STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 2, 2004
v	No. 247310 Otsego Circuit Court
ADAM JOSEPH FINNERTY, Defendant-Appellant.	LC No. 02-002769-FC

Before: Whitbeck, C.J., and Owens and Schuette, JJ.

PER CURIAM.

I. Overview

Defendant Adam Joseph Finnerty was charged with one count of first-degree criminal sexual conduct for allegedly engaging in digital penetration with a twelve-year-old girl. Finnerty's attorney requested that the jury be instructed on second-degree criminal sexual conduct (CSC II),[1] despite the fact that Finnerty was only indicted on CSC I. The jury found him not guilty of CSC I, but convicted him of CSC II. He appeals of right. We affirm.

II. Basic Facts And Procedural History

Finnerty lived in a duplex with Ken and Monica Gentz and their three children. In March 2002, the complainant, Ken Gentz's twelve-year-old sister, spent the night at their house. Monica Gentz told the complainant she could sleep in a bunk bed in Finnerty's bedroom. According to the complainant, after falling asleep fully clothed on the top bunk, she awoke to find Finnerty's finger in her vagina. The Michigan State Police twice interviewed Finnerty about this incident. During the second interview, Finnerty admitted that he put his hand down the complainant's pants and touched the outside of her vagina, but he denied that penetration occurred.

The prosecutor filed a felony complaint in April 2002, alleging that Finnerty had committed CSC I by engaging in digital penetration with the complainant, a person under 13 years of age. However, at the preliminary examination on July 25, 2002, the prosecutor told the

[1] MCL 750.520c(1)(a) (person under 13 years of age).

district court that the "[d]efendant is charged with criminal sexual conduct in the first degree; and Count II is criminal sexual conduct in the second degree. The sole testimony here today establishes the digital penetration by the Defendant of – of the victim. . . . The People have demonstrated some evidence on each element of the offense and move for bindover as charged." The district court found that there was probable cause to bind Finnerty over for trial. On July 26, 2002, the district court issued a bindover document that did not list the offense or offenses with which Finnerty was to be tried, stating only that Finnerty was bound over to circuit court "on the charge(s) in the complaint." On August 5, 2002, the prosecutor filed an information that included one count of CSC I and one count of CSC II, and Finnerty was arraigned before the circuit court.

The trial began on January 21, 2003. Before opening statements, both the prosecutor and the trial court informed the jury that the case involved a charge of CSC I. During his opening statement, the prosecutor told the jury, "at the end of this case, you may hear about what's called a less serious offense, a lesser crime that's similar to [CSC I]. But the defendant is charged with this crime, this more serious crime. The question at the end of this case may be which of those two, the more serious or the lesser serious crime, he committed."

At trial, Finnerty testified that that he when he discovered the complainant in his bed, he told her that she could not sleep there, but when she did not get out of the bed, he climbed into the top bunk next to her to sleep. Finnerty asserted that he fell asleep immediately and denied touching the complainant in any way. With respect to his admission during the second police interview, Finnerty claimed that he felt intimidated and that he agreed with whatever the officer said in order to end the interview.

The jury was given a verdict form with three choices: "Not guilty," "Guilty of Criminal Sexual Conduct – First Degree," and "Guilty of the lesser offense of Criminal Sexual Conduct – Second Degree." The jury found Finnerty guilty of CSC II, and the trial court sentenced Finnerty to twelve months in jail and sixty months probation. The trial court granted the prosecutor's motion for nolle prosequi and dismissed "Count I," CSC I, because the jury convicted Finnerty of "Count II," CSC II.

On June 20, 2003, Finnerty moved for a *Ginther*[2] hearing and for a judgment of acquittal or a new trial. Finnerty argued that because of the Supreme Court's ruling in *People v Cornell*,[3] the jury instructions on CSC II were improper because it is a *cognate* lesser offense of CSC I, and *Cornell* held that the jury could only be instructed on *necessarily included* lesser offenses. It is clear from the record that the prosecutor, defense counsel, and the trial court were unaware of the *Cornell* decision.

At the hearing, the parties stipulated that defense counsel was not aware of the change in the law and that counsel's failure to object was not a matter of trial strategy. The prosecutor asserted that if he had been aware of the *Cornell* decision at the time, he would have moved to

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[3] *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002).

amend the complaint to add CSC II as an alternative charge to CSC I. The prosecutor argued that the error was therefore harmless because the CSC II instruction would have reached the jury in any event.

The trial court agreed with the prosecutor's argument and further found that the error was harmless because the evidence would have supported a CSC II charge and Finnerty had notice that the prosecutor intended to argue CSC II in the alternative. Accordingly, the trial court denied Finnerty's motion.

