STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 18, 2000
v	No. 214839 St. Clair Circuit Court
RICHARD ALAN DUENAZ, Defendant-Appellant.	LC No. 93-002168-FH

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

PER CURIAM.

Following a jury trial, defendant was convicted of fourth-degree criminal sexual conduct, MCL 750.520e(1)(a); MSA 28.788(5)(1)(a), for a July 5, 1993, incident, and assault with intent to commit second-degree criminal sexual conduct, MCL 750.520g(2); MSA 28.788(7)(2), for a July 13, 1993, incident. He was sentenced as a third habitual offender, MCL 769.11; MSA 28.1083, to two to four years' imprisonment for the CSC IV conviction and five to ten years' imprisonment for the assault with intent to commit CSC II conviction.

Defendant appeals his conviction of assault with intent to commit CSC II, only.[1] On appeal, defendant argues that the trial court's refusal to instruct the jury on any of the factors elevating CSC IV to CSC II was error requiring reversal. We agree and reverse defendant's conviction of assault with intent to commit second-degree criminal sexual conduct. Defendant's conviction of fourth-degree criminal sexual conviction is affirmed.

Defendant was originally charged with the crime of assault with intent to commit CSC involving sexual penetration, MCL 750.520g(1); MSA 28.788(7)(1), for the July 13, 1993, incident. The trial

[1] Ostensibly, defendant's "claim of appeal" pertains to both convictions. However, because the issues raised on appeal relate only to his assault with intent to commit CSC II conviction, defendant's appeal of his CSC IV conviction has been abandoned. *People v McMiller*, 202 Mich App 82, 83, n 1; 507 NW2d 812 (1993).

court instructed the jury on "assault with intent to commit CSC involving sexual contact" and CSC IV as lesser included offenses. At trial, defendant objected to the court's failure to include in its instructions any of the elements that elevate CSC IV to CSC II in the jury instructions for assault to commit CSC involving sexual contact.

We review jury instructions as a whole to determine whether the trial court committed error requiring reversal. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). No error results from the omission of an instruction of the charge as a whole substantively covers the omitted instruction. *People v Harris* 190 Mich App 652, 664; 476 NW2d 767 (1991). Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories that are supported by the evidence. *People v Crawford*, 232 Mich App 608, 620; 591 NW2d 669 (1999).

The standard jury instructions on assault with intent to commit CSC II, CJI2d 20.18(8), required that the jury be instructed on at least one of the factors distinguishing CSC II from CSC IV. However, use of Michigan Criminal Jury Instructions is not required, *People v Gadomski*, 232 Mich App 24, 31-32; 592 NW2d 75 (1998), and we therefore do not conclude that a mere deviation from the standard instruction is dispositive of error. Where an objection was raised at trial, as was done here, failure to give a requested instruction is error requiring reversal if the requested instruction (1) is substantially correct, (2) was not substantially covered in the charge given to the jury, and (3) concerns an important point in the trial so that the failure to give it seriously impaired the defendant's ability to effectively present a given defense. *People v Moldenhauer*, 210 Mich App 158, 159-160; 533 NW2d 9 (1995). The defendant bears the burden of establishing error requiring reversal stemming from the issuance of an inappropriate jury instruction. See, generally, *People v Minor*, 213 Mich App 682, 685; 541 NW2d 576 (1995).

Here, defendant was substantially correct in requesting that the jury be instructed on one of the elements of CSC II because this was clearly an element of the offense. *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). Moreover, when viewed as a whole, the instructions did not protect defendant's rights because none of the elements of CSC II were ever given to the jury in any other instruction. A miscarriage of justice, or manifest injustice, occurs when an erroneous or omitted instruction pertains to a basic and controlling issue in the case. *People v Johnson*, 187 Mich App 621, 628; 468 NW2d 307 (1991). In the present case, the omitted instruction resulted in manifest injustice because it went to an element of the crime that, as will be discussed, was not shown. Thus, we must conclude that the instructional error requires reversal.

The instructional error was not harmless, where as here, there was insufficient evidence to show that defendant met any of the aggravating factors under CSC II. To review this claim, we consider the evidence in a light most favorable to the prosecution to 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, 513-516; 489 NW2d 748, amended 441 Mich 1201 (1992). Under the circumstances, the only aggravating circumstance that the prosecution might have shown was that defendant caused the complainant to suffer a "personal injury." MCL 750.520c(1)(f); MSA 28.788(3)(1)(f).

Even assuming the facts in a light most favorable to the prosecution, however, defendant did not cause the victim "personal injury" within the meaning of this statute. A personal injury can result from mental anguish if evidence is presented that would convince a rational trier of fact to conclude, beyond a reasonable doubt, that the victim experienced extreme or excruciating pain, distress, or suffering of the mind. *People v Petrella*, 424 Mich 221, 259; 380 NW2d 11 (1985). In the present case, the prosecution only brought forth evidence that the complainant was upset after each of the incidents. In *Petrella*'s companion case, *People v Simpson*, the Court held that where the only evidence of mental anguish was testimony that the complainant was crying and upset, that evidence, alone, was insufficient to show mental distress. *Id.* at 275. Thus, we must conclude as a matter of law that because none of the aggravating factors of CSC II was present, there was insufficient evidence to convict defendant of assault with intent to commit CSC II.

Having concluded that there was insufficient evidence to convict defendant of assault with intent to commit CSC II, we need not address defendant's remaining arguments concerning the charge.

Double jeopardy precludes retrying defendant on the originally charged offense of assault with intent to commit CSC involving penetration. *People v Garcia*, 448 Mich 442, 497-499; 531 NW2d 683 (1995). The jury must not have believed that defendant had the intent to penetrate defendant, when this was the sole difference between the charged offense and lesser offense of which he was convicted. *Id.* Moreover, there was insufficient evidence to convict defendant of assault with intent to commit CSC II, so that retrial of this charge is also precluded under double jeopardy principles. *People v Mehall*, 454 Mich 1, 5; 557 NW2d 110 (1997). We therefore remand for a new trial on the lesser included offense of CSC IV regarding the July 13, 1993, incident.

Affirmed in part; reversed and remanded in part. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Roman S. Gribbs