STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 21, 2013
v	No. 306327 Wayne Circuit Court
SAMEER MADHLOUM MURAD, Defendant-Appellant.	LC No. 02-011792-FH

Before: SHAPIRO, P.J., and SERVITTO and RONAYANE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right[1] his bench trial convictions of two counts of attempted fourth-degree criminal sexual conduct, using force or coercion, MCL 750.92; MCL 750.520e(1)(b). Defendant was sentenced to two years' probation and was additionally ordered to complete a sex offenders program, to have no contact with the complaining witness, and to seek and maintain employment. We affirm.

Defendant's convictions arise out of his touching the breasts of a female guest at the motel where he worked as a maintenance man. According to defendant, subsequent to his trial, his defense attorney advised him that an appeal would be unnecessary as the two misdemeanor convictions would not have an effect on his immigration status. Based on that advice, defendant did not proceed with an appeal. Thereafter, the INS apparently began deportation proceedings against defendant. Defendant moved for relief from judgment, which the trial court denied. The trial court did, however, find that defense counsel had failed to provide effective assistance of counsel with respect to advice concerning defendant's appellate rights. Defendant thereafter filed a motion to reissue judgment under MCR 6.428 in order to restart the time under which he could file an appeal as of right, which the trial court granted. This appeal followed.

Before delving into defendant's arguments on appeal, we first note that the prosecution contends that this Court does not have jurisdiction to hear this case as an appeal as of right because the trial court improperly reissued defendant's judgment under MCR 6.428 in order to

[1] As will be discussed below, we do not agree that defendant was entitled to an appeal as of right.

restart the clock and to allow defendant to file a timely appeal as of right. We agree, for two reasons.

First, and most importantly, the trial court never actually found that counsel failed to properly advise defendant regarding the consequences of his convictions on his immigration status or the possibility of deportation. The trial court opined, "*assuming* that defense counsel did not properly advise defendant as asserted . . ." Thus, while the trial court stated that it found counsel to be ineffective, it did not state the actual basis upon which it found counsel to be ineffective.

Second, defense counsel relied upon *Padilla v Kentucky*, __ US __; 130 S Ct 1473, 1483-1487; 176 L Ed 2d 284 (2010), during the motion hearing to demonstrate that counsel's conduct was deficient. In *Padilla*, 130 S Ct at 1483-1487, the United States Supreme Court held that where the deportation consequences of a pending criminal charge can be easily determined by reading the language of the statute, counsel providing incorrect information about such deportation consequences to a client who is making a decision regarding a plea agreement constitutes constitutionally deficient conduct under the first prong of the ineffective assistance of counsel test in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).[2] However, this Court has held that *Padilla*, decided in 2010, only applies prospectively under both Federal and Michigan law. *People v Gomez*, 295 Mich App 411; 820 NW2d 217 (2012). Defendant in this case was convicted in 2002, and counsel allegedly gave defendant the incorrect advice about the immigration consequences of his convictions around that same time. Because Michigan case law prior to *Padilla* supported the proposition that immigration consequences of a defendant's plea constitute collateral matters that do not affect whether a plea is considered voluntary or knowing, by analogy the immigration consequences of a conviction should also be considered a collateral matter regarding the decision to file for appeal. *People v Davidovich*, 463 Mich 446, 453; 618 NW2d 579 (2000); *Gomez*, 295 Mich App at 418. Therefore, the trial court clearly erred in finding that counsel's incorrect advice regarding the immigration implications of defendant's convictions constituted deficient conduct of counsel.

Based upon the above, this Court lacks jurisdiction to hear this appeal as of right. However, "in the interest of judicial economy" and pursuant to MCR 7.216(A)(7) and the Court's general powers, this Court elects to treat this appeal as being before this Court on leave granted. *City of Detroit v State*, 262 Mich App 542, 545; 686 NW2d 514 (2004).

Defendant raises two arguments on appeal, the first being that the trial court erred in considering the offense of attempt, when defendant was not charged with the same, and when such charges were not requested or supported by a rational view of the evidence. We disagree.

This Court applies the clear error standard of review regarding a trial court's findings of fact following a bench trial. *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006). "A finding is clearly erroneous when, although there is evidence to support it, the

[2] Michigan applies essentially the same two prong test set out in *Strickland*. *Strickland*, 466 US at 687; *Uphaus*, 278 Mich App at 185.

reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.* This Court reviews questions of law, such as whether an offense is a lesser included cognate offense of the offense charged, de novo. *People v Smith*, 478 Mich 64, 68-69; 731 NW2d 411 (2007). "Claims of instructional error are generally reviewed de novo by this Court, but the trial court's determination that a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion." *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). By analogy, in a bench trial, a trial court's decision to consider attempt pursuant to MCL 768.32(1), which is the functional equivalent of the trial court instructing itself regarding attempt, should be reviewed for an abuse of discretion. This Court may find a trial court abused its discretion when "the trial court's decision is outside the range of principled outcomes." *People v Terrell*, 289 Mich App 553, 558-559; 797 NW2d 684 (2010).

