STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 16, 2001
v	No. 220905 St. Clair Circuit Court
PATRICK LEE WILSON, Defendant-Appellant.	LC No. 98-003741-FH

Before: Murphy, P.J., and Hood and Cooper, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of one count of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a) (victim under thirteen years of age), and two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a); MSA 28.788(3)(1)(a) (victim under thirteen years of age); MCL 750.520.520c(1)(b); MSA 28.788(3)(1)(b) (victim between the ages of thirteen and sixteen and related to defendant). Defendant was sentenced to concurrent terms of eight to twenty years' imprisonment for the CSC I conviction and six to fifteen years' imprisonment for the CSC II convictions. Defendant appeals as of right, and we affirm.

Defendant first argues that the trial court erred in failing to sua sponte instruct the jury regarding the lesser included offense of third-degree criminal sexual conduct (CSC III). We disagree. Whether a jury instruction is applicable to the facts of the case lies within the sound discretion of the trial court. *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998). A trial court is required to give instructions that are supported by the evidence or the facts of the case. *Id*. Defendant alleges that CSC III is a lesser included offense of CSC I. A necessarily included lesser offense is one that is committed as part of the greater offense. *People v Reese*, 242 Mich App 626, 629; 619 NW2d 708 (2000). That is, it is impossible to commit the greater offense without first having committed the lesser offense. *Id*. at 629-630. In the present case, CSC III is not a necessarily included lesser offense. Review of the information reveals that defendant was charged with statutory rape for committing digital penetration upon a victim under the age of thirteen years old. MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). MCL 750.520d; MSA 28.788(4) does not address the sexual penetration of a person under the age of thirteen, but addresses the sexual penetration of an individual between the ages of thirteen and sixteen. Accordingly, when examining the elements of the charged offense and the proofs, CSC III is not

a lesser included offense of CSC I. *Reese, supra*. Furthermore, there is no indication in the record that defendant disputed that the victim was twelve years old at the time of the offense. Accordingly, this issue is without merit.[1] *Ho, supra*. Furthermore, the allegation that counsel was ineffective for failing to request or object to the instructions on this basis is without merit because defense counsel had no duty to raise a meritless objection. *People v Kulpinski*, 243 Mich App 8, 27; 602 NW2d 537 (2000).

Defendant next argues that the trial court erred when it failed to instruct on fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e; MSA 28.788(5), as a "necessarily included offense of CSC II." We disagree. CSC IV was not a lesser included offense as it applied to the victim who was twelve years of age because MCL 750.520e; MSA 28.788(5) does not address individuals within the same age category, but rather addresses victim between the ages of thirteen and sixteen years of age. However, with regard to the fifteen year old victim, CSC IV was a lesser included offense of CSC II, and the failure to give such an instruction was erroneous, but subject to a harmless error analysis. *People v Mosko*, 441 Mich 496, 601-503; 495 NW2d 534 (1992). We conclude that the failure to give the instruction was harmless beyond a reasonable doubt, and there is no indication that it affected the outcome of the proceedings. *Reese, supra*.

Defendant next argues that the trial court abused its discretion in sentencing defendant. This issue is not preserved for appellate review where defendant failed to present a copy of the presentence investigation report on appeal. MCR 7.212(C)(7); *People v Cain*, 238 Mich App 95, 129; 605 NW2d 28 (1999).

Defendant next argues that the trial court erred in denying his motion for a new trial based on ineffective assistance of counsel for failing to move to suppress defendant's statement to police. We disagree. To establish a claim of ineffective assistance of counsel, the defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness and was so prejudicial that the defendant was denied a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). The defendant must overcome the presumption that the challenged action was trial strategy and also establish a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). When reviewing a claim of ineffective assistance of counsel based on counsel's performance, the question is whether counsel's actual performance undermines confidence in the reliability of the result. *People v Mitchell*, 454 Mich 145, 155; 560 NW2d 600 (1997). Review of the record reveals that defense counsel's failure to move to suppress the statement was trial strategy. Defense counsel elicited from Detective Baker the fact that defendant denied committing the acts of which he was accused. While Detective Baker indicated that defendant also made a statement regarding sexual gratification, defense counsel was able to attack the credibility of Detective Baker. His notes were taken after the interview when defendant did not have the opportunity to make corrections. Defense counsel also argued that this process reflected Detective Baker's bias and desire to obtain a conviction. Based on the record, defendant has failed meet his burden. *Hoag, supra*. Finally, we note that defendant may

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[1] Defendant has not alleged that the CSC III was a cognate lesser included offense. Accordingly, we need not address this issue on appeal.

not harbor error as an appellate parachute. *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998). The trial court did not abuse its discretion in denying defendant's motion for a new trial. *People v Brown*, 239 Mich App 735, 746; 610 NW2d 234 (2000).

Affirmed.

/s/ William B. Murphy
/s/ Harold Hood
/s/ Jessica R. Cooper