STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT EDWARD McCONNON a/k/a SCOTT EDWARD MOSHER,

Defendant-Appellant.

UNPUBLISHED
February 18, 2000

No. 209063
Newaygo Circuit Court
LC No. 96-006318-FC

Before: Holbrook, Jr., P.J., and Zahra and J.W. Fitzgerald,* JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(f); MSA 28.788(3)(1)(f) and attempted third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(b); MSA 28.788(4)(1)(b).[1] Defendant was sentenced to concurrent prison terms of 8 to 22 1/2 years for the CSC II conviction and 4 to 7 1/2 years for the attempted CSC III conviction. We affirm the CSC II conviction but reverse and remand for a new trial on the attempted CSC III conviction.

Defendant first argues that his CSC III conviction should be reversed because the trial court erred in instructing the jury on assault with intent to commit CSC III instead of attempted CSC III, completely omitting any instruction on the law of attempt. We agree. Because defendant failed to raise an objection at trial to the instructions given, we review this constitutional error[2] for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, three requirements must be met: (1) error must have occurred, (2) the error was plain, . . . (3) and the plain error affected substantial rights." *Id.* at 763. The third prong of the plain error rule requires a showing of prejudice, i.e., "that the court assess whether the jury, properly instructed, could have reached a different verdict had the error not occurred. *People v Vaughn*, 447 Mich 217, 238; 524 NW2d 217 (1994), overruled in part on other grounds 460 Mich 750.[3]

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

The prosecution concedes that the trial court erred when it read CJI2d 20.17 (assault with intent to commit CSC II) instead of a combination of CJI2d 9.2 (attempt), CJI2d 20.12 (CSC III), and CJI2d 20.15 (force or coercion) to reflect the offense charged. Moreover, the error was plain. Thus, resolution of this issue comes down to a question of whether defendant has established prejudice.[4] We believe defendant has met this burden.

There are certain elements of a proper attempted CSC III instruction and the charge actually given to the jury that are identical. The trial court properly instructed the jury that the prosecutor had the burden of proof beyond a reasonable doubt. It also instructed the jury on the meaning of force or coercion. Nevertheless, the instruction incorrectly informed the jury that it could convict defendant of attempted CSC III if it found that he "committed the assault and intended to commit sexual penetration." Michigan follows the rule that mere intention to commit a specified crime does not amount to an attempt. *People v Coleman*, 350 Mich 268, 276, 277; 86 NW2d 281 (1957); *People v Atcher*, 57 Mich App 148, 150; 226 NW2d 77 (1974). Rather, the prosecution must prove that defendant had "the specific intent to commit the crime attempted and that he made an overt act going beyond mere preparation towards the commission of the crime. *People v Kimball*, 109 Mich App 273, 278-279; 311 NW2d 343, modified on other grounds 412 Mich 890 (1981). Nothing in the trial court's instructions put the legal concept of attempt before the jury. See *People v Byrd*, 133 Mich App 767, 773-774; 350 NW2d 802 (1984).

We believe that the jury could have reached a different conclusion had it been properly instructed. Based on the record , the jury could have concluded that although defendant intended to penetrate the complainant, nevertheless his act was indistinguishable from the other non-penetrating acts it found supported the CSC II conviction. That is, the jury could have reasonably concluded that defendant did not take the overt step necessary to be guilty of attempted CSC III. Such a finding would technically rest on the elements the trial court actually identified for the jury without being legally sustainable as an attempted CSC III.[5] Accordingly, we hold that this plain error did adversely affect defendant's rights under the Fifth and Sixth Amendments of the United States Constitution. Further, we believe the error also seriously undermined the fairness and integrity of the judicial proceedings. *Johnson v United States*, 520 US 461, 469-470; 117 S Ct 1544; 137 L Ed 2d 718 (1997); *Carines, supra* at 772.

Defendant also argues that reversal is required because the trial court erred when it did not define the term "personal injury" for the jury in the context of its CSC II jury instruction. We disagree. At the beginning of the jury instructions, the court informed the jury that it "must take all of my instructions together as the law that you are to follow." When the trial court instructed the jury on the law regarding CSC II, it had already defined the term "personal injury" by issuing CJI2d 20.9 in its entirety in conjunction with its instructions on CSC I.[6] See *People v Bonham*, 182 Mich App 130, 134; 451 NW2d 530 (1989). Further, in its instruction for CSC II, the court noted that one of the elements of the crime was "that defendant caused personal injury to the complainant . . . ." Accordingly, we see no error requiring reversal.

