STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JESSE JONES,

Defendant-Appellant.

UNPUBLISHED
March 4, 1997

No. 186286
Recorder's Court
LC No. 93-007148

Before: Jansen, P.J., and Reilly and W. C. Buhl,* JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(b); MSA 28.788(4)(1)(b), assault with a dangerous weapon (felonious assault), MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to serve concurrent terms of nine years and six months to fifteen years' imprisonment for each count of third-degree criminal sexual conduct and two years and six months to four years' imprisonment for the felonious assault conviction, to be served consecutively to two years' imprisonment for his felony-firearm conviction. Defendant appeals as of right and we affirm.

Defendant argues that the trial court erred in declining to instruct the jury on the purportedly cognate lesser included offense of assault with intent to commit criminal sexual conduct. We disagree. This Court reviews instructions as a whole and determines whether they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Moldenhauer*, 210 Mich App 158, 159-160; 533 NW2d 9 (1995); *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995).

In order to require a properly requested instruction for a cognate lesser included offense, two elements must be satisfied. *People v Hendricks*, 446 Mich 435, 444; 521 NW2d 546 (1994). First, the principal offense and the lesser offense must be of the same class or category. *Id*.; *People v Ora Jones*, 395 Mich 379, 387; 236 NW2d 461 (1975). Second, the evidence adduced at trial must support a conviction of the lesser offense. *Hendricks*, *supra*, p 444; *Ora Jones*, *supra*, p 388. A

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

defendant is entitled to a jury instruction on the lesser offense *only if* the evidence introduced at trial would justify the jury in concluding that the lesser offense, and not the greater charged offense, was committed. *People v Draper*, 150 Mich App 481, 487; 389 NW2d 89 (1986). Moreover, "there must be more than a modicum of evidence . . . ." *People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991). Here, defendant did not assert that he *attempted* to touch the complainant. Rather, defendant admitted that he engaged in sexual intercourse with the complainant, but argued that the act was consensual. Admittedly, consent is a viable defense to a charge of assault, which is an essential element of assault with intent to commit criminal sexual conduct, *People v Worrell*, 417 Mich 617, 621-623; 340 NW2d 612 (1983); however, there was no evidence on record to show that defendant "merely" assaulted the complainant or to show that the complainant consented to being touched by defendant. For want of evidence to support a conviction of assault with intent to commit criminal sexual conduct, we conclude that the trial court was correct in declining the requested instruction.

Defendant next argues that the trial court abused its discretion in permitting the prosecutor to question defendant regarding his ownership of a poster bearing the phrase, "Eat more pussy." We disagree. This Court reviews a trial court's decision regarding the admission of evidence for an abuse of discretion. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996); *People v Catanzarite*, 211 Mich App 573, 579; 536 NW2d 570 (1995). "An abuse of discretion exists when the court's decision is so grossly violative of fact and logic that it evidences perversity of will, defiance of judgment, and the exercise of passion or bias. Stated somewhat differently, an abuse of discretion also exists when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling." *Ullah*, *supra*, p 673.

Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402; *People v VanderVliet*, 444 Mich 52, 60-61; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994). Evidence is relevant if it has any tendency to make the existence of a fact which is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *VanderVliet*, *supra*, p 60. Under this broad definition, evidence is admissible if it is helpful in throwing light on any material point. *People v Kozlow*, 38 Mich App 517, 524-525; 196 NW2d 792 (1972). Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *People v Mills*, 450 Mich 61, 74-75; 537 NW2d 909 (1995). Unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *Id*. Assessing probative value against prejudicial effect requires a balancing of factors, including the time necessary to present the evidence and the potential for delay, whether the evidence is cumulative, how directly the evidence tends to prove the fact in support of which it is offered, how important the fact sought to be proved is, the potential for confusion, and whether the fact can be proved another way with fewer harmful collateral effects. *People v Oliphant*, 399 Mich 472, 490; 250 NW2d 443 (1976). Here, the fact that defendant not only owned, but chose to display at the time of the incident, a poster advocating the act of cunnilingus intimates that defendant, at the very least, was not averse to the practice of oral sex. Accordingly, we conclude that defendant's ownership of the poster bears on the likelihood of whether he performed cunnilingus on the complainant. Given the importance of the fact

sought to be proved and that MRE 403 determinations "are best left to a contemporaneous assessment of the presentation, credibility, and effect of the testimony by the trial judge," *Ullah, supra*, p 675, we do not find an abuse of discretion.

Defendant next argues that there was insufficient evidence to establish the act of cunnilingus. We disagree. When considering a sufficiency of the evidence challenge, we view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995).

