

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEPHEN T. NICHOLS,

Defendant-Appellant.

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UNPUBLISHED

July 26, 1996

No. 174392

LC No. 93-11202-FH

Before: Holbrook, Jr., P.J., and Saad and W. J. Giovan,\* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of third-degree criminal sexual conduct, MCL 750.520d(1)(b); MSA 28.788(4)(1)(b), and was sentenced to serve three to fifteen years in prison. He appeals as of right, and we reverse.

The prosecutor violated defendant's right to remain silent and right to counsel by cross-examining him regarding his request for an attorney when police questioned him about handcuffs he possessed. When a defendant speaks after receiving *Miranda*<sup>1</sup> warnings, a momentary pause or even a failure to answer a question is not to be construed as an affirmative invocation of the right to remain silent. *People v McReavy*, 436 Mich 196, 222; 462 NW2d 1 (1990). However, where the record indicates that the defendant's silence is attributable to invocation of the Fifth Amendment privilege against self-incrimination or reliance on *Miranda* warnings, use of that silence against the defendant is error. *Id.*, 201. The prosecutor's questions effectively attempted to force defendant to explain his assertion of his *Miranda* and Fifth Amendment rights to counsel and to remain silent. However, the *Miranda* rights contain an implicit assurance that silence in reliance on those rights will not be penalized. See *People v Cetlinski*, 435 Mich 742, 746; 460 NW2d 534 (1990). A prosecutor may not use a defendant's exercise of the Fifth Amendment right to remain silent against the defendant at trial. *People v Gilbert*, 183 Mich App 741, 747; 455 NW2d 731 (1990). The jury could have inappropriately inferred that defendant sought the assistance of counsel because the police were pressing him about strong evidence of guilt. Inasmuch as the only direct testimony regarding the incident was from

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\* Circuit judge, sitting on the Court of Appeals by assignment.

defendant and the complainant, any corroborating evidence could have tipped the scale in the credibility contest. *People v Gee*, 406 Mich 279, 283; 278 NW2d 304 (1979); *People v Scobey*, 153 Mich App 82, 86; 395 NW2d 247 (1986). Accordingly, we conclude that this impropriety was not harmless beyond a reasonable doubt, *People v Anderson (After Remand)*, 446 Mich 392, 404-406; 521 NW2d 538 (1994), and reverse defendant's conviction. We note that we do not find improper the prosecutor's cross-examination regarding defendant's failure to assert during police questioning that his sexual activity with the complainant was consensual. From the record, it appears that before the handcuffs were mentioned, defendant was answering questions and had not affirmatively invoked his right to remain silent. *People v Davis*, 191 Mich App 29, 36; 477 NW2d 438 (1991).

Given our decision above, we need only address the merits of two of defendant's remaining issues, given the likelihood that they may arise on retrial. First, the trial court did not err by failing to instruct the jury sua sponte on the lesser misdemeanor of assault and battery. Even if this instruction had been requested, it would have been improper because criminal sexual conduct offenses protect a distinct societal interest from other types of assaultive offenses. *People v Payne*, 90 Mich App 713, 720-721; 282 NW2d 456 (1979). Instructions on a lesser misdemeanor should not be given unless there is an "inherent relationship" between the greater and lesser offenses. *People v Hendricks*, 446 Mich 435, 444-445; 521 NW2d 546 (1994).

Second, we find no merit to defendant's argument that the trial court's instructions failed to apprise the jury adequately that it could convict him of third-degree criminal sexual conduct only if it found that he committed the oral penetration testified to by the complainant. There was evidence of only one oral penetration. The court clearly and unambiguously instructed the jury that conviction required, in part, proof beyond a reasonable doubt that defendant's penis entered the complainant's mouth, thereby confining the possibility of conviction to the act charged, although the prosecution had also presented evidence of other (hand-genital) sexual contact. *People v Howell*, 396 Mich 16, 28; 238 NW2d 148 (1976); *People v Yarger*, 193 Mich App 532, 536-537; 485 NW2d 119 (1992).

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.

/s/ Henry W. Saad

/s/ William J. Giovan

<sup>1</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).