Next, defendant argues that reversal is required because the trial court erroneously denied his motion for a directed verdict on the CSC I charge. We disagree. Considering all of the evidence in a

light most favorable to the prosecution, we believe a rational trier of fact could have found based on the evidence in record as of the motion that the essential elements of CSC I were proved beyond a reasonable doubt. *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995). As for defendant's reliance on the *Vail* automatic reversal rule,[7] we note that the *Vail* rule was specifically overruled in *People v Graves*, 458 Mich 476; 581 NW2d 229 (1998).

Defendant further argues that the trial court erred by denying his motion for a directed verdict on the CSC II count. Specifically, defendant asserts that there was no evidence from which a rational trier of fact could conclude that complainant had suffered the requisite physical injury. Again, we disagree. In *People v Martinez*, 190 Mich App 442; 476 NW2d 641 (1991), this Court held that when a defendant causes a victim personal injury at the outset of a series of specific acts, each constituting criminal sexual conduct, then the original injuries are sufficient proof of the aggravating element for the charges related to that series of sexual assaults. *Id*. at 444-445. The only modifying principle is that the defendant cannot manifest an intent to cease the attack. *Id*. at 445.

In this case, the complainant's testimony described a continuous assault similar to that in *Martinez*. She also explained that she tried to scream, she was crying, felt upset, and was "terrified" for her life during the assault. As for the physical injuries defendant claims occurred prior to the charged offense, complainant testified that the first time she noticed this swelling and bruising was after defendant left her apartment. Both the emotional reaction and her physical injuries qualify as personal injuries. See *People v Petrella*, 424 Mich 221; 380 NW2d 11 (1985); *People v Himmelein*, 177 Mich App 365, 377; 442 NW2d 667 (1989); *People v Hollis*, 96 Mich App 333, 337; 292 NW2d 538 (1980). When viewed in the light most favorable to the prosecutor, we believe this testimony demonstrated that the complainant sustained her injuries during the initial assault that immediately preceded the acts, and that defendant did not intend to discontinue the attack at that time.

Defendant's final argument is that the trial court erred by excluding evidence that the complainant had a history of excessive alcohol consumption that resulted in memory loss and accidental injuries. By failing to make an offer of proof in the trial court, defendant failed to preserve this issue for appeal. MRE 103(a)(2). In any event, the trial court's ruling on this issue did not constitute a miscarriage of justice because the court still permitted defendant to question the complainant and other witnesses about her drinking on the night of the offense. *People v Stacy*, 193 Mich App 19, 31; 484 NW2d 675 (1992). Moreover, defendant does not suggest what testimony he hoped to elicit, leaving us to speculate about its admissibility.

Affirmed in part, reversed in part, and remanded for a new trial on the charge of CSC III. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ John W. Fitzgerald

[1] Defendant was acquitted of home invasion, MCL 750.110a(2); MSA 28.305(a)(2), and attempted first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(f); MSA 28.788(2)(1)(f).

[2] The omission of an essential element of a criminal jury instruction is an error of constitutional magnitude. *People v Gaudin*, 515 US 506, 509-510; 115 S Ct 2310; 132 L Ed 2d 444 (1995); *Carines*, *supra* at 761.

[3] Although the *Carines* Court expressly "repudiated the *Vaughn* plurality's conclusion that litigants have no duty to preserve claims of instructional error," *Carines*, *supra* at 767, the *Carines* Court did not similarly disavow the *Vaughn* Court's explanation of the prejudice standard.

[4] "It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Unites States v Olana*, 507 US 725, 734; 113 S Ct 1770; 123 L Ed 2d 508 (1993). Accord *Carines*, *supra* at 763.

[5] We do not suggest that it would be impossible for a properly instructed jury to convict defendant of attempted CSC III based on the record.

[6] The instruction given contains the following pertinent language taken from CJI2d 20.9: "Personal injury means bodily injury, disfigurement, chronic pain, pregnancy, disease, loss or impairment of sexual or reproductive organ, or mental anguish. Mental anguish means extreme pain[,] extreme distress, or extreme suffering either at the time of the event or later."

[7] *People v Vail*, 393 Mich 460, 464; 227 NW2d 535 (1975), overruled in part 458 Mich 476.