STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 3, 2000
v	No. 219563 Calhoun Circuit Court
BOBBY LEE CAIN, Defendant-Appellant.	LC No. 98-002910

Before: Wilder, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

A jury convicted defendant Bobby Lee Cain of one count of first-degree criminal sexual conduct (CSC I)[1] and one count of third-degree criminal sexual conduct (CSC III).[2] The trial court sentenced Cain as an habitual offender[3] to enhanced prison terms of 30 to 45 years for the CSC I conviction and 10 to 22½ years for the CSC III conviction. Cain appeals as of right. We affirm.

I. Basic Facts And Procedural History

This case arises out of a sexual assault that occurred in Battle Creek on June 13, 1998. The victim testified that on the night of June 12, 1998, she went to a bar called Pablo's to meet with friends. She drank two beers and three mixed drinks while at Pablo's and, she explained, she became so intoxicated that she was "passing in and out" of consciousness. While at the bar, the victim saw Cain, whom she had known for approximately nine years,[4] and accepted his offer to drive her to her house.

The victim said that she lost consciousness after Cain placed her in a truck outside the bar, but she awakened when Cain penetrated her vagina with his penis. According to the victim, she "told

[1] MCL 750.520b(1)(d); MSA 28.788(2)(1)(d).

[2] MCL 750.520d(1)(c); MSA 28.788(4)(1)(c).

[3] MCL 769.10; MSA 28.1082.

[4] Cain apparently dated the victim's sister for some time.

[Cain] no" and "tried to push him off," but she eventually "passed out again." Later, she woke again when Cain attempted to put his penis in her mouth. She recalled that Cain repeatedly told her to open her mouth, that she told him no, but that he was "forceful, and [his penis] went in [her mouth] and . . . maybe ten or fifteen seconds later he ejaculated in [her] mouth."

At trial, the prosecutor introduced DNA evidence to prove the sexual conduct underlying the offenses. Dr. Steven Milligan, a DNA analyst at the Michigan State Police crime laboratory, analyzed samples taken from the victim following the sexual assault. Dr. Milligan testified that DNA extracted from a sample of Cain's blood matched the DNA extracted from the seminal fluid detected in samples taken from the victim's vagina and her panties. Dr. Milligan estimated that the odds were 38 billion to one that the seminal fluid came from someone other than Cain.

After the prosecutor rested, Cain moved for a directed verdict "on both counts" arguing that no reasonable jury could convict him of either CSC I or CSC III because the prosecutor failed to demonstrate "that the victim was physically helpless." The trial court denied the motion.

When Cain testified, he offered a considerably different version of events. He claimed that on June 12, 1998, at 7:30 a.m., the victim called him at his home and that they later had consensual sexual relations, while they were at the victim's apartment. Cain said that he next saw the victim at Pablo's in the early morning hours of June 13, 1998. Because he observed that she was intoxicated, he literally picked her up and carried her out to a Bronco. However, he denied that he had sexual relations with the victim in the back seat of that vehicle.

II. Directed Verdict

A. Standard Of Review

Cain first argues that the trial court improperly denied his motion for a directed verdict. When reviewing a trial court's decision to deny a motion for directed verdict, we review "the record de novo and consider the evidence presented by the prosecution in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime charged were proved beyond a reasonable doubt."[5]

B. The Information Versus The Statute

The crux of Cain's argument is that the prosecutor had to prove that the victim was helpless when he allegedly committed CSC against her. Having failed to do so, Cain contends, the trial court should have directed a verdict of acquittal for both charges. Cain's legal argument, however, has no merit.

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[5] *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370(1999).

The CSC statute[6] provides in relevant part that a person is guilty of CSC I if sexual penetration occurs, and if:

> The actor is aided and abetted by 1 or more other persons and *either* of the following circumstances exists:
>
> (i) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.
>
> (ii) The actor uses force or coercion to accomplish the sexual penetration. [Emphasis supplied.]

Thus it is clear that a prosecutor may rely on evidence of a victim's physical helplessness in order to prove that a defendant committed CSC I. However, this statute is written in the disjunctive, permitting the prosecutor to introduce evidence of other types of aggravating circumstances to prove this crime occurred.[7] Those other aggravating circumstances include evidence that the victim was mentally incapable or incapacitated and the defendant knew or should of known about that condition, which is grouped with physical helplessness. Similarly, the prosecutor may prove the aggravating circumstance by demonstrating that the defendant used force or coercion to perpetrate the penetration. A prosecutor does *not* have to prove that more than one of these enumerated aggravating circumstances occurred to prove beyond a reasonable doubt that a defendant committed CSC I.

