

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN ELLSWORTH MITCHELL, II,

Defendant-Appellant.

UNPUBLISHED

January 25, 2000

No. 212488

Antrim Circuit Court

LC No. 97 003107-FC

Before: Markey, P.J., and Murphy and R.B. Burns*, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). He was sentenced to 12-1/2 to 25 years' imprisonment. He appeals by right. We affirm.

Defendant argues that the trial court committed error requiring reversal when it refused to give a lesser offense instruction, specifically an instruction for the crime of gross indecency. Defendant argues that the crime of gross indecency is a necessarily included lesser offense of CSC I (penetration of a person under thirteen years of age). First, this issue is not preserved. While defendant requested the gross indecency instruction below, he did not argue the issue presently before this Court. Rather, he merely stated that gross indecency was a cognate lesser included offense and never raised the question whether gross indecency is a necessarily included lesser offense. Issues not raised before and considered by the trial court are generally not preserved for appellate review. *People v Conner*, 209 Mich App 419, 422; 531 NW2d 734 (1995). See also *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994).

Moreover, even were this issue preserved, defendant has not demonstrated error requiring reversal. Gross indecency is *not* a necessarily included lesser offense of CSC I. *People v Hack*, 219 Mich App 299, 307; 556 NW2d 187 (1996).¹ Therefore, there has been no showing that an instructional error resulted in the conviction of an actually innocent defendant or seriously

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

affected the proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Thus, reversal is not warranted. *Id.*

We affirm.

/s/ Jane E. Markey

/s/ William B. Murphy

/s/ Robert B. Burns

¹ We note that defendant advances an interesting argument challenging the rule of law established in *Hack*. His argument, however, does not support reversal of his conviction because, assuming that gross indecency is a necessarily included lesser offense, failure to give the instruction was harmless under the circumstances. Defendant confessed to penetrating the victim, who was then approximately nine years old. Although he attempted to discredit his own confessions at trial, the jury obviously did not accept his explanation that he did not know what he was doing when he confessed and that the confessions were not true.