STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 2, 2010
v	No. 293404 Kent Circuit Court
KERRY DALE MILLER, Defendant-Appellant.	LC No. 08-010052-FC

Before: SAWYER, P.J., and FITZGERALD and SAAD, JJ.

PER CURIAM.

A jury convicted defendant of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(f), and unlawful imprisonment, MCL 750.349b. The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 30 to 40 years for CSC I and 15 to 30 years for kidnapping. Defendant appeals as of right. We affirm in part and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. FACTS

The complaining witness testified that she had been on friendly terms with defendant for several years, and had on some occasions taken his money in exchange for sexual favors. According to complainant, on the occasion in question she accepted defendant's offer of $75 in exchange for his tying her up, but this agreement did not include physical violence against her. After she disrobed, defendant duct-taped her mouth and put her in restraints, then beat her buttocks with a belt "several times," "slugged" her "hard in the mouth," and penetrated her vagina with his penis before ejaculating on her chest. Complainant testified that defendant also produced a gun and told her he would kill her if she told anyone of the incident. According to complainant, defendant then forced her into his vehicle and drove her some distance away and threatened to abandon her. Defendant eventually drove her home after receiving her assurance that she would not tell of the incident.

II. SELF-REPRESENTATION

Defendant first argues that the trial court violated his right of self-representation by denying his in pro per motion to represent himself and by failing to hold a hearing with regard to the motion. Under the circumstances of this case, we disagree.

We review a trial court's decision affecting a defendant's right to the attorney of his choice for an abuse of discretion. *People v Adkins*, 259 Mich App 545, 556; 675 NW2d 863 (2003). Where a criminal defendant wishes to waive the right to counsel, we review the trial court's factual findings in that regard for clear error, and "to the extent that a ruling involves an interpretation of the law or the application of a constitutional standard to uncontested facts" review is de novo. *People v Russell*, 471 Mich 182, 187; 684 NW2d 745 (2004).

A criminal defendant has a right to represent himself, US Const, Am VI; Const 1963, art 1, § 13; MCL 763.1; *People v Kevorkian*, 248 Mich App 373, 417; 639 NW2d 291 (2001), although there is a presumption against the waiver of counsel. *People v Belanger*, 227 Mich App 637, 641; 576 NW2d 703 (1998). A defendant seeking to proceed in propria persona must make an unequivocal request for self-representation. *Russell*, 471 Mich at 190; *Williams*, 470 Mich at 642. The purpose of this requirement is to "abort frivolous appeals by defendants who wish to upset adverse verdicts after trials at which they had been represented by counsel." *People v Anderson*, 398 Mich 361, 367; 247 NW2d 857 (1976). Once a defendant makes an unequivocal request to represent himself, the trial court must determine that the defendant's assertion of his right to self-representation is knowing, intelligent, and voluntary by informing the defendant of the potential risks. *Williams*, 470 Mich at 642; see also MCR 6.005(D)(1). The trial court is to make every reasonable presumption against the waiver of the right to counsel. *Russell*, 471 Mich at 188, 193.

In this case, on June 9, 2009, defendant filed a handwritten "Motion for Defendant to Represent Himself in these Matters." Defendant's motion was based on his allegation that "defense counsel failed at every stage[;] since January 5, 2009 the Defendant has been requesting discovery and Defendant's counsel has failed to respond, which has denied him due process and a fair trial." Defendant also alleged that "Defendant's Counsel has failed to turn in a witness list for Defendant and he has failed to respond to the key documents needed to present this matter before this Honorable Court." Defendant concluded by requesting that the court grant the motion "to represent himself in these matters." In the brief in support of the motion, defendant again refers to counsel's failure to request discovery, as well as counsel's failure to file an appeal with regard to the trial court's denial of his motion to dismiss. Defendant again requested that he be allowed to represent himself "in both matters before this Honorable Court." On June 10, 2009, the trial court issued a written order denying the motion on the ground that "the right to self-representation and the right to counsel are mutually exclusive."

Defendant's request to represent himself "in both matters," when read in the context of his motion and his brief, suggests that defendant was requesting to represent himself with regard to his request for discovery, as well as the motion for leave to appeal of the denial of his motion

to dismiss. Nowhere in the context of the motion is there a request to represent himself at trial.[1] Defendant's motion was not an unequivocal request to represent for self-representation.

III. BAD ACTS

We review a trial court's decision on whether to admit evidence of other bad acts for an abuse of discretion. *People v Kahley*, 277 Mich App 182, 184; 744 NW2d 194. "A trial court abuses its discretion when it fails to select a principled outcome from a range of reasonable and principled outcomes." *Id.*

MRE 404(b)(1) establishes that evidence of other bad acts is not admissible to prove a person's character in order to show behavior consistent with those other wrongs, but provides that such uncharged conduct may be admissible for other purposes, "such as proof of motive, opportunity, intent, preparation, scheme, plan or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material . . . ."

At issue in this case were the facts underlying defendant's 1990 conviction of third-degree criminal sexual conduct. The victim of that crime testified that she had dated defendant briefly, but that when she told defendant the relationship had to end, defendant came to her home and there put her in handcuffs, ripped off her clothes, threatened her with a gun, and "raped" her "repeatedly." The witness indicated that defendant beat her all over, including her buttocks, with a riding crop, leaving her "black and blue from head to toe," and added that defendant tied her to the bed, put duct tape over her mouth, and struck her face with his fists.

A police detective involved with the earlier case testified that defendant stated that the victim had "messed over his mind," and added,

> He admitted to assaulting her physically. He admitted to forcing sex upon her. He admitted to striking her with a horse crop, which is a small whip. He admitted to tying her up—first placing her in handcuffs behind her back, later using rope and cord and . . . tape . . . and, when I asked him why he did that, he said because she kept trying to escape.

