home invasion conviction, 85 months to 50 years' imprisonment on the CSC 1 conviction, and to 50 months to 15 years' imprisonment on the CSC 3 conviction, all to be served concurrently. We affirm.

[1] Defendant had been charged with CSC 1, but the district court found that the evidence only supported a CSC 3 charge, and defendant was bound over accordingly.

I. SELF-REPRESENTATION

Defendant first argues that the trial court violated defendant's right to counsel, where the court failed to establish that defendant's waiver of counsel was knowing, voluntary, and intelligent, failed to warn defendant of the nature of the charges against him and the range of allowable sentences for each charge as required by MCR 6.005(D), and failed to reconfirm his waiver of counsel prior to all subsequent proceedings as required by MCR 6.005(E).

A criminal defendant's right to self-representation is guaranteed by the Sixth Amendment of the United States Constitution, by Article 1, § 13, of the Michigan Constitution, and by MCL 763.1. *People v Williams*, 470 Mich 634, 641-642; 683 NW2d 597 (2004). Although a defendant has a right to counsel and a right to self-representation, the defendant does not have a right to both and, consequently, there is an unavoidable tension between these two rights when the defendant chooses to proceed pro se. *People v Adkins (After Remand)*, 452 Mich 702, 720; 551 NW2d 108 (1996). The *Adkins* Court recognized "the potential for savvy defendants to use these competing rights as a means of securing an appellate parachute." *Id.* at 724. The Court further stated that a trial court should indulge every reasonable presumption against waiver of the right to counsel. *Id.* at 721.

In *People v Russell*, 471 Mich 182, 190; 684 NW2d 745 (2004), our Supreme Court set forth the applicable criteria to consider, outside of the court rule, when a request for self-representation is made:

> Upon a defendant's initial request to proceed pro se, a court must determine that (1) the defendant's request is unequivocal, (2) the defendant is asserting his right knowingly, intelligently, and voluntarily through a colloquy advising the defendant of the dangers and disadvantages of self-representation, and (3) the defendant's self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business. [Citing *People v Anderson*, 398 Mich 361; 247 NW2d 857 (1976).]

A trial court must additionally satisfy the requirements of MCR 6.005(D) and (E).[2] *Russell*, 471 Mich at 190-191. Substantial compliance with these requirements is adequate. *Id.* at 191. In *Russell, id.*, the Michigan Supreme Court elaborated:

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[2] MCR 6.005 provides in relevant part:

> (D) If the court determines that the defendant is financially unable to retain a lawyer, it must promptly appoint a lawyer and promptly notify the lawyer of the appointment. The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first

In *Adkins*, this Court clarified the scope of judicial inquiry required by *Anderson* and MCR 6.005(D) when confronted with an initial request for self-representation. *Adkins* rejected a "litany approach" in favor of a "substantial compliance" standard:

> "We hold, therefore, that trial courts must substantially comply with the aforementioned substantive requirements set forth in both *Anderson* [three criteria cited above] and MCR 6.005(D). Substantial compliance requires that the court discuss the substance of both *Anderson* and MCR 6.005(D) in a short colloquy with the defendant, and make an express finding that the defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures. The nonformalistic nature of a substantial compliance rule affords the protection of a strict compliance rule with far less of the problems associated with requiring courts to engage in a word-for-word litany approach. Further, we believe this standard protects the 'vital constitutional rights involved while avoiding the unjustified manipulation which can otherwise throw a real but unnecessary burden on the criminal justice system.'"

The *Adkins* Court indicated that the "court rule requirements are merely vehicles to ensure that the defendant knowingly and intelligently waived counsel with eyes open." *Adkins*,

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> (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
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> (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.
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> (E) If a defendant has waived the assistance of a lawyer, the record of each subsequent proceeding (e.g., preliminary examination, arraignment, proceedings leading to possible revocation of youthful trainee status, hearings, trial, or sentencing) need show only that the court advised the defendant of the continuing right to a lawyer's assistance (at public expense if the defendant is indigent) and that the defendant waived that right. Before the court begins such proceedings,
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> (1) the defendant must reaffirm that a lawyer's assistance is not wanted; or
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> (2) if the defendant requests a lawyer and is financially unable to retain one, the court must appoint one; or
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> (3) if the defendant wants to retain a lawyer and has the financial ability to do so, the court must allow the defendant a reasonable opportunity to retain one.

452 Mich at 725. Finally, we note that, with respect to factual findings surrounding a defendant's waiver of counsel, our review is for clear error. *Russell*, 471 Mich at 187. To the extent, however, that a ruling entails interpretation of the law or application of a constitutional standard to uncontested facts, we review the matter de novo. *Id.*

As to whether defendant's request to represent himself here was asserted knowingly, intelligently, and voluntarily through a colloquy advising defendant of the dangers and disadvantages of self-representation, the trial court, in numerous proceedings, repeatedly warned defendant of the dangers and disadvantages of self-representation and strongly and repeatedly urged defendant to obtain counsel, practically pleading with him to do so. Standby counsel was ready and prepared to handle the trial and even asked defendant to allow him to take over as defendant's attorney. Defendant insisted on representing himself.

"[T]he existence of a knowing and intelligent waiver must depend in each case upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused." *Anderson*, 398 Mich at 370. We note that defendant does have a criminal history, so he was familiar with the criminal justice system. The *Anderson* Court found that the defendant's "history of personal involvement with the criminal justice system" provided partial support for the conclusion that he invoked his right to self-representation knowingly, intelligently, and voluntarily. *Id.* at 370-371. Some of the motions and arguments raised by defendant below reflected knowledge and a grasp of the law.

In specific regard to whether the waiver of counsel was voluntary here, some of defendant's remarks at a couple of the earlier hearings are troubling, in that, he stated that he wanted to proceed pro se because his attorney would not talk to him about the case. However, thereafter and by the time of trial, defendant was determined to try the case himself, even though a new standby attorney was in place and there was no claim that this attorney refused to communicate with defendant. Indeed, during trial, defendant complained to the court about the standby attorney's repeated efforts to communicate with defendant, such that the court informed the attorney not to communicate with defendant unless defendant initiated the discussion. We find that defendant's request to represent himself was asserted knowingly, intelligently, and voluntarily.[3]

With respect to compliance with MCR 6.005(D) and (E), we acknowledge that the trial court failed to pay heed to the rule in part, and we implore trial courts across the state to simply and directly employ the court rule in order to avoid comparable claims of error. We do find that ultimately there was substantial compliance with the court rule here. We reach this conclusion taking into consideration information on the charges and possible sentences as could be gathered from the record (arraignment, rejected plea deal, defendant's petition for counsel, felony

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[3] We further find that defendant's request was unequivocal, despite the accompanying request for standby counsel, see *People v Hicks*, 259 Mich App 518, 530; 675 NW2d 599 (2003), and that defendant's self-representation did not disrupt, unduly inconvenience, or burden the court and the administration of the court's business.

information), as allowed in *Adkins*, 452 Mich at 731. In further support of our holding, we rely on the repeated warnings and advice given to defendant by the trial court in numerous proceedings, defendant's continual access to counsel, defendant's insistence over a considerable period of time that he represent himself, and defendant's repeated acknowledgement of his right to counsel and rejection of that right.

II. SUFFICIENCY OF EVIDENCE AT PRELIMINARY EXAMINATION

Defendant next argues that the district court lacked probable cause to bind him over to the trial court on the first-degree home invasion charge, where there was no evidence that he actually made entry into the home and no evidence that he lacked permission to enter the victim's home if he indeed entered the home. This argument lacks merit. In *People v Waltonen*, 272 Mich App 678, 684; 728 NW2d 881 (2006), this Court stated:

> The primary function of a preliminary examination is to determine whether a felony has been committed and, if so, whether there exists probable cause to believe that the defendant committed the felony. Probable cause requires evidence sufficient to make a person of ordinary caution and prudence to conscientiously entertain a reasonable belief of the defendant's guilt. The magistrate, however, need not be without doubts regarding guilt. Following the conclusion of the preliminary examination, if it appears to the district court that there is probable cause to believe that a felony was committed and that the defendant committed it, the court must bind the defendant over for trial. [Citations omitted.]

