STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 15, 2002
v	No. 234115 Macomb Circuit Court
ROBERT ALLEN REICH, Defendant-Appellant.	LC No. 00-002380-FH

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

PER CURIAM.

Defendant appeals as of right his jury convictions of false personation,[1] representation as a public utility employee, MCL 750.217b, and second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(c). Defendant was sentenced to seventeen to twenty-four months' imprisonment for the false personation conviction, and ten to fifteen years' imprisonment for the CSC II conviction. We affirm.

I

This case stems from an incident in July 2000 in which defendant entered the apartment of an eighty-six-year-old woman by posing as a City of Eastpointe water department employee. After showing the victim a tea-colored water sample purportedly taken from her water supply, he told the victim that the water could be harmful to her heart. The victim complied with defendant's instruction to lie on her bed and remove her blouse and bra, whereupon defendant manipulated the victim's breasts to perform a "heart check" with a stethoscope.

II

Defendant argues that the trial court erred in refusing to instruct the jury on the lesser included misdemeanor offenses of assault and battery and attempted false personation, representation as a public utility employee. We disagree.

[1] See Michigan Penal Code, Chapter XXXV, False Personation; see also 32 Am Jur 2d, False Personation.

The resolution of this issue is controlled by the recent Michigan Supreme Court decision *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002), and MCL 768.32(1).[2] Upon indictment for an offense that consists of different degrees, the jury may find the defendant not guilty of the offense in the degree charged and may find the defendant guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense. *Id*.; *Cornell, supra* at 341. A requested jury instruction on a misdemeanor necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element, which is not part of the lesser included offense and a rational view of the evidence would support it. *Cornell, supra* at 357. An instruction on a cognate offense is not permissible. *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002); *Cornell, supra* at 359. Harmless error analysis is applicable to jury instruction errors involving necessarily included lesser offenses. *Id.* at 361-362.

Defendant was charged with second-degree criminal sexual conduct, MCL 750.520c(1)(c), which provides:

> A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and if any of the following circumstances exists:
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> * * *
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> (c) Sexual contact occurs under circumstances involving the commission of any other felony.

The trial court denied defendant's request for an instruction on assault and battery, MCL 750.81. Assault and battery is not a necessarily included lesser offense of second-degree sexual criminal conduct. Assault and battery is a specific intent crime where there must be either an intent to injure or an intent to put the victim in reasonable fear or apprehension of an immediate battery, an element not required for second-degree criminal sexual conduct, which requires only general intent. *People v Johnson*, 407 Mich 196; 284 NW2d 718 (1979); *People v Datema*, 448 Mich 585, 602; 533 NW2d 272 (1995); *People v Brewer*, 101 Mich App 194, 195-196; 300 NW2d 491 (1980).

A necessarily included offense is one which must be committed as part of the greater offense, and it would be impossible to commit the greater offense without first having committed the lesser offense. *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001). When the lesser offense is a specific intent crime and the greater offense is a general intent crime, proof of the lesser offense is not established by proof of the greater, general intent offense because criminal intent is a required element in the lesser misdemeanor offense. *People v Corbiere*, 220 Mich App 260, 266; 559 NW2d 666 (1996). Thus, under *Cornell*, the trial court did not err in refusing to give the assault and battery instruction to the jury.

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[2] *Cornell* was decided after the verdict in this case. It overruled prior case law concerning lesser included offense instructions. *Cornell, supra* at 358, 367; *People v Silver*, 466 Mich 386, 388; 646 NW2d 150 (2002).

Defendant also requested that the jury be instructed on attempted false personation, representation as a public utility employee, MCL 750.217b; MCL 750.92, as a lesser included offense of false personation, representation as a public utility employee, MCL 750.217b.

The difference between the charged offense and the attempt is that the charged offense is the completed crime, and the attempt is an act toward the commission of the crime. MCL 750.92. In the present case, there was no genuine dispute whether the charged offense of false personation, representation as a public utility employee, was committed, rather, the dispute and defense were whether it was defendant. Defense counsel's argument for the attempt instruction was apparently based on the possibility that it may have been a maintenance man rather than a public utility man that entered the apartment, although "having the water kit in the [perpetrator's] possession [] might be an attempt to personate a public utility worker."

We find no error with regard to the denial of defendant's request for an attempt instruction because it was not supported by a rational view of the evidence. *Reese*, *supra* at 446-448; *People v Silver*, 466 Mich 386, 388; 646 NW2d 150 (2002). The evidence supported only the completed offense of false personation of a utility employee. It is not error to omit jury instructions on a lesser offense where the evidence tends to only prove the greater. *Reese*, *supra*; *Cornell*, *supra* at 355-356. Therefore, the trial court did not err in refusing to give the instruction.

In any event, any error was harmless with regard to the requested instructions because the jury found defendant guilty of the greater offenses of CSC II and false personation, representation as a public utility employee. *Id*. at 363-365, n 19; see also *People v Baker*, 103 Mich App 704, 713-714; 304 NW2d 262 (1981). The jury rejected the available lesser included offense of fourth-degree CSC, which the jury could have found absent a finding that defendant had committed the felony of false personation.

II

Defendant argues that he is entitled to resentencing because the trial court abused its discretion in imposing a sentence that exceeded the statutory sentencing guidelines.[3] We disagree.