III. Jury Instructions

A. Standard Of Review

We review claims of instructional error de novo.[4]

B. Instruction On Cognate Lesser-Included Offense

Finnerty argues that reversal is required because the trial court erred by instructing the jury on a cognate lesser included offense that resulted in his conviction. We agree that instructing the jury on CSC II was erroneous.[5]

Under MCL 768.32, when a defendant has been indicted for an offense that consists of different degrees, the jury "may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense *inferior to that charged in the indictment,* or of an attempt to commit that offense."[6] In *Cornell*, the Court concluded that the term "inferior" offense in MCL 768.32 applied only to *necessarily included* lesser offenses – that is, "offenses in which the elements of the lesser offense are completely

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[4] *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996).

[5] Before we could begin our analysis, we faced the unexpectedly daunting task of determining for what offense Finnerty was actually tried. The prosecutor indicated at the preliminary examination that he was pursuing two separate counts, CSC I and CSC II, and while the district court agreed that there was probable cause to bind Finnerty over for trial, the bindover document stated only that Finnerty was bound over to circuit court "on the charge(s) in the complaint," which listed only CSC I. On the same day as the arraignment, the prosecutor filed an information that included one count of CSC I and one count of CSC II. At trial, however, the prosecutor told the jury that the case involved a charge of CSC I, and they would be considering CSC II only as a lesser offense, which the jury verdict form confirmed. Because charging decisions are generally left to the prosecutor's discretion, we conclude from this porridge of conflicting documentation that Finnerty was actually tried on a single count of CSC I, although the prosecutor's post-trial motion for nolle prosequi of "Count I" based on Finnerty's conviction on "Count II" gives us pause. We hope this example will serve as a reminder to the bench and bar of the importance of making a clear record, without which accurate appellate review becomes challenging, if not impossible.

[6] MCL 768.32 (emphasis added).

subsumed in the greater offense"[7] - and not to cognate offenses, which "share several elements, and are of the same class or category as the greater offense," but have "some elements not found in the greater offense."[8] Therefore, the Court held that the jury may only be instructed on an inferior offense if the lesser offense is *necessarily included* in the greater offense and a rational view of the evidence supported the instruction.[9]

Here, Finnerty was only indicted on CSC I, but the jury was instructed on, and convicted him of, CSC II. CSC II is not a *necessarily included* lesser offense of CSC I because CSC II requires proof of an intent to seek sexual arousal or gratification, and CSC I does not require this element.[10] Accordingly, CSC II is a cognate lesser offense of CSC I, not a *necessarily included* lesser offense,[11] and allowing the jury to consider CSC II was therefore erroneous.[12]

However, we decline to reverse on this ground because Finnerty not only failed to object to the jury instruction on CSC II, he affirmatively requested it. An invited error occurs "when a party's own affirmative conduct directly causes the error" of which that party later complains.[13] When a party invites an error at trial, the right to appeal based on that error is waived and the error is extinguished.[14]

IV. Ineffective Assistance Of Counsel

A. Standard Of Review

Whether a defendant was denied effective assistance of counsel presents a mixed question of fact and constitutional law.[15] This determination requires a judge first to find the facts, then determine "whether those facts constitute a violation of the defendant's constitutional

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[7] *Cornell*, *supra* at 356.

[8] *Id*. at 344.

[9] See *id*. at 357. See also *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002).

[10] *People v Lemons*, 454 Mich 234, 253; 562 NW2d 447 (1997).

[11] *Id*. at 253-254.

[12] See MCL 768.32; *Cornell*, *supra* at 357. We are unconvinced, to say the least, by the prosecutor's assertion that *Cornell* is inapplicable here because MCL 768.32 does not apply to offenses that are formally divided into degrees. The statute expressly applies to situations in which an accused is indicted for an offense "consisting of different degrees."

[13] See *People v Jones*, 468 Mich 345, 353; 662 NW2d 376 (2003), citing *People v Carter*, 462 Mich 206; 612 NW2d 144 (2000).

[14] *Id*.

[15] *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

right to effective assistance of counsel."[16] We review the trial court's factual findings for clear error and review de novo its constitutional determination.[17]

B. Legal Standards

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that, but for counsel's error, it is reasonably probable that the outcome would have been different.[18] Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.[19] To show an objectively unreasonable performance, the defendant must prove that counsel made "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[20] In so doing, the defendant must overcome a strong presumption that the challenged conduct might be considered sound trial strategy.[21] The defendant must also show that the proceedings were "fundamentally unfair or unreliable."[22]

C. Request For Instruction On Cognate Offense

Finnerty argues that he was denied effective assistance of counsel when defense counsel "failed to object to" the instruction on CSC II. In fact, as noted, defense counsel requested the instruction. At the *Ginther* hearing, defense counsel stipulated that "it wasn't part of his trial strategy to request or to allow an instruction on the lesser offenses had he known that he could have foreclosed them and left it – the prosecutor's case to rise or fall on the CSC I charge . . . ." Thus, it is more consonant with the facts of this case to premise the ineffective assistance claim on counsel's ignorance of *Cornell*.