The trial court allowed this testimony on the ground that "there is a sufficient particularity which shows this was not a matter of accident, but certain plan, scheme, or design in which the defendant committed these acts . . . ." This decision did not lie outside a range of reasonable and principled outcomes.

Evidence of prior bad acts is admissible if it is offered for a proper purpose, if it is relevant, and if its probative value is not substantially outweighed by unfair prejudice. *People v*

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[1] Defendant is clearly appealing the denial of his right to self-representation *at trial*, as evidenced by his argument that "the motion was timely, as it was filed on June 9, 2009 and trial was not scheduled for, and did not begin, until June 22, 2009."

Crawford, 458 Mich 376, 385; 582 NW2d 785 (1998), citing *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). A proper purpose is one other than establishing the defendant's character to show his or her propensity to commit the offense. *VanderVliet*, 444 Mich at 74.

The similarities between the earlier incident and the instant allegations are readily apparent. These include threatening the victims with a gun, duct-taping their mouths, beating them with a whipping instrument, striking them in their faces, and forcing sexual acts upon them. Although the earlier victim described a longer course of conduct, including some different sexual activity, and did not suggest that the incident began as an act of prostitution, the similarities nonetheless render the earlier incident relevant to show that the instant one did not result from a mistake or accident, but rather followed from a common plan, scheme, or design in expressing lust or hostility.

Further, the trial court guarded against the possibility that this evidence would be unfairly prejudicial, including by using it as mere propensity evidence, having instructed the jury to take care to "consider it for only one limited purpose, that is, to help . . . judge the believability of testimony regarding the acts for which the defendant is now on trial," adding, "you must not decide that it shows that the defendant is a bad person or that the defendant is likely to commit crimes," and admonishing, "You must not convict the defendant here because you think he is guilty of the other bad conduct." It is well established that "jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 487; 581 NW2d 229 (1998).

For these reasons, we reject this claim of error.

IV. SENTENCING

Defendant argues that his sentence for his conviction of CSC I of 30 to 40 years is invalid because the minimum is more than two-thirds of the maximum, in violation of *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972). However, defendant admits that this objection was not raised below. We therefore confine our review to ascertaining whether there was plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

In *Tanner*, 387 Mich at 690, our Supreme Court held that, where indeterminate sentencing is in order, the minimum sentence should be no greater than two-thirds of the maximum. Given defendant's 40-maximum sentence, adherence to *Tanner* indicates a minimum of no more than 26 years and eight months.

Tanner concerned a defendant who was charged with first-degree murder,[2] who then, during the course of trial, pleaded guilty to manslaughter.[3] 387 Mich at 686. The trial court

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[2] MCL 750.316.

[3] MCL 750.321.

imposed a sentence of imprisonment of 14 years and 11 months to 15 years. *Id.* Our Supreme Court held that this range was not sufficient to honor this state's statutory indeterminate sentencing system. *Id.* at 689. Accordingly, the Court set forth the rule that "any sentence which provides for a minimum exceeding two-thirds of the maximum is improper as failing to comply with the indeterminate sentence act." *Id.* at 690.

The Legislature substantially adopted this principle in MCL 769.34(2)(b), which states that a sentencing court "shall not impose a minimum sentence, including a departure, that exceeds 2/3 of the statutory maximum sentence." However, our Supreme Court has held that "MCL 769.34 does not apply when a defendant is convicted of a crime punishable with imprisonment for 'life or any term of years' because the minimum will never exceed 2/3 of the statutory maximum sentence of life." *People v Drohan*, 475 Mich 140, 162 n 14; 715 NW2d 778 (2006), citing *People v Powe*, 469 Mich 1032; 679 NW2d 67 (2004).

In this case, the sentence in question is for defendant's conviction of CSC I, which is punishable by life or any term of years. MCL 750.520b(2)(a). Accordingly, MCL 769.34(2)(b), the legislative embodiment of the *Tanner* rule, does not apply.

However, *Drohan* and *Powe* addressed only the legislative two-thirds rule, which by its plain terms limits a minimum sentence in connection with the statutory maximum. We note that neither case mentioned *Tanner*, which more broadly applies to any indeterminate sentence, including those imposing discretionary, instead of statutory, maximum sentences, and which remains good law.

We further note that where the Supreme Court has cited *Tanner* it has called for strict adherence with it. See *People v Feliciano*, 485 Mich 1122, 1122-1123; 780 NW2d 254 (2010); *People v Floyd*, 481 Mich 938; 751 NW2d 34 (2008). *Floyd* is directly on point. As in this case, the sentencing offense was CSC I, and the minimum sentence fell within the recommended range under the sentencing guidelines. *People v Floyd*, unpublished opinion per curiam of the Court of Appeals, issued January 15, 2008 (Docket No. 272425), slip op at 4. The Supreme Court recognized a *Tanner* violation in the sentence of imprisonment of 62 to 80 years, and reiterated that "the proper remedy for a *Tanner* violation is a reduction in the minimum sentence." 481 Mich at 938. *Feliciano* comports with *Floyd*, although it concerned convictions that could bring statutory maximum sentences, as enhanced by habitual offender status, of no more than 20 years. 485 Mich at 1123. Further, *Floyd* postdates *Drohan* and *Powe*, and thus, to the extent inconsistent with them, has overruled them.

Thus, we remand this case to the trial court for the limited purpose of adjusting the minimum sentence downward to 26 years, eight months. The valid maximum sentence of 40 years is to be retained.

Affirmed in part and remanded. Jurisdiction is not retained.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Henry William Saad