STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SOLOMON F. GOLIDAY,

Defendant-Appellant.

UNPUBLISHED
February 4, 1997

No. 168558
Recorder's Court
LC No. 93-01118

Before: McDonald, P.J., and Wahls and D. B. Leiber*, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of first degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2) and sentenced to concurrent terms of fifteen to thirty years' imprisonment. On appeal defendant claims the court's instructions to the jury were erroneous. We affirm.

Defendant requested instructions on third-degree and attempted third-degree criminal sexual conduct, MCL 750.520d; MSA 28.788(4); MCL 750.92; MSA 28.287 and fourth-degree and attempted fourth-degree criminal sexual conduct, MCL 750.520e; MSA 28.788(5); MSA 750.92; MSA 28.287. The trial court refused.

On appeal defendant first claims the offense of CSC III is a necessarily included lesser offense of CSC I and therefore the court erred in denying his request for such an instruction. We disagree. Michigan recognizes two classes of lesser included offenses - necessarily included lesser offenses and cognate lesser offenses. A necessarily included lesser offense is one which must be committed whenever the greater offense is committed. A cognate lesser offense is one that shares several elements with, and is of the same class or category as, the greater offense, but that may contain some elements not found in the greater offense. *People v Ora Jones*, 395 Mich 379; 236 NW2d 461 (1975); *People v Green*, 86 Mich App 142; 272 NW2d 216 (1978).

* Circuit judge, sitting on the Court of Appeals by assignment.

In the present case the prosecutor chose to charge defendant with a violation of two counts of CSC I, MCL 750.520b(1)(e); MSA 28.788(2). This section has only two elements; penetration and possession of a weapon. Defendant claims CSC III under MCL 750.520d(1)(b); MSA 28.788(4) is a necessarily included lesser offense of MCL 520b(1)(e); MSA 28.788(2). The elements of the latter are penetration and force or coercion as listed in MCL 520(b)(1)(f)(i) to (v); MSA 28.788(2) which requires the actor to cause personal injury and use force or coercion to accomplish sexual penetration. Under the facts of this case it was possible to be convicted of CSC I without having committed CSC III because of the additional element of personal injury required under CSC III.[1] Thus CSC III in this case is a cognate lesser offense, rather than a lesser included offense, because it shares the element of penetration and is in the same class or category as CSC I, but was not necessarily committed.

Further the requested instruction was not compatible with the defendant's defense wherein he denied the use of force and/or coercion or a weapon to accomplish penetration, arguing instead that the complainant consented to the multiple penetrations by the three men. The failure to give the instruction did not prevent the jury from believing the defendant's defense. Defendant was not prejudiced by the Court's failure to give the instruction. *People v Marshall*, 115 Mich App 433; 320 NW2d 396 (1982).

Moreover even if the instruction should have been given as a cognate lesser offense we conclude such a failure was harmless error. *People v Mosko*, 441 Mich 496; 495 NW2d 534 (1992). The evidence of guilt is overwhelming. The defendant admits he and two others sexually penetrated the complainant vaginally and orally. The complainant testified she was hit with the gun before the assault occurred and defendant dropped the gun on the ground when he took his turn assaulting the complainant. The police caught the defendant running out of the garage pulling up his pants and the officers observed defendant's wallet and toy gun fall out of his pants. The only issue in the case was whether the complainant consented to having three men vaginally and orally penetrate her. The jury did not believe the defense's theory of consent. The failure of the court to instruct on the cognate lesser offense of CSC III would have no affect on the verdict. *People v Considine*, 196 Mich App 160; 492 NW2d 465 (1992).

Defendant also claims for the first time on appeal the trial court failed to properly instruct the jury on his defense of consent. This issue is not preserved because the defendant did not seek such an instruction at trial and failed to object to the instructions as given on this issue. *People v Mills*, 450 Mich 61; 537 NW2d 909 (1995). In any case, we find no manifest injustice because the court's instructions were adequate on the defense of consent.

Defendant next claims the jury returned inconsistent verdicts because they found him not guilty of armed robbery yet guilty of two counts of CSC I which required the use of a weapon. We disagree. Defendant was charged with the armed robbery of the complainant's companion. The robbery occurred before the sexual assault on complainant. Defendant never denied the complainant's companion was the victim of an armed robbery, but claimed he was not a part of that armed robbery. The jury was free to find defendant did not take part in the earlier armed robbery yet find the defendant

used a weapon during the subsequent sexual assault on complainant. We do not find the verdicts inconsistent.

Finally, the court's refusal to instruct the jury on CSC IV and attempted CSC III and CSC IV was not erroneous. The defendant admitted penetration so the evidence does not support the requested instructions. *People v Higgs*, 209 Mich App 306; 530 NW2d 182 (1995).

Affirmed.

/s/ Gary R. McDonald
/s/ Dennis B. Leiber

[1] In certain factual scenarios CSC III may be a necessarily lesser included offense but this is not one of them. See *People v Mosko*, 441 Mich 496; 495 NW2d 534 (1992).