STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 14, 2006
v	No. 263125 Calhoun Circuit Court
JACKSON JAMES MARGRAVES, Defendant-Appellant.	LC No. 2004-004234-FH

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

A jury convicted defendant of fourth-degree criminal sexual conduct (CSC) (sexual contact by force or coercion), MCL 750.52e(1)(b), and first-degree home invasion (another person lawfully present within the dwelling), MCL750.110a(2). We affirm.

I. Facts and Procedural History

Defendant resided across the street from the victim. On June 10, 2004, defendant approached the victim on her driveway. After she informed defendant that she was leaving and he could not stay, she began to enter her enclosed porch. Defendant then pushed her inside and followed her into the porch. Defendant then forced the victim against the wall, held her arms above her head, and began to kiss her. He eventually reached under her clothing and touched her breast. Despite her repeated requests to stop, defendant did not do so until the victim kneed him in the groin. At that point, defendant let go and the victim ran into her house and locked the door behind her.

The prosecution charged defendant with one count of fourth-degree criminal sexual conduct on the grounds that he used force or coercion to accomplish sexual contact. The prosecution also charged defendant with one count of first-degree home invasion and alleged that he entered a dwelling without permission and committed fourth-degree CSC, a "felony," while entering, present in, or exiting, the dwelling.

After the close of the prosecution's case in chief, defendant moved for a directed verdict and argued that, at most, the prosecution proved that he committed a misdemeanor, but he was charged with first-degree home invasion on a theory of commission of a felony. Thus, defendant maintained that the prosecution failed to present sufficient evidence to sustain his conviction for

first-degree home invasion. The trial court disagreed and ruled that, because it was punishable by imprisonment, fourth-degree CSC was a "felony" for purposes of the home invasion statute.

II. Analysis

A conviction for first degree home invasion requires proof that (1) defendant broke and entered a dwelling or entered a dwelling without permission; (2) the defendant (a) intended to commit a felony, larceny, or assault at the time of entry or (b) committed a felony, larceny, or assault while entering, present inside, or leaving the dwelling and (3) did so either (a) armed with a dangerous weapon or (b) while another person is lawfully present in the dwelling. MCL 750.110a(2).[1]

Defendant argues that the prosecution failed to prove that he committed a "felony," an essential element of first-degree home invasion. Fourth-degree CSC is statutorily defined as a misdemeanor with a possible punishment of two years' imprisonment. MCL 750.520e(1)(b). Although the Michigan Supreme Court has held that a two-year misdemeanor may be considered a felony under the Code of Criminal Procedure for consecutive sentencing, habitual offender, and probation purposes, it has explicitly stated that a two-year misdemeanor is a misdemeanor for Penal Code purposes. *People v Smith*, 423 Mich 427, 434; 378 NW2d 384 (1985). This Court has also held that conduct that violates a statute that identifies a crime as a misdemeanor may not serve as the underlying felony for another crime. See *People v Williams*, 243 Mich App 333, 335; 620 NW2d 906 (2000).[2] Accordingly, we hold that fourth-degree CSC cannot be used as the predicate offense for a felony-theory charge of home invasion because the penal code defines the crime as a misdemeanor.

Nevertheless, defendant is not entitled to relief from his conviction. The predicate offense for first-degree home invasion may be any one of three types: a felony, a larceny, or an assault. MCL 750.110a(2). The underlying larceny or assault crimes may be either misdemeanor or felony crimes as long as the other aggravating circumstances exist. *People v Sands*, 261 Mich App 158, 162-163; 680 NW2d 500 (2004).

This Court has held that fourth-degree CSC is an assault for purposes of the home invasion statute. *People v Musser*, 259 Mich App 215, 224; 673 NW2d 800 (2003). In *Musser*,

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[1] "When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt." *People v. Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). We also review de novo challenges to the sufficiency of the evidence. *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002).

[2] In *Williams*, this Court held that resisting arrest, MCL 750.479, which at the time of the case was a two-year misdemeanor, could not be used as a felony to establish the crime of absconding on a felony bond, MCL 750.199(a). In *People v Baker*, 207 Mich App 224, 225; 523 NW2d 882 (1994), this Court also held that resisting arrest, MCL 750.479, designated a misdemeanor in the penal code, could not be used as the underlying felony for the felony-firearm statute, MCL 750.227(b).

the defendant appealed his conviction of first-degree home invasion and argued that fourth-degree CSC, the predicate offense for the home invasion charge, is not a felony or an assault. *Id*. at 221. The *Musser* Court discussed statutory interpretation and the meaning of "assault" in the home invasion statute and held that, because the statute itself does not define "assault," the common law definition of assault applies. *Id*. at 223. The Court further explained that CSC crimes are recognized as "a specialized or aggravated form of assault." Thus, the Court concluded that fourth-degree CSC is an assault for the purposes of the first-degree home invasion statute. *Id*. at 223-224.

Defendant's charge and subsequent conviction for fourth-degree CSC is therefore sufficient evidence to support the "felony, larceny, or *assault*" element of MCL 750.110a(2). Here, the victim testified that defendant assaulted her while she was lawfully in her dwelling after defendant *forced* his way inside. Defendant *pushed his way* into her enclosed front porch, *grabbed her*, *pushed her against the* wall, and *fondled her*. Weighing this evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the first-degree home invasion charge were proved beyond a reasonable doubt.

In reaching our conclusion, we note that the information charged defendant with first-degree home invasion based on the theory that he committed a felony while present in the victim's dwelling. It did not charge defendant with the commission of an assault. Defendant did not challenge the validity of the information at trial nor does he specifically challenge it on appeal. A failure to object to a defective information at trial precludes reversal unless a manifest injustice resulted from the defect. *People v Covington*, 132 Mich App 79, 86; 346 NW2d 903 (1984). Moreover, proceeding to trial on a defective information is harmless error if the trial court could have amended the information to conform with the evidence presented at trial, as long as the defendant is not prejudiced, i.e., that he received proper notice of the charges against him. *People v McGhee*, 268 Mich App 600, 629; 709 NW2d 595 (2005); *Covington*, *supra* at 86.[3] An information is sufficient as long as it provides the defendant with fair notice of the charges he must defend against, identifies the crime so that conviction or acquittal bars a subsequent charge, notifies him of the nature and character of the crime so he may prepare his defense, and permits the court to "pronounce judgment according to the right of the case." *People v Weathersby*, 204 Mich App 98, 101; 514 NW2d 493 (1994); MCL 767.45.

Here, the information was sufficient to provide defendant with fair notice of the charges against him. Defendant was charged, tried, and convicted of the two crimes specified in the information. Despite the difference in the theory of the case relating to first-degree home invasion, the same proofs were required. In addition, the trial court instructed the jury that the prosecution needed to prove that defendant committed fourth-degree CSC in order to convict on

[3] Further, an information may be freely amended "before, during, and after trial to cure any defect, imperfection, or omission in form or substance, including a variance between the information and the proofs, as long as the accused is not prejudiced by the amendment and the amendment does not charge a new crime." *People v Higuera*, 244 Mich App 429, 444; 625 NW2d 444 (2001); MCL 767.76. See also *People v Goecke*, 457 Mich 442, 459; 579 NW2d 868 (1998).

the home invasion charge. The trial court did not instruct the jury that defendant committed a "felony" or that a felony had to be proved as an element of first-degree home invasion. Therefore, defendant was not prejudiced by the terminology in the information. He knew what crimes he was accused of committing, and the jury considered those same crimes. And, because the information could have been amended at any time to conform with the verdict, there was no manifest injustice related to the information. *Covington, supra* at 87.

Affirmed.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder