STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDDIE L. DILLARD,

Defendant-Appellant.

UNPUBLISHED
December 28, 1999

No. 202905
Recorder's Court
LC No. 96-002224

Before: Smolenski, P.J., and Whitbeck and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(b); MSA 28.788(2)(1)(b). Defendant was sentenced, as a fourth habitual offender, MCL 769.12; MSA 28.1084, to twenty-five to fifty years in prison for each conviction. Defendant appeals as of right. We affirm.

Defendant first claims that the trial court erred by failing to instruct the jury on second-degree criminal sexual conduct because the evidence supported a conviction of that offense. As the trial judge properly recognized, CSC II is a cognate lesser included offense of CSC I. *People v Lemons*, 454 Mich 234, 253-254; 562 NW2d 447 (1997). A cognate lesser included offense is one which is of the same class or category as the greater offense, and shares some common elements. *Id*. at 252. A cognate lesser included offense contains an element that is not contained in the greater offense. *Id.* at 253. When a defendant requests a jury instruction on a cognate lesser included offense, the judge must give the instruction if the evidence supports a conviction of the lesser offense. *Id.* at 254. "The requested instruction on the cognate offense must be consistent 'with the evidence and defendant's theory of the case.'" *Id*., quoting *People v Heflin*, 434 Mich 482, 495; 456 NW2d 10 (1990).

In this case, a jury instruction on CSC II was not consistent with the evidence, nor with defendant's theory of the case. The evidence clearly supported a conviction of CSC I, and not CSC II. A conviction of CSC I requires proof of sexual penetration. MCL 750.520b(1); MSA 28.788(2)(1). CSCII requires only sexual contact, MCL 750.520c(1); MSA 28.788(3)(1), that "can reasonably be construed as being for the purpose of sexual arousal or gratification," MCL 750.520a(k); MSA 28.788(1)(k). This latter element is not contained in CSC I. The victim testified that defendant

penetrated her on three different occasions. The prosecution also offered evidence of defendant's statement to police after his arrest, in which he admitted to one act of cunnilingus. Cunnilingus is included in the statutory definition of sexual penetration, and therefore supports the conviction of CSC I. MCL 750.520a(l); MSA 28.788(1)(l). At trial, defendant denied any sexual conduct. There was no factual dispute giving rise to the issue whether only sexual contact, as opposed to sexual penetration, had occurred, which would have supported a CSC II instruction. Rather, the jury was presented with conflicting evidence supporting a conclusion that one, three, or no acts of sexual penetration occurred. Furthermore, because defendant denied any sexual conduct with the victim, an instruction on CSC II would not have been consistent with defendant's theory of the case. *Lemons*, *supra* at 254; *People v Draper*, 150 Mich App 481, 488-489; 389 NW2d 89 (1986), remanded on other grounds 437 Mich 873 (1990).

Defendant also claims that the judge's failure to instruct the jury on third-degree criminal sexual conduct deprived him of a fair trial. Defendant never raised this issue below. To raise an unpreserved constitutional issue on appeal, defendant must establish plain error that affected a substantial right. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

CSC III is a necessarily included lesser offense of CSC I. *People v Mosko*, 441 Mich 496, 501; 495 NW2d 534 (1992). The trial judge must instruct the jury on necessarily included lesser offenses, when requested, "[r]egardless of the evidence." *Lemons*, *supra* at 254. Because defendant did not request a CSC III instruction, we find no error. Furthermore, we find that failure to instruct the jury on CSC III did not prejudice defendant. On the facts of this case, CSC I and CSC III are distinguished only by the element in CSC I that requires a showing that defendant lived in the same household as the victim. MCL 750.520b(1)(b)(i); MSA 28.788(2)(1)(b)(i). This element was never an issue at trial. Defendant testified that he lived with the victim. Therefore, failure to instruct on CSC III, even if requested, did not prejudice defendant because it would not have changed the jury's verdict.

Defendant next claims that he was denied a fair trial because the judge permitted him to be seen by the jury wearing his jail clothes. We disagree.

A defendant has a right to be tried in civilian clothes. *People v Shaw*, 381 Mich 467, 475; 164 NW2d 7 (1969). Failure to object in a timely fashion constitutes a waiver of this right. *People v Turner*, 144 Mich App 107, 109; 373 NW2d 255 (1985), citing *Shaw*, *supra* at 475. "The objection must be made before the jury is empanelled." *Turner*, *supra* at 109. Because defendant has not preserved this issue, we review it for plain error. *Carines*, *supra* at 764, 774.

Defendant claims that he was denied a fair trial because the jury viewed him in his jail uniform. This Court has held that "[o]nly if a defendant's clothing can be said to impair the presumption of innocence is there a denial of due process." *People v Lewis*, 160 Mich App 20, 31; 408 NW2d 94 (1987). Defendant's appearance in prison clothes was not necessarily prejudicial. See *People v Harris*, 201 Mich App 147, 151, 152; 505 NW2d 889 (1993). The prejudicial effect of defendant's prison clothes depends on whether the jury would recognize his clothing as prison attire. *People v Lee*, 133 Mich App 299, 301; 349 NW2d 164 (1984); *Turner*, *supra* at 111-112. In some cases, the

Court has found that a defendant was not prejudiced by wearing his jail clothes, where the clothes resembled ordinary civilian clothes and were not labeled with a jail insignia. *Harris*, *supra* at 151; *Woods*, *supra* at 359.

In this case, defendant did not object to wearing his jail uniform at trial, and the record is void of any description of defendant's appearance. Defendant has failed to establish plain error. Therefore, we find that defendant was not deprived of his right to a fair trial.

Affirmed.

/s/ Michael R. Smolenski
/s/ William C. Whitbeck
/s/ Brian K. Zahra