The third-degree criminal sexual conduct statute, MCL 750.520d(1)(b); MSA 28.788(4)(1)(b), prohibits engaging in sexual penetration with another person under certain circumstances, including where the penetration is accomplished by force or coercion. *Hutner, supra*, p 283. MCL 750.520a(l); MSA 28.788(a)(l) defines "sexual penetration," for purposes of sections 520a to 520l, as "sexual intercourse, *cunnilingus*, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body" [emphasis added.] *People v Mehall*, 213 Mich App 353, 377; 539 NW2d 593 (1995), rev'd 454 Mich 1 (1997). Cunnilingus requires "the *placing* of the mouth of a person upon the external genital organs of the female which lie between the labia, or the labia itself (sic), or the mons pubes (sic)" [emphasis added.] *People v Legg*, 197 Mich App 131, 133; 494 NW2d 797 (1992); citing *People v Harris*, 158 Mich App 463, 470; 404 NW2d 779 (1987). Here, the complainant testified that defendant "performed cunnilingus on me." When asked what she meant by cunnilingus, the complainant testified, "He had oral sex with me." In an attempt to further expound on the complainant's definition of cunnilingus, the prosecutor asked, "Placed his mouth on your vagina?" The complainant responded, "Yes." Because the complainant's testimony established that defendant "placed" his mouth upon her genital organs, there was sufficient evidence to support the verdict. *Legg, supra*.

Defendant also argues that he was deprived of his right to the effective assistance of counsel by counsel's failure to challenge the impartiality of juror eleven. Specifically, defendant claims that juror eleven's familiarity with prosecution witness Lisa Collins, a Detroit Police Officer, rendered the juror incapable of delivering an impartial verdict and that, therefore, his attorney should have exercised a peremptory challenge, challenged for cause, or moved for a mistrial. We disagree. To establish a claim of ineffective assistance of counsel, the defendant must show: (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that the performance so seriously prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

In the instant case, Juror Eleven's familiarity with Collins was not discovered until after the jury was sworn. Moreover, counsel could not be expected to have discovered such familiarity any earlier because: (1) the witness was listed under a different surname and (2) the witness was listed as a civilian, not a police officer. Because a party may exercise his right of peremptory challenge, as well as any challenges for cause, only up to the time the jury is sworn, *Hunter v Parsons*, 22 Mich 96 (1870);

Scripps v Reilly, 38 Mich 10 (1878), *People v Goode*, 78 Mich App 781, 785-786; 261 NW2d 47 (1977); defendant's claim that counsel's failure to do so deprived him of effective representation is without merit. Further, defendant's claim that counsel's failure to move for a mistrial is also without merit because the trial court, by conducting voir dire of the juror, conducted itself as it would have if counsel had moved for a mistrial, see *Podbielski v Argyle Bowl, Inc*, 44 Mich App 280, 287; 205 NW2d 240 (1973), and thereby satisfied itself as to the juror's impartiality. Because the court determined that juror eleven could render a fair and impartial verdict notwithstanding her familiarity with Collins, counsel's omission could not have affected the outcome of trial and, therefore, did not deprive defendant of the effective assistance of counsel. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Moreover, defendant failed to overcome the presumption that counsel's omission might be considered sound trial strategy. See *People v Robinson*, 154 Mich App 92, 93; 397 NW2d 229 (1986)

Lastly, defendant argues that the trial court erred in sentencing him to serve nine years and six months to fifteen years' imprisonment for his third-degree criminal sexual conduct convictions. Specifically, defendant asserts that the minimum guidelines range of six to ten years was erroneously calculated, claiming that the sentencing court improperly scored Offense Variables 1 (Aggravated Use of Weapon), 2 (Physical Attack and/or Injury), 7 (Offender Exploitation of Victim Vulnerability), and 12 (Criminal Sexual Penetrations). We review a trial court's exercise of discretion in calculating the sentencing guidelines for an abuse of discretion. *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991). A trial court's scoring decision for which there is any supporting evidence will be upheld on appeal. *People v Watkins*, 209 Mich App 1, 5; 530 NW2d 111 (1995). Here, there was evidence on record to justify the trial court's scoring decisions with regard to OV 7 and OV 12, but not with regard to OV 1 and OV 2. Although defendant's objections to the scoring of OV 1 and OV 2 have merit, recalculation of those variables only affects the lower end of the sentencing guidelines range. Because the trial court clearly intended to sentence defendant at the upper end of the guidelines range,[1] resentencing is not necessary.

Defendant also argues that the sentence imposed is violative of the principle of portionality. We disagree. We review a claim of disproportionality for an abuse of discretion. *People v Poppa*, 193 Mich App 184, 187; 483 NW2d 667 (1992). A sentencing court has abused its discretion when a sentence is not proportionate "to the seriousness of the circumstances surrounding the offense and the offender." *Id*. Because defendant's sentence falls within the recommended guidelines range and because defendant failed to introduce at sentencing any unusual circumstances which would mandate a downward departure from the guidelines, we decline to find an abuse of discretion. *People v McElhaney*, 215 Mich App 269, 285-286; 545 NW2d 18 (1996).

Affirmed.

/s/ Kathleen Jansen
/s/ Maureen Pulte Reilly
/s/ William C. Buhl

[1] The record from the sentencing hearing reveals that the trial court admonished defendant for his conduct, stated, "I intend to give you the maximum," then sentenced defendant to serve a minimum term of nine years and six months.