The trial court departed from the guidelines in sentencing defendant to ten to fifteen years' imprisonment for the CSC II conviction.[4] Defendant contends that the court improperly based this guidelines departure on mere allegations of past criminal offenses, from which the court concluded that defendant posed a danger to society. Further, the court improperly based the departure on factors already taken into account in the guidelines, including the victim's age, and lack of physical agility.

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[3] The instant offenses were committed on July 3, 2000, and thus sentencing is governed by the statutory sentencing guidelines. MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000).

[4] The parties do not dispute that the guidelines sentencing range was one to two years.

A

Sentences falling outside the statutory guidelines require reversal and remand for resentencing unless there are substantial and compelling reasons for the departure. *People v Babcock*, 250 Mich App 463, 465-466; 648 NW2d 221 (2002) (*Babcock II*), lv gtd 467 Mich 872 (2002); *People v Babcock*, 244 Mich App 64, 72, 74; 624 NW2d 479 (2000) (*Babcock I*). The court must state on the record its rationale for departure. *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001). The factors underlying the departure must be objective and verifiable. *Babcock II*, *supra* at 467; *Babcock I*, *supra* at 75.

This Court reviews for abuse of discretion a trial court's determination that objective and verifiable factors constitute substantial and compelling reasons to depart from the statutory guidelines. *Id*. at 76. The existence or nonexistence of a particular factor is a factual determination reviewed for clear error. *Id.* at 75-76. Nonetheless, a court may not premise a sentencing departure on an offense characteristic or offender characteristic already considered in determining the appropriate guidelines range, unless the court finds from the facts of the record that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b); *Babcock I*, *supra* at 79. Whether the factors articulated by the trial court are objective and verifiable is a matter of law reviewed de novo. *Id*. at 76.

B

At sentencing, the prosecutor argued for an upward departure from the guidelines, citing defendant's long history of similar offenses against elderly women and a pattern of sexual dysfunction involving coercive and fraudulent practices. Defense counsel took issue with the consideration of certain of these offenses because of the lack of convictions, noting that in a similar 1977 incident, defendant was found not guilty (by reason of insanity) and that a 1987 case was dismissed (the elderly woman victim died before trial).

In imposing defendant's sentence, the trial court recognized that the sentence must consider the particular circumstances of the case and the defendant, indicating that in this case the Court was satisfied that it had reliable complete, detailed information about defendant. The court stated that it found substantial and compelling reasons for an upward departure from the guidelines and that it concurred with the prosecutor. In stating its rationale for the departure, the court emphasized that the victim was eighty-six-years-old, was unstable in her walking, and had no ability to run from defendant. The court indicated that defendant had an obvious pattern of behavior, which was appalling, and that defendant posed a substantial risk to society, particularly senior citizens.

We find no abuse of discretion in the court's determination that there were substantial and compelling reasons for an upward departure. An abuse of discretion exists when the result was so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, and the exercise of passion or bias. *Babcock I*, *supra* at 76.

Although a victim's age and inability to escape are considered under offense variable 10 for "exploitation of a vulnerable victim," MCL 777.40(1)(b), in departing from the guidelines, the court cited the appalling nature of defendant's repeated offenses against elderly women and defendant's pattern of behavior, which go beyond the mere fact that the victim in this case was

vulnerable. Defendant's history of these similar, repeated offenses was undisputed, notwithstanding the lack of convictions, and was objective and verifiable.[5] The circumstances in this case and the remarks of the trial court convince us that the court did not base its departure merely on factors already taken into account by the offense variables. *Babcock I*, *supra* at 79; see also *Armstrong*, *supra* at 425 (defendant's uncontrollable sexual attraction toward little boys and the need to protect other children not adequately considered by the guidelines). The departure was properly supported by substantial and compelling reasons and was not an abuse of discretion. *Babcock II*, *supra* at 471.

III

Defendant argues that the challenged information in the Presentence Investigation Report (PIR) that was erroneous must be deleted, rather than merely stricken, from the report. Defendant challenged the federal second-degree criminal sexual conduct charge, which was found to be erroneous and was not considered in sentencing. The PIR was corrected by drawing a line through the erroneous charge. Defendant contends that he is entitled to a corrected PIR in which the erroneous charge is deleted. We disagree.

MCR 6.425(D)(3), provides:

> If any information in the presentence report is challenged, the court must make a finding with respect to the challenge or determine that a finding is unnecessary because it will not take the challenged information into account in sentencing, it must direct the probation officer to
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> (a) correct or delete the challenged information in the report, whichever is appropriate, and
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> (b) provide defendant's lawyer with an opportunity to review the corrected report before it is sent to the Department of Corrections.

Where the trial court concludes that challenged information will not be taken into account in sentencing, the court must order the information stricken from the PIR. MCL 777.14(6); see also MCR 6.425(D)(3)(a). However, there is no requirement that a completely new PIR be prepared. *People v Martinez*, 210 Mich App 199, 202; 532 NW2d 863 (1995). As required by statute, the inaccuracy was stricken. *Id*.; MCL 777.14(6).

Affirmed.

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

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[5] Objective and verifiable factors are actions or occurrences that are external to the minds of the judge, the defendant, and others involved in making the decision and are capable of being confirmed. *People v Arcos*, 206 Mich App 374, 376; 522 NW2d 655 (1994).