The trial in this case took place in January 2003. *Cornell* had been decided seven months earlier, in June 2002. Further, *Cornell*'s holding that MCL 768.32(1) did not permit instructions on cognate offenses was reiterated in *People v Reese* in July 2002.[23] We conclude that defense counsel's ignorance of *Cornell* and its progeny was objectively unreasonable.[24]

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[16] *Id*. at 579.

[17] *Id*.

[18] *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

[19] *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

[20] *LeBlanc*, *supra* at 578, quoting *Strickland*, *supra* at 687.

[21] *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001).

[22] *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2002).

[23] See *Reese*, *supra*.

[24] See *Strickland*, *supra* at 687; *Pickens*, *supra* at 302-303.

However, Finnerty must also establish that, but for counsel's error, it is reasonably probable that the outcome would have been different.[25] In this case, the prosecutor testified that if defense counsel had objected to the CSC II instruction on the basis of *Cornell*, he would have moved to amend the complaint to include CSC II as an alternative count, and the trial court stated on the record that it would have granted the motion.

Finnerty acknowledges that a trial court has the authority to amend the information to add a new charge as long as it does not result in unfair surprise or prejudice to the defendant.[26] Finnerty also acknowledges that the prosecutor could have listed alternative *theories* for conviction of a single offense.[27] However, Finnerty maintains that because there was evidence of only one sexual act, that act could not give rise to more than one criminal *charge* for purposes of trial, conviction, and sentencing.

While we agree that a defendant may not be *convicted* of more than one count arising from a single criminal act, the prosecutor may *charge* the defendant with more than one count in the alternative, if the facts support it. It is well established that "the decision whether to bring a charge and what charge to bring lies in the discretion of the prosecutor,"[28] and a prosecutor has discretion to "charge in a single information all offenses which do arise out of a single criminal transaction or occurrence."[29] This discretion includes the choice to bring alternative charges, listed in separate counts, based on the same criminal conduct.[30]

The sole case on which Finnerty relies for the contrary proposition is *People v Johnson*,[31] which he quotes as stating that if there is evidence of only one sexual act, that act "may only give rise to one criminal charge for purposes of trial, conviction, and sentencing."[32] However, the quoted phrase has been taken out of context. In *Johnson*, the Court held that a defendant may not be convicted of more than one count of CSC I on the ground that a single penetration met several of the statutory circumstances by which that crime could be committed. Contrary to the assertion in Finnerty's brief, the quoted phrase does not apply to all situations "where there is evidence of only one sexual act," but rather to situations where "a sexual penetration happens to be accompanied by more than one of the aggravating circumstances enumerated in the statute."[33] Here, the prosecutor was not seeking to predicate more than one conviction on a single

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[25] See *id*.

[26] See MCR 6.112(H); *People v McGee*, 258 Mich App 683, 689-693; 672 NW2d 191 (2003).

[27] See MCL 767.55; *People v Goold*, 241 Mich App 333, 342-343; 615 NW2d 794 (2000).

[28] *People v Venticinque*, 459 Mich 90, 100; 586 NW2d 732 (1998).

[29] *Goold*, *supra* at 342-343.

[30] See, e.g., *McGee*, *supra* at 685-695 (prosecutor could amend the information to include an alternative count of perjury based on same conduct that supported the initial count of making false felony report).

[31] *People v Johnson*, 406 Mich 320, 331; 279 NW2d 534 (1979).

[32] *Id*. at 331.

[33] *Id*.

penetration based on the existence of more than one aggravating circumstance, and the holding in *Johnson* is inapplicable.

In his brief on appeal, Finnerty poses the question: "If the jury cannot consider a cognate lesser offense, then how could it consider that same offense as an 'alternative' to the principal charge?" The answer is that the prohibition against considering cognate lesser offenses derives from the *Cornell* court's interpretation of MCL 768.32, which establishes the circumstances under which a jury may convict a defendant of an *uncharged* offense. Once an offense has been formally charged as a separate count, the jury does not need the authority of MCL 768.32 to convict the defendant of that charge, and the rule in *Cornell* is inapplicable. Therefore, we reject Finnerty's implication that the difference between convicting a defendant of a separately charged offense rather than of an uncharged cognate offense is a question of form, not substance.

In sum, we conclude that Finnerty failed to show a reasonable probability that, but for counsel's error, the outcome would have been different. The prosecutor testified that, had defense counsel brought the rule in *Cornell* to his attention, he would have moved to amend the complaint to include CSC II as an alternative count, and the trial court stated it would have granted the motion. We see no legal reason that the amendment would have been improper, and there is no reason to think that the jury would have reached a different verdict had it considered CSC II as an alternative count rather than a cognate lesser offense. Therefore, reversal for ineffective assistance is not warranted.

Affirmed.

/s/ William C. Whitbeck
/s/ Donald S. Owens
/s/ Bill Schuette