In this case, the information charged Cain with violating MCL 750.520b(1)(d); MSA 28.788(2)(1)(d) and stated that Cain "knew or had reason to know that the victim was physically helpless, *and* used force or coercion to accomplish the sexual penetration."[8] This properly identified force or coercion as an aggravating circumstance. That the information charged Cain with knowing or having a reason to know that the victim was physically helpless was an alternative theory of Cain's criminal liability. According to the plain language of the statute, a prosecutor need only prove *one* aggravating circumstance from *either* of these two general categories, i.e., various types of incapacitation or force/coercion. To require the prosecutor to prove more than one aggravating circumstance would make no sense because there was only one act of penetration charged and additional aggravating circumstances would not support any additional criminal liability.[9] Further, only the Legislature has the authority to amend or modify the plain language of the statute. It would be absurd to impute similar powers to the prosecutor to make substantive changes in the law simply by drafting an information in a particular manner.

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[6] MCL 750.520b(1)(d); MSA 28.788(2)(1)(d).

[7] See *People v Gadomski*, 232 Mich App 24, 30-31; 592 NW2d 75 (1998).

[8] Emphasis supplied.

[9] See *id.*

C. Proof Of The Essential Elements Of The Crime

As a substantive matter, the trial court properly denied Cain's motion for a directed verdict. When we view the evidence in the light most favorable to the prosecutor, a rational jury could have found that the prosecutor proved the essential elements of CSC I beyond a reasonable doubt.[10] The prosecutor's theory was that Cain committed CSC I when he used his penis to penetrate the victim's mouth. The victim's testimony wholly supported this charge. In her own words:

> Then I passed out again, and when I woke up again the – the – when I woke up again, he was positioned on his knees where his penis was like up to my mouth . . . . He was telling me to open my mouth. I told him no. He kept repeating himself. . . . He's like "Open your F'ing mouth" and then his penis was on my mouth and he just was like forceful and it went in and like maybe ten or fifteen seconds later he ejaculated in my mouth.

In *People v Patterson*,[11] the Michigan Supreme Court defined the term "force or coercion" to include "the use of actual physical force by the defendant, or any action sufficient to create a reasonable fear of dangerous consequences." The victim's testimony permitted a reasonable inference that, in light of her continued protests and description of the offense as "forceful," Cain used actual physical force to penetrate the her mouth with his penis. Therefore, the trial court properly denied Cain's motion for a directed verdict on the charge of first-degree criminal sexual conduct.

The trial court also properly denied Cain's motion to direct a verdict of acquittal for the CSC III charge under MCL 750.520d(1)(c); MSA 28.788(4)(1)(c) for penile-vaginal penetration. That statute states that a person is guilty of criminal sexual conduct in the third degree if he engages in sexual penetration with another person and "knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless." MCL 750.520a(i); MSA 28.788(1) defines a person as "physically helpless" when that "person is unconscious, asleep, or for any other reason is physically unable to communicate unwillingness to an act."

The evidence of the victim's intoxication, which caused her to go in and out of consciousness, fits within the statutory definition of physical helplessness. In fact, when the victim testified at trial, she specifically stated that the act of penetration is what roused her to consciousness. When the penetration began, she was not in a position to give her consent to the sexual act. In *People v James Perry*,[12] a case in which the defendant first woke his victim before committing CSC I, this Court specifically commented that evidence that a victim is asleep when a person commits an act of sexual penetration or awakes during the penetration, would be sufficient to prove physical helplessness. Accordingly, the trial court properly denied the motion for a directed verdict for the CSC III charge.

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[10] *Mayhew*, *supra*.

[11] *People v Patterson*, 428 Mich 502, 509; 410 NW2d 733 (1987), quoting CJI 20:5:03.

[12] *People v James Perry*, 172 Mich App 609, 611; 432 NW2d 377 (1988).

III. The "Notice Of Defense"

A. Standard Of Review

Cain argues that the trial court committed error requiring reversal by allowing the prosecutor to admit a "Notice of Defense to Use Prior Sexual Act of Victim" (the notice) as evidence to impeach him while he was being cross-examined. Whether to admit evidence is a decision entrusted to the trial court's sound discretion and will not be disturbed on appeal unless there is evidence that the trial court abused that discretion.[13]

B. The Prosecutor's Cross-Examination

As we noted above, Cain testified at trial that he and the victim had consensual sexual intercourse on June 12, 1998. During cross-examination, the prosecutor asked Cain whether, after he was arrested on the morning of June 13, 1998, he thought to tell officers that he and the victim had engaged in consensual intercourse less than twenty-four hours earlier. Cain stated that officer to whom he gave a statement "didn't give [him] the opportunity" to state that he and the victim had consensual intercourse on June 12, 1998. The following exchange then took place:

> *Q.* Do [the DNA statistics] help you now come up with the idea that this act was consensual sometime earlier that day?
>
> *A.* No.
>
> *Q.* I show you this document. Do you recognize that?
>
> *A.* This is the first I've seen it.
>
> * * *
>
> *Q.* It indicates it's a notice of defense to use prior sexual act of victim and one of the things that it states is that the defendant and the alleged victim had consensual sex within hours of the alleged rape.