Here, there was testimony by the victim at the preliminary examination that defendant was told before the rape and home invasion occurred that he was not permitted in the home. And the victim also testified that defendant came into the home on December 3, 2008, absent permission, and proceeded to commit the CSC 1. Additionally, there was more than enough evidence at trial showing that defendant was guilty of first-degree home invasion; therefore, any error at the preliminary examination was harmless. *People v Moorer*, 246 Mich App 680, 682; 635 NW2d 47 (2001)(any error in the sufficiency of the proofs at the preliminary examination as to an element of the crime was harmless where sufficient evidence at trial supported the jury's verdict); see also *People v Hall*, 435 Mich 599, 601-603; 460 NW2d 520 (1990).

III. LEGALITY OF ARREST AND SEARCH AND ADMISSIBILITY OF STATEMENTS

Defendant initially contends that his arrest was unlawful because there was a lack of probable cause to arrest him and no warrant was issued. Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense occurred and that the defendant committed it. *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). An arrest warrant is generally not required to accomplish a felony arrest so long as there is probable cause to believe that a defendant committed a felony. *People v Johnson*, 431 Mich 683, 690-691; 431 NW2d 825 (1988). However, absent exigent circumstances or consent, the Fourth Amendment prohibits the police from entering a person's home to make a felony arrest without an arrest warrant and reason to believe that he is at home.

City of Troy v Ohlinger, 438 Mich 477, 484-486; 475 NW2d 54 (1991); *People v Oliver*, 417 Mich 366, 379; 338 NW2d 167 (1983).

Here, there is a felony arrest warrant for defendant in the record, but there does appear to be a conflict in the date of the warrant and return and police testimony concerning the date that defendant was taken into custody. Regardless, the police officer that first made contact with defendant testified that defendant was found at a friend's apartment, that the friend greeted the officer at the door, that the officer asked for defendant, that the friend then went back into the apartment to get defendant, that defendant came to the door, and that defendant agreed to accompany the officer back to the police station. It was not defendant's home, the police officer apparently did not enter the apartment, regardless, defendant's friend consented to the officer's actions, and defendant agreed to go with the officer. Accordingly, a warrant was not required. Moreover, police had information provided by the victim herself that defendant forcibly engaged in sexual intercourse with her absent her consent, a felony, whether CSC 1 or CSC 3. See MCL 750.520b(2) and 750.520d(2). Hence, there was probable cause to arrest defendant. Defendant's argument that the police should have waited to arrest him until the victim's medical examination was completed does not have any basis in law and lacks merit. The fact that the rape examination later revealed no trauma to the genital area did not negate the existence of probable cause to arrest defendant on the basis of the victim's complaint. We would also note that the examination did reveal that the victim was bitten on the arm, which is consistent with her description of the rape.

Defendant also makes reference to an illegal search and the need to suppress evidence discovered through the search; however, the record does not show that any search was conducted, nor does it show that evidence was collected as a result of a search; there was no such evidence presented at trial.

Defendant next argues that statements he made to the police should have been suppressed because they were made when he was intoxicated and sleep deprived. After a *Walker*[4] hearing, the trial court issued a written opinion in which the court found that defendant's statements to police were voluntary and not the result of coercion. A trial court's factual findings at a suppression hearing are reviewed for clear error, but its ultimate ruling, a constitutional issue, is reviewed de novo. *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005). The test for voluntariness of a confession or statement made to the police is whether, considering the totality of the circumstances, the confession or statement was the product of an essentially free and unconstrained choice by the defendant, or whether the defendant's will had been overborne and his capacity for self-determination critically impaired. *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988). Among the many factors that a court can consider in determining whether a statement was made voluntarily are whether the defendant was intoxicated and whether the defendant was deprived of sleep. *Id.* at 334.

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[4] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

Here, an interviewing officer testified at the *Walker* hearing that defendant appeared tired, resting his head on a table, and that a faint odor of alcohol on defendant's breath was noticeable. However, the officer also testified that defendant was coherent, that he understood the questions posed to him, that defendant was alert to everything the officer stated, that defendant responded to questions accordingly, that defendant understood his *Miranda*[5] rights, and that defendant voluntarily waived those rights. Defendant testified at the hearing that he was tired when he was interviewed and that he felt intoxicated. He also stated, "I probably was hearing him, I *probably just wasn't comprehending it to the best of my ability* because I was tired and I had been drinking that night before . . . and that morning." (Emphasis added.) That he "probably" did not comprehend "to the best" of his ability falls woefully short of making his statements involuntary. Given the officer's testimony and defendant's questionable testimony, we cannot conclude that defendant's statements to police were involuntary. Furthermore, assuming error, it was harmless. MCL 769.26; *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). Defendant never admitted to having raped the victim, who was the subject of this particular police interview; rather, he claimed that he engaged in consensual sex with her and stopped when she indicated that she no longer wanted to continue the act. This is consistent with defendant's position at trial. Reversal is unwarranted.

