STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LOUIS V. PERRY,

Defendant-Appellant.

UNPUBLISHED
March 26, 2002

No. 228141
Wayne Circuit Court
LC No. 99-010023

Before: Neff, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of fourth-degree criminal sexual conduct (CSC IV) (use of force or coercion), MCL 750.520e(1)(b).[1] The trial court sentenced defendant to three years' probation. Defendant appeals as of right. We reverse.

This case arises out of defendant's alleged sexual assault on a cleaning lady he had lured into his apartment under the guise of providing an estimate for cleaning his apartment. While the complainant was in his apartment, defendant made an indecent proposal to her, grabbed her hand, pulled her into the kitchen, and then kissed and groped her. Defendant was originally charged with assault with intent to commit a felony, to-wit pandering, MCL 750.455, 750.87, but was convicted of the uncharged offense of CSC IV. The trial court held that CSC IV was a lesser included offense of the original assault.

Defendant argues that the trial court erred in convicting him of CSC IV – in effect sua sponte amending the information to charge a new offense – because CSC IV is not a necessarily included or cognate offense of assault with intent to commit a felony. We agree.

A trial court may amend an information at any time before, during, or after trial in order to cure any defect, imperfection, or omission in form or substance, including a variance between information and proofs, as long as the accused is not prejudiced by the amendment and the amendment *does not charge a new crime*. MCL 767.76; *People v Higuera*, 244 Mich App 429,

[1] The order of conviction and sentence erroneously indicates that defendant was convicted of MCL 750.520e(1)(a), which involves a victim between the ages of thirteen and sixteen years. It is clear from the trial court's finding that there was a "forceful touching of a person" and that defendant was convicted under MCL 750.520e(1)(b).

444; 625 NW2d 444 (2001); *People v Perry*, 460 Mich 55, 65-66; 594 NW2d 477 (1999). MCL 768.32(1) allows the court as the factfinder to find the accused not guilty of the offense in the degree charged in the indictment but guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense.

There are two types of lesser included offenses: necessarily included offenses and cognate lesser offenses. *People v Marji*, 180 Mich App 525, 630; 447 NW2d 835 (1989), remanded on other grounds sub nom *People v Thomas*, 439 Mich 896 (1991). A necessarily included offense is one that must be committed as part of the greater offense, and it is impossible to commit the greater without first having committed the lesser. *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001); *People v Veling*, 443 Mich 23, 36; 504 NW2d 456 (1993). The evidence at trial will always support the lesser offense if it supported the greater. *Id*. Conversely, a cognate offense is an offense of the same class as the greater offense but contains not only elements in common with the charged offense but also elements not found in the charged offense, *Bears*, *supra* at 627, and must protect the same societal interests. *People v Hendricks*, 446 Mich 435, 447; 521 NW2d 546 (1994).

A defendant has a due process right to have notice of the charges against him before he can be convicted of them. US Const Ams VI, XIV; Const 1963, art 1, § 20. This state's cognate lesser offense doctrine has its origin in this concern for the defendant's due process rights. Thus, the validity of defendant's conviction hinges on whether CSC IV could be properly considered a cognate lesser included offense of the charged crime sufficient to provide notice to defend against that charge. Assault with intent to commit a felony protects a different societal interest from CSC IV, and the Legislature has seen fit to designate the offenses as protecting different societal interests. In *People v Cobriere*, 220 Mich App 260, 264; 559 NW2d 666 (1996), this Court affirmed its position that criminal sexual conduct statutes and assault statutes were enacted to protect distinct legislative interests. The Court stated that criminal sexual conduct statutes were enacted to strengthen laws proscribing certain kinds of sexual conduct, contrasted with assault statutes designed to address general contact among individuals and preserve safety and security by protecting people against corporeal harm. *Id.* The Court continued:

> In enacting criminal sexual conduct statutes, the Legislature chose not to have sexual misconduct prosecuted under the general assault statutes or to identify criminal sexual conduct as a heightened degree of assault. Instead, the Legislature devised a comprehensive statutory scheme harshly penalizing limited and specifically defined forms of sexual contact. [*Id.* at 265.]

Moreover, the elements of the offenses of assault with intent to commit pandering and CSC IV are sufficiently dissimilar to negate a finding that they are cognate offenses. Pandering is a specific intent crime and requires that the defendant knowingly and intentionally "persuade," through force or otherwise, the complainant to become a prostitute. MCL 750.455; CJI2d 20.34; *People v Morey*, 461 Mich 325, 329; 603 NW2d 250 (1999); *People v Rocha*, 110 Mich App 1, 16; 312 NW2d 657 (1981). The focus of the offense of CSC IV is on the sexual contact made with the specific intent of sexual gratification and accomplished by an aggravating circumstance, including, but not limited to, force or coercion. *People v Crippen*, 242 Mich App 278, 284-285; 617 NW2d 760 (2000). Because the offenses of assault with intent to commit a felony and CSC IV are not of the same class or category and are designed to protect different societal interests,

the addition of the new charge resulted in unfair surprise sufficient to deny defendant his constitutional right to due process.

Reversed.[2]

/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot

[2] In light of our conclusion that defendant's conviction must be reversed, we need not discuss the remainder of the issues raised by defendant. We have reviewed the issues, however, and find them to be without merit.