By its language, MCL 768.32(1) allows the fact finder, in certain situations, to find a defendant guilty of a lesser offense of the offense charged or of an attempt of the offense charged. See *People v Wilder*, 485 Mich 35, 41; 780 NW2d 265 (2010). MCL 768.32(1) provides:

> Except as provided in subsection (2), upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense.

In this case, defendant was charged with two counts of fourth-degree criminal sexual conduct, using force or coercion, MCL 750.520e(1)(b), and convicted of two counts of attempted fourth-degree criminal sexual conduct, using force or coercion, MCL 750.92; MCL 750.520e(1)(b).

In *Wilder*, 485 Mich at 41, our Supreme Court analyzed the meaning of MCL 768.32(1), stating:

> [T]he *Cornell*[3] Court concluded that MCL 768.32(1) permits the trier of fact to find a defendant guilty of a lesser offense if the lesser offense is necessarily included in the greater offense. A lesser offense is necessarily included in the greater offense when the elements necessary for the commission of the lesser offense are subsumed within the elements necessary for the commission of the greater offense.
>
> Necessarily included lesser offenses are distinguishable from cognate offenses. Cognate offenses share several elements and are of the same class or category as the greater offense, but contain elements not found in the greater offense. As a result, a cognate offense is *not* an inferior offense under MCL 768.32(1). Accordingly, the trier of fact may not find a defendant not guilty of a

[3] *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002).

> charged offense but guilty of a cognate offense because the defendant would not have had notice of all the elements of the offense that he or she was required to defend against. [footnotes omitted; footnote added].

Therefore, the Michigan Supreme Court has held that pursuant to MCL 768.32(1), a defendant may be found guilty of a necessarily included lesser offense when the defendant was charged with the greater offense, but a defendant may not be convicted of a cognate offense if the defendant has not been charged with the cognate offense. *Id.* The *Cornell* Court held that "a requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Cornell*,[4] 466 Mich 335, 357; 646 NW2d 127 (2002). Therefore, for a trial court to be able to instruct the jury regarding an offense not charged pursuant to MCL 768.32(1), "a rational view of the evidence" must support the defendant's conviction of the offense. *Id.*

There is no reason, however, to conclude that *Cornell*'s holding regarding its distinction between lesser included offenses and cognate offenses under MCL 768.32(1) limits the express language of the statute that also allows conviction of attempt. In a concurring statement in an order of the Michigan Supreme Court, Justice Markman has commented on the import of MCL 768.32(1) regarding convictions of attempt, stating:

> *Cornell* and its progeny have largely focused on which offenses are necessarily included lesser offenses and which are cognate offenses. However, it cannot be overlooked that MCL 768.32(1) expressly authorizes an instruction for an "attempt" of a charged offense, even though an attempt may otherwise constitute a cognate offense. Where warranted by the evidence, such an instruction must be provided. [*People v Smith*, 483 Mich 1112; 766 NW2d 832 (2009) (Markman, J., concurring).][5]

When this Court reviews statutory language, the Court's goal is to "give effect to the intent of the Legislature." *People v Likine*, 492 Mich 367, 387; 823 NW2d 50 (2012). This Court first looks to the text of the statute, and "[i]f the statute is unambiguous on its face, the

---

[4] Some cases indicate that *People v Mendoza*, 468 Mich 527; 664 NW2d 685 (2003), overrules *Cornell* in part by holding that manslaughter is an inferior offense to murder. However, *Mendoza* relies on the *Cornell* analysis of necessarily included lesser offenses to reach this conclusion; therefore, the pertinent analysis in *Cornell* has not been overruled. *Mendoza*, 468 Mich at 531-533, 540-541, 544.

Because *Cornell* was decided on June 18, 2002, and defendant was convicted on December 20, 2002, there is no issue with retroactive application of *Cornell* to the present case. *Cornell*, 466 Mich 335. See *People v Phillips*, 470 Mich 894; 683 NW2d 597 (2004)

[5] While concurring statements are not binding authority, these statements are instructive. *Duncan v State*, 488 Mich 1019; 791 NW2d 721 (2010).