IV. RAPE SHIELD LAW

Defendant next argues that the trial court improperly applied the rape shield law, MCL 750.520j, effectively denying defendant his Sixth Amendment right to confrontation. Defendant claims that he "should have been allowed to present evidence of the complainant's sexual conduct that may be probative of ulterior motive for making a false charge and/or any false accusations of rape in the past." This argument pertained to only one of the victims.

Generally, a court's ruling to admit or exclude evidence is reviewed for an abuse of discretion, but underlying questions of law, such as the applicability of a statute that impacts the evidentiary ruling, are reviewed de novo. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). MCL 750.520j, commonly referred to as the rape shield law in Michigan, see *People v Hackett*, 421 Mich 338, 344; 365 NW2d 120 (1984), provides as follows:

> (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
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> (a) Evidence of the victim's past sexual conduct with the actor.

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

(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

(2) If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1).

To protect a defendant's confrontation rights, the rape shield law must on occasion yield to those rights, such as where a complainant's prior sexual conduct is used for the purpose of showing bias, testing the truth of a witness, showing the complainant's motive for making a false charge, or where a complainant made prior false allegations of rape. *Hackett*, 421 Mich at 348-349. "The defendant is obligated initially to make an offer of proof as to the proposed evidence and to demonstrate its relevance to the purpose for which it is sought to be admitted." *Id.* at 350.

Defendant asked the victim at issue whether she had ever been raped in the past, but the trial court prevented the victim from answering, finding that the question violated the rape shield law. We find that defendant never made the requisite offer of proof to demonstrate the relevancy of the proposed evidence. MCL 750.520j(2); *Hackett*, 421 Mich at 350. We cannot discern from the record whether the victim had previously been raped, nor do we know the relevancy of the evidence if she had indeed been raped in the past; there is nothing in the record or in defendant's appellate brief giving answers to these questions. There is also nothing in the record suggesting that the victim had previously made a false accusation of rape and, anyway, that is not how defendant framed the question to her. Defendant is engaging in pure speculation. There was no error in the court's ruling on this particular claim.

With respect to questions addressing sexual activity between the victim and one of the witnesses who testified against defendant, we find it unnecessary to determine whether the court erred in excluding the evidence. Assuming error in the court's ruling, it clearly would not have had any effect on the court's verdict had the court considered the evidence admissible. In the court's fairly extensive written opinion, it placed no reliance whatsoever on the testimony of the witness, who allegedly had sex with the victim, in finding defendant guilty of CSC 3. Thus, the error was harmless. MCL 769.26; *Lukity*, 460 Mich at 495. In sum, reversal is unwarranted on defendant's rape shield law arguments.

V. PROSECUTORIAL MISCONDUCT

Defendant finally argues that the prosecutor committed misconduct by referencing the term "rape" when framing many of his questions posed to the witnesses. Defendant argues that use of the term "rape" gave the appearance that defendant had already been found guilty of the charges.

We first note that defendant objected below on the ground now being raised on appeal, and the trial court sustained the objection, agreeing with defendant that the prosecutor should not use the term "rape" when framing his questions. Assuming misconduct, it certainly was harmless, MCL 769.26; *Lukity*, 460 Mich at 495, and defendant was not denied a fair and impartial trial, *People v Dobek*, 274 Mich App 58, 63-64; 732 NW2d 546 (2007), especially given that this was a bench trial and the court itself recognized an impropriety. "'A judge, unlike a juror, possesses an understanding of the law which allows him to ignore . . . errors and to decide a case based solely on the evidence properly admitted at trial.'" *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001) (citation omitted). The prosecutor's use of the term "rape" did not sway the trial court to render a verdict against defendant; rather, the court's verdict was based on the evidence, as reflected in the court's written opinion.

Affirmed.

/s/ William B. Murphy
/s/ Jane M. Beckering
/s/ Michael J. Kelly