Cain's counsel then objected to introducing this document as evidence. The trial court overruled the objection without comment and the prosecutor proceeded to ask Cain:

> *Q.* And the date. What's the date on this document?
>
> *A.* The date is March 22nd.
>
> *Q.* That's Monday of this week isn't it?

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[13] *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995).

A. Yes.

Cain's main argument in the trial court was that introducing this notice as evidence constituted an improper infringement on the attorney-client privilege. However, on appeal, Cain argues only that introducing this document was improper because it was irrelevant and its probative value was substantially outweighed by its prejudicial effect. Even if this slightly different argument on appeal does not constitute abandonment of the only preserved argument related to this issue,[14] Cain's present contention is meritless.

Generally, all relevant evidence is admissible, and irrelevant evidence is not admissible.[15] Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence.[16] Under this broad definition, evidence is admissible if explains an issue at trial.[17] Witness credibility is always at issue in a trial[18] and the notice created a substantial question about Cain's credibility when he claimed consensual conduct as a defense. Introducing the notice was classic, permissible impeachment through extrinsic evidence.[19] That the notice was filed one day before the trial began is relevant to the weight the jury should give to the impeaching statement, not to its admissibility.[20]

MRE 403 permits a trial court to exclude otherwise relevant evidence "if its probative value is *substantially outweighed* by the danger of *unfair prejudice*, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[21] As the Michigan Supreme Court explained so well in *People v Vasher*:[22]

> [P]rejudice means more than simply damage to the opponent's cause. A party's case is always damaged by evidence that the facts are contrary to his contentions, but that cannot be grounds for exclusion. What is meant here is an undue tendency to move the tribunal to decide on an improper basis, commonly, though not always, an emotional one. In the pungent phrase of Judge Sloan in *State v Rollo*, 221 Or 428, 438; 351

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[14] *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999).

[15] MRE 402; *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998).

[16] MRE 401; *People v Crawford*, 458 Mich 376, 387-388; 582 NW2d 785 (1998).

[17] *People v Kozlow*, 38 Mich App 517, 524-525; 196 NW2d 792 (1972).

[18] *People v Whitfield*, 425 Mich 116, 131 n 11; 388 NW2d 206 (1986); see also MRE 607.

[19] See MRE 613.

[20] See generally *Cole v Eckstein*, 202 Mich App 111, 113-114; 507 NW2d 792 (1993).

[21] Emphasis added.

[22] *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995).

> P2d 422 (1960), the party "is entitled to hit as hard as he can above, but not below, the belt." McCormick, Evidence (2d ed), § 185, p 439.

Having made consensual sexual relations an issue at trial, we see nothing unfairly prejudicial in the prosecutor's efforts to show that the consent defense was a recent fabrication. The notice did not add anything inflammatory to the body of evidence already presented to the jury. Rather, it called into question the time at which Cain decided to assert this defense, implicitly challenging his motivation to testify truthfully at trial. Any prejudice inherent in allowing the jury to learn of the notice did not "substantially outweigh" the probative value the notice played in raising the credibility issue. Thus, we conclude that the trial court did not err in its ruling on this issue.

IV. Lesser Offense Jury Instructions

A. Preservation And Standard Of Review

Cain argues that the trial court erroneously failed to instruct the jury on fourth-degree criminal sexual conduct (CSC IV), which is a lesser offense. Cain did not ask the trial court to issue this instruction and so failed to preserve this issue for appeal.[23] Under these circumstances, Cain must demonstrate that the trial court's failure to instruct on this lesser offense was a plain error affecting his substantial rights, meaning that the error was outcome determinative.[24]

B. Necessarily Included And Cognate Lesser Offenses

There are two types of lesser felony offenses: offenses that are "necessarily included" in the more severe[25] felony and lesser offenses that are "cognate" to the more severe felony.[26] Identifying a necessarily included offense is relatively simple; if a perpetrator must commit every element of the lesser offense plus one or more additional elements to commit the more serious crime, then the less serious crime is "necessarily included."[27] In other words, it is impossible to commit the greater offense without first committing the lesser when one is necessarily included in the other.[28] However, when the lesser and

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[23] *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); see also MCL 768.29; MSA 28.1052.

