

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID H. MCGEE,

Defendant-Appellant.

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UNPUBLISHED

April 13, 1999

No. 205968

Recorder's Court

LC No. 96-500864

Before: Gribbs, P.J., and Griffin and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of first-degree criminal sexual conduct, involving a mentally disabled victim over whom defendant was in a position of authority and used that authority to coerce the victim to submit, MCL 750.520b(1)(h)(ii); MSA 28.788(2)(1)(h)(ii). Defendant was sentenced to six to fifteen years' imprisonment. We affirm.

Defendant argues that the trial court erred when it refused to instruct the jury on second-degree criminal sexual conduct. We disagree. Jury instructions are reviewed in their entirety to determine if there was error. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Even if the instructions are imperfect, no error is created if the instructions fairly present the issues to be tried and sufficiently protect the defendant's rights. *Id.* The instructions must include all the elements of the crime charged and must not exclude any material issues, defenses, or theories if there is evidence to support them. *Daniel, supra*, 207 Mich App 53. Reversal is not required if the error was harmless. *People v Mosko*, 441 Mich 496, 503; 495 NW2d 534 (1992).

Second-degree criminal sexual conduct is a cognate lesser offense of first-degree criminal sexual conduct because it is possible to commit first-degree criminal sexual conduct without first having committed second-degree criminal sexual conduct. *People v Lemons*, 454 Mich 234, 253-254; 562 NW2d 447 (1997). Before the trial court can instruct on cognate lesser offenses, it must review the evidence to determine if it would support a conviction of the cognate lesser offense. *Id.* Moreover, the instruction on the cognate lesser offense must be consistent with the evidence and defendant's theory of the case. *Lemons, supra*, 454 Mich 254. An instruction on second-degree criminal sexual conduct would not have been consistent with the evidence or with defendant's theory in this case. *Lemons*,

*supra*, 454 Mich 254. The trial court’s refusal to instruct the jury on second-degree criminal sexual conduct was not improper.

Defendant also argues that the trial court erred in refusing to instruct the jury on third-degree criminal sexual conduct as a necessarily included lesser offense. We agree but find the error harmless.

In *Mosko, supra*, the Michigan Supreme Court held that third-degree criminal sexual conduct is a necessarily lesser included offense of first-degree criminal sexual conduct. *Mosko, supra*, 441 Mich 501. If a lesser offense is necessarily included and a defendant requests an instruction on that offense, the court must instruct the jury regarding that lesser crime. *People v Marji*, 180 Mich App 525, 530; 447 NW2d 835 (1989), remanded on other grounds sub nom *People v Thomas*, 439 Mich 896 (1991). Accordingly, the trial court erred in denying defendant’s request for a jury instruction on third-degree criminal sexual conduct.

However, on the facts of this case, the trial court’s refusal to instruct on third-degree criminal sexual conduct was harmless. *Mosko, supra*, 441 Mich 501-503. In this case, first- and third-degree criminal sexual conduct are distinguished only by the presence or absence of a situation in which defendant was “in a position of authority over the victim and used this authority to coerce the victim to submit.” MCL 750.520b(1)(h)(ii); MSA 28.788(2)(1)(h)(ii). At trial, defendant did not dispute that he was in a position of authority over the victim. Accordingly, the trial court’s refusal to instruct the jury on third-degree criminal sexual conduct was harmless error. *Mosko, supra*, 441 Mich 505-506.

Affirmed.

/s/ Roman S. Gibbs  
/s/ Richard Allen Griffin  
/s/ Kurtis T. Wilder