

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDRE DESHAWN HARRIS,

Defendant-Appellant.

UNPUBLISHED

February 27, 2001

No. 219577

Oakland Circuit Court

LC No. 98-162906-FH

Before: Meter, P.J., and Neff and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from a jury-based conviction of third-degree criminal sexual conduct (CSC), MCL 750.520d(1)(a); MSA 28.788(4)(1)(a), for which he was sentenced as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to ten to forty years in prison. We affirm.

Defendant's sole claim on appeal is that trial counsel was ineffective because he did not request an instruction on the lesser offense of fourth-degree CSC. To establish that a defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, the defendant must show that counsel's representation fell below an objective standard of reasonableness and that the representation so prejudiced defendant as to deprive him of a fair trial. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995). Because defendant did not move for a new trial or evidentiary hearing below, our review is limited to mistakes apparent on the record. *Id.*

Fourth-degree CSC, which is predicated upon sexual contact with a person between the ages of thirteen and fifteen who is at least five years younger than the defendant, MCL 750.520e(1)(a); MSA 28.788(5)(1)(a), is a cognate lesser offense of third-degree CSC, which is predicated on the sexual penetration of a person between the ages of thirteen and fifteen. MCL 750.520d(1)(a); MSA 28.788(4)(1)(a). *People v Lemons*, 454 Mich 234, 253-254; 562 NW2d 447 (1997) (second-degree CSC is a cognate lesser offense of first-degree CSC). The trial court need only instruct on a cognate lesser offense if requested to do so, the instruction is consistent with the evidence and the defendant's theory of the case, and the evidence would support a conviction of that charge. *People v Sullivan*, 231 Mich App 510, 517-518; 586 NW2d 578 (1998); *People v Cheeks*, 216 Mich App 470, 479; 549 NW2d 584 (1996).

The victim testified that defendant engaged in sexual penetration with her when she was fourteen years old. Defendant admitted that he engaged in sexual penetration with the victim, but claimed that he thought she was old enough to consent to the act.¹ Therefore, a rational view of the evidence did not support fourth-degree CSC and defendant would not have been entitled to such an instruction had it been requested. *People v Wilhelm (On Rehearing)*, 190 Mich App 574, 577; 476 NW2d 753 (1991). That being the case, defense counsel was not ineffective for failing to request an instruction on fourth-degree CSC. *People v Bryant*, 129 Mich App 574, 582; 342 NW2d 86 (1983).

Affirmed.

/s/ Patrick M. Meter
/s/ Janet T. Neff
/s/ Peter D. O'Connell

¹ Contrary to defendant's assertion, it is possible to commit sexual penetration without first having committed sexual contact. *Lemons, supra*.