

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER WILLIAMS, a/k/a  
CHRISTOPHER GREEN, and a/k/a  
CHRISTOPHER JOHNSON,

Defendant-Appellant.

---

UNPUBLISHED

September 24, 1999

No. 204712

Recorder's Court

LC No. 96-003189 FY

Before: Gribbs, P.J., and O'Connell and R.B. Burns\*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of five counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1); MSA 28.788(2)(1). Three counts were based on an aggravating factor of aiding and abetting, MCL 750.520b(1)(d)(ii); MSA 28.788(2)(1)(d)(ii), and two counts were based on an aggravating factor of the use of a weapon, MCL 750.520b(1)(e); MSA 28.788(2)(1)(e). Although defendant was convicted of five counts of CSC I, only three acts of sexual penetration occurred. At sentencing, the trial court noted that counts four and five were alternative theories for the same acts of penetration for which defendant was convicted of counts one through three. Accordingly, the trial court only sentenced defendant for three counts of CSC I. Defendant was sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to three concurrent terms of imprisonment of twenty-five to forty years. Defendant appeals as of right. We affirm, but remand for correction of the judgment of sentence.

Defendant was accused of entering the victim's residence and sexually assaulting her with the assistance of another man (codefendant).<sup>1</sup> The victim testified that the two men asked for her roommate, and when she informed them that her roommate was gone, codefendant pulled out a gun and asked her for money. When the victim responded that she did not have money, defendant allegedly told codefendant that the victim's roommate kept money in her vagina and that the victim might have done the same. The victim testified that codefendant then removed her clothing and searched her vagina with

---

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

two fingers while defendant held her arms behind her shoulders. The victim also testified that codefendant then had sexual intercourse with her while defendant held her arms, and that defendant then had sexual intercourse with her.

The prosecutor charged defendant with six counts of CSC I based on three acts of sexual penetration: digital penetration by codefendant, penile penetration by codefendant, and penile penetration by defendant. The prosecutor alleged that defendant was guilty of the first and second acts as an aider and abettor to codefendant. For each act of penetration, the prosecutor charged defendant under two alternative theories or aggravating circumstances: penetration with the aid of an accomplice and penetration while armed with a weapon. Rather than charging defendant with three counts of CSC I based on two alternative theories, the prosecutor charged defendant in a six-count information. The first three counts consisted of the three acts of penetration under the accomplice theory, MCL 750.520b(1)(d)(ii); MSA 28.788(2)(1)(d)(ii), and the last three counts consisted of the three acts of penetration under the weapon theory, MCL 750.520b(1)(e); MSA 28.788(2)(1)(e).

Defendant first argues that the trial court's jury instructions on the necessarily lesser-included offense of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(b); MSA 28.788(4)(1)(b), were erroneous because they set forth the identical three elements as those given for the first three counts of CSC I based on the aggravating circumstance of aiding and abetting. Defendant contends, therefore, that the trial court effectively failed to instruct the jury on the offense of CSC III, thereby denying him a fair trial. However, defendant failed to preserve this issue because he did not object to the instructions given. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Therefore, in order to avoid forfeiture of this issue, defendant must demonstrate plain error that was prejudicial, i.e., that could have affected the outcome of the trial. *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994); *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). We conclude that defendant has not demonstrated plain error that was outcome determinative and has accordingly forfeited review of this issue.

We review claims of instructional error de novo. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). We review the instructions as a whole to determine whether any error requiring reversal exists. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998). "Even if somewhat imperfect, instructions do not create error if they fairly present to the jury the issues tried and sufficiently protect the defendant's rights." *Id.*, 143-144.

We find no error in the instructions given, let alone outcome-determinative plain error. Defendant was charged as an aider and abettor because two of the acts of sexual penetration were performed by codefendant. The trial court appropriately instructed the jury that to be guilty as an aider and abettor, the prosecutor must prove beyond a reasonable doubt that the defendant or another person committed the crime, that the defendant assisted the commission of the crime, and that the defendant intended the commission of the crime or knew when he assisted that the other person intended its commission. *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). The trial court then correctly instructed the jury on the elements of CSC I under the aggravating factor of aiding and abetting: penetration accomplished by force or coercion with the assistance of another. MCL 750.520b(1)(d)(ii); MSA 28.788(2)(1)(d)(ii). Then, the trial court properly instructed the jury

that if they decided that defendant was not guilty of CSC I, they could consider whether defendant was guilty of CSC III. The court correctly instructed the jury that the elements of CSC III as charged were penetration accomplished by force or coercion. MCL 750.520d(1)(b); MSA 28.788(4)(1)(b). Additionally, because defendant was charged as an aider and abettor, the court properly instructed the jury that it must also find that defendant assisted codefendant in committing the crime. The jury was correctly instructed by the trial court on the elements of CSC I and CSC III as charged. The instructions were not erroneous. Therefore, defendant has not demonstrated outcome-determinative plain error and has accordingly forfeited this issue.

Defendant next argues that the trial court erred in failing to sua sponte direct a verdict of acquittal on three of the six charged counts of CSC I because the evidence established only three penetrations. Defendant has cited no authority for the proposition that the trial court must on its own initiative direct a verdict of acquittal where insufficient evidence is presented. Nonetheless, we note that six counts of CSC I were inappropriate where only three acts of sexual penetration were alleged. *People v Johnson*, 406 Mich 320, 331; 279 NW2d 534 (1979) (holding that one act of sexual penetration “may give rise to only one criminal charge for purposes of trial, conviction, and sentencing”). Instead, the prosecutor should have charged defendant with three counts of CSC I based on two alternative theories of guilt. *Id.* at 331 n 3. However, we find no error requiring reversal because defendant was only sentenced for three of the counts of CSC I. The trial court noted that counts four through six were merely alternative theories relating to the same three acts of sexual penetration, and accordingly merged defendant’s convictions based on the weapon theory into his convictions based on the accomplice theory. However, it is not clear from the judgment of sentence whether the trial court vacated the two additional convictions or whether it maintained those convictions and only sentenced defendant for three convictions. Therefore, we remand to the trial court to clarify the judgment of sentence to reflect three convictions and sentences for CSC I based on two alternative theories. See, e.g., *People v Bigelow*, 229 Mich App 218, 220-221; 581 NW2d 744 (1988). Specifically, counts one and four merge into one conviction of CSC I based on two alternative theories, counts two and five merge into one conviction of CSC I based on two alternative theories, and defendant’s conviction of count three remains intact.

Defendant also argues that his trial counsel was ineffective because he failed to object to the allegedly improper instructions and failed to move for a directed verdict. However, based on our previous analysis, we conclude that defendant has failed to establish that he was so prejudiced by counsel’s allegedly deficient performance as to be deprived of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994).

Affirmed, but remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Roman S. Gribbs  
/s/ Peter D. O’Connell  
/s/ Robert B. Burns

<sup>1</sup> Defendant was initially tried jointly with codefendant, resulting in a mistrial because the jury could not reach a verdict. Defendant was then tried separately, resulting in the instant convictions from which defendant appeals.