[24] *Carines*, *supra*.

[25] More severe offenses are often called "greater offenses," which explains the "lesser included" terminology often applied to these crimes. In general, whether necessarily included or merely cognate offenses, this lesser/greater analysis focuses on the relationship or similarity of the elements of two separate crimes.

[26] *People v Marji*, 180 Mich App 525, 530; 447 NW2d 835 (1989).

[27] *People v Garrett*, 161 Mich App 649, 651; 411 NW2d 812 (1987).

[28] *Id.*

greater crimes are merely in the same class or category, with the greater crime not encompassing all the elements of the lesser crime, then the lesser crime is a cognate offense.[29]

CSC IV is not a necessarily included offense of CSC I because a perpetrator need not commit the sexual contact required in CSC IV in order to commit the sexual penetration required to constitute CSC I.[30] However, the elements of CSC IV are frequently reflected in the circumstances surrounding an act of CSC I.[31] If evidence of sexual contact were "factually included" in the circumstances of the CSC I Cain committed, then the trial court should have issued a CSC IV instruction.[32]

However, Cain is not entitled to have his conviction reversed for an instructional error because any error in the instructions in this case was not plain.[33] The only evidence of sexual contact in this case was the evidence of sexual penetration. As an abstract principle, a reasonable person might be inclined to infer that acts of sexual penetration are also intentional touching of the victim's intimate parts for the purpose of sexual gratification or arousal.[34] However, Cain specifically argued to the jury why the evidence introduced at trial did not support a conclusion that there was *any* sexual conduct. In fact, Cain's argument focused so exclusively on his defense theory that there was *no* sexual conduct, that a reasonable person would not be able to conclude that he intended to rely on an argument that he committed some lesser offense simply in order to defend himself on the greater charge. Nor did the prosecutor attempt to portray the evidence as satisfying CSC IV as an alternative offense. Absent a specific request for a CSC IV instruction, the trial court simply had no reason to believe that whether Cain committed CSC IV was an issue at trial. Accordingly, the failure to issue the instruction *sua sponte* was not a clear and obvious error given the nature and focus of the proofs.

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[29] *People v Michael Lee Perry*, 460 Mich 55, 61; 594 NW2d 477 (1999).

[30] *People v Baker #2*, 103 Mich App 704, 712-713; 304 NW2d 262 (1981); see MCL 750.520b(1); MSA 28.788(2)(1) (CSC I requires "sexual penetration"); MCL 750.520e(1); MSA 28.788(5)(1) (CSC IV requires "sexual contact"); see also MCL 750.520a(k) and (l); MSA 28.788(1)(k) and (l) (defining "sexual penetration" and "sexual contact").

[31] *Baker #2*, *supra* at 713.

[32] *Id.*; see also *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991); *People v Thompson*, 76 Mich App 705, 708; 257 NW2d 268 (1977).

[33] *Carines*, *supra* at 763.

[34] See MCL 750.520a(c) and (k); MSA 28.788(1)(c) and (k).

V. Burden Of Proof Jury Instruction

A. Preservation And Standard Of Review

Cain's final argument[35] is that the trial court committed error requiring reversal by failing to instruct the jury that the prosecutor had the burden of proving that Cain used force or coercion during the sexual assault *and* that the victim was physically helpless. Cain objected at trial, thereby preserving this issue for appeal.[36] Because jury instructions are reviewed in their entirety to determine if reversal is required,[37] our review is essentially de novo.

B. The Trial Court's Obligation To Instruct The Jury

This argument is essentially the same argument Cain advanced concerning the trial court's decision to deny the motion for a directed verdict. The only difference is that, now, Cain contends that the trial court had an obligation to instruct the jury in a manner that complied with his incorrect view of the law. We reiterate that the relevant statutes, not the language the prosecutor used in the criminal information, controls the evidence necessary to prove CSC I and CSC III beyond a reasonable doubt. Therefore, the trial court properly rejected Cain's argument that it had to instruct the jury to find proof beyond a reasonable doubt that he used force and coercion against the victim *and* that the victim was physically helpless.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Michael R. Smolenski
/s/ William C. Whitbeck

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[35] To the extent that Cain also argues that the trial court's instructions permitted the jury to render a verdict without unanimity, we disagree. See *People v Yarger*, 193 Mich App 532, 537; 485 NW2d 119 (1992). The trial court did instruct the jury that its verdict had to be unanimous. Further, this case involved two separate charges of CSC supported by unequivocal victim testimony that both acts occurred, not a single charge of CSC supported by evidence of multiple criminal acts. Thus, there is no unique unanimity problem in this case requiring a special jury instruction.

[36] *Carines*, *supra*.

[37] *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992).