Legislature will be presumed to have intended the meaning expressed, and judicial construction is neither required nor permissible." *Id.*

MCL 768.32(1) provides for several options when a defendant is charged with a crime that has varying degrees: the judge may find the accused guilty as charged, not guilty, guilty of a lesser offense of the offense charged, *or* guilty of an attempt to commit the charged offense. Use of the word "or" indicates that these options exist independent of one another. *Wilder* interpreted *Cornell* to mean that because a cognate offense includes elements that are not included in the greater offense, "a cognate offense is *not* an inferior offense under MCL 768.32(1)." *Wilder*, 485 Mich at 41. But, even if attempt to commit fourth degree criminal sexual conduct is a lesser included cognate offense of fourth-degree criminal sexual conduct, MCL 768.32(1) *also* explicitly allows the fact finder to be instructed regarding attempt of the offense with which defendant is charged. Conviction of the attempt thus remains an option under the statute, regardless of *Cornell's* instruction regarding lesser offenses.

Defendant continues his argument by contending that no rational view of the evidence supports finding that he "attempted" to commit the offenses and that the only possible verdicts were that he either completed the charged acts and was thus guilty of fourth degree criminal sexual conduct or did not commit the acts and was thus not guilty of anything. The trial court "is presumed to know the law." *People v Garfield*, 166 Mich App 66, 79; 420 NW2d 124 (1988). And, Michigan law permits conviction of an attempt where the evidence demonstrates the crime was actually completed. *People v Jones*, 443 Mich 88, 103; 504 NW2d 158 (1993).[6]

The evidence presented by the victim regarding the encounter was uncontested. Defendant grabbed the victim's right breast, then her left breast. Defendant then grabbed the victim by the back of her neck with his left hand and pushed her into the corner of the room while the victim was facing defendant. Defendant's body was up against the victim, and he began licking and kissing her face. The victim began screaming, "No," and, "Get off me." Defendant stopped and let go of the victim, began walking toward the doorway, put his finger to his mouth in a "Shhh" motion, and stated, "Just a little love, just a little kiss. Do you want a little money, or something, honey?" Because MCL 750.520e(1)(b), requires that defendant engaged in sexual contact with the victim, which includes defendant intentionally touching the victim's "clothing covering the immediate area of the victim's or actor' s intimate parts," with a sexual purpose and with force, this Court concludes that these undisputed facts support the conclusion that the crime of fourth-degree criminal sexual conduct occurred. Therefore, because the

[6] See also *Jones*, 443 Mich at 103, quoting *United States v York*, 578 F2d 1036, 1039 (CA 5, 1978), cert den 439 US 1005; 99 S Ct 619; 58 L Ed 682 (1978) (internal quotation marks omitted) (explaining the rationale behind the Michigan rule that a defendant can be convicted of attempt even if the evidence shows defendant completed a crime: "'To compel acquittal of an attempt because the completed offense was proved would result in the anomalous situation of a defendant going free not because he was innocent, but for the very strange reason that he was too guilty.'").

evidence shows defendant committed the completed offense, the trial court could properly convict defendant of attempted fourth-degree criminal sexual conduct.

Defendant's second argument on appeal is that the trial court's verdict is inconsistent with its factual findings; therefore, the trial court's verdict constitutes an impermissible "waiver break," which warrants reversal of his convictions. We disagree.

When a judge in a bench trial acts as a fact finder and renders a verdict that is inconsistent with his or her findings of fact, the resulting verdict is known as a "waiver break." *People v Ellis*, 468 Mich 25, 26-28; 658 NW2d 142 (2003). While a jury is permitted to render an inconsistent verdict, a trial court, acting as the fact finder in a bench trial, "'is not afforded the same lenience[]'" and may not render an inconsistent verdict. *Ellis*, 468 Mich at 26. According to the Michigan Supreme Court, waiver breaks are "unethical and a ground for referral to the Judicial Tenure Commission . . . ." *Id.* at 26. However, "a trial court's decision of not guilty, whether proper or not, is constitutionally protected by double jeopardy principles," and "a trial judge that rewards a defendant for waiving a jury trial by 'finding' him not guilty of a charge for which an acquittal is inconsistent with the court's factual findings cannot be corrected on appeal." *Id.* at 28.

Here, defendant's waiver break argument fails for two reasons. First, Michigan law permits a conviction of attempt when the evidence shows the underlying offense was completed. *Jones*, 443 Mich at 103. Therefore, even if the trial court's findings of fact demonstrated that defendant completed the charged offense and no evidence supported a conviction of attempt, this is immaterial under Michigan law. Second, even if the court's verdicts did constitute a waiver break, this Court cannot correct such an error on appeal. *Ellis*, 468 Mich at 28.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Deborah A. Servitto
/s/ Amy Ronayne Krause