

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
September 20, 2012

v

CHRISTOPHER CODY JENKINS,

Defendant-Appellant.

No. 304565
Kalamazoo Circuit Court
LC No. 2010-001694-FH

Before: M. J. KELLY, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

Defendant Christopher Cody Jenkins appeals by right his jury conviction of assault with intent to commit criminal sexual conduct involving sexual penetration. MCL 750.520g. The trial court sentenced him to serve nine days in jail and five years on probation. On appeal, the sole issue is whether the trial court erred when it denied Jenkins' request to instruct the jury on consent. Because we conclude that the trial court did not abuse its discretion when it denied the request, we affirm.

This Court reviews de novo claims of instructional error. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). However, this Court reviews a trial court's determination that an instruction does not apply under the facts for an abuse of discretion. *Id.* If a defendant requests an instruction on a defense theory that is supported by the evidence, the trial court must instruct the jury on that theory. *People v Mills*, 450 Mich 61, 81; 537 NW2d 909 (1995).

At trial, Jenkins asked the trial court to instruct the jury on consent to the battery element of assault with the intent to commit criminal sexual conduct: "a battery is a forceful or violent touching *without lawful consent* of the person" Relying on *People v Starks*, 473 Mich 227; 701 NW2d 136 (2005), the trial court denied the request because it concluded that the victim could not legally consent as a result of severe intoxication. On appeal, Jenkins argues that the trial court erred when it relied on *Starks* to deny his request.

We need not address whether the trial court properly applied *Starks*. In order to be entitled to an instruction on a particular defense, there must be evidence to support that theory. *Mills*, 450 Mich at 81. Here, there was evidence that Jenkins did not have the victims consent: a police officer testified that he heard the victim tell Jenkins "no," "stop," and "no, I am not your baby." The officer also testified about what he saw when he approached Jenkins and the victim and the testimony strongly suggested that Jenkins had engaged in sexual contact with the victim.

And, the victim subsequently told the officer that Jenkins had engaged her in sexual intercourse against her will. At trial Jenkins did not testify that the victim had willingly engaged in sexual contact with him; he denied having had any sexual contact with her. Thus, the evidence supported two inferences: that there was no sexual contact or that there was sexual contact, but it was not consensual. Accordingly, even if the trial court erred when it relied on *Starks*, because there was no evidence to support the consent instruction, we cannot conclude that the trial court abused its discretion when it refused to give it. See *People v McLaughlin*, 258 Mich App 635, 652 n 7; 672 NW2d 860 (2003) (noting that this Court will not reverse where the trial court came to the right result even if for the wrong reason).

Affirmed.

/s/ Michael J. Kelly

/s/ Joel P. Hoekstra

/s/ Cynthia Diane Stephens