STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 28, 2008
v	No. 277042 Calhoun Circuit Court
JAMES ELLIS SPARKS, a/k/a KHALID RASHAD, a/k/a RASHAD KHALID, Defendant-Appellant.	LC No. 2006-003491-FC

Before: Whitbeck, P.J., and Jansen and Davis, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction of criminal sexual conduct in the first degree (CSC I), force or coercion to accomplish penetration and resulting in personal injury, MCL 750.520b(1)(f), entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Complainant testified that defendant came to her apartment at her invitation to repair her washing machine, and that while he was there, defendant pushed her to the floor, tore her clothing, and attempted to penetrate her anus with his penis. Complainant stated that defendant achieved slight penetration. Complainant stated that after the assault she suffered anxiety attacks and had difficulty sleeping. She sought counseling to deal with the stress of the event.

Defendant testified that while he was in complainant's apartment, complainant initiated physical contact by massaging his leg and touching his penis. Defendant stated that he stopped complainant's actions, and then went to the bathroom. He urinated, and wiped himself with a piece of toilet tissue. Defendant stated that he assumed that he threw the tissue in the toilet. Defendant denied that he sexually penetrated complainant.

Evidence collected from complainant's apartment, including a cigarette butt and a piece of toilet tissue, were sent for DNA analysis. Sperm cells found on the toilet tissue matched defendant's DNA profile. Biological material found on the cigarette butt also matched defendant's DNA profile.

Defendant requested an instruction on the offense of criminal sexual conduct in the fourth degree (CSC IV), MCL 750.520e, on the ground that if the jury determined that penetration did not occur, it could also determine that complainant did not suffer mental anguish. The trial court

denied the request, finding that the evidence did not support the giving of the requested instruction. The jury was instructed on the offenses of CSC I and criminal sexual conduct in the second degree (CSC II), MCL 750.520c. The jury found defendant guilty of CSC I.

We review a claim of instructional error de novo. *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002). Defendant preserved this issue below; therefore, to be entitled to a reversal of his conviction, defendant must establish that it is more probable than not that the trial court's refusal to give the requested instruction undermined the reliability of the verdict. *People v Lowery*, 258 Mich App 167, 172-173; 673 NW2d 107 (2003).

A person is guilty of CSC I if he engages in sexual penetration with another person and he causes personal injury to the victim and force or coercion is used to accomplish the penetration. MCL 750.520b(1)(f). Personal injury includes mental anguish. MCL 750.520a(m).

A person is guilty of CSC IV if he engages in sexual contact with another person and the contact is accomplished by force or coercion. MCL 750.520e(1)(b). Sexual contact includes an intentional touching of the victim's intimate parts done for the purpose of sexual arousal or gratification, done for a sexual purpose, or for revenge, to inflict humiliation, or out of anger. MCL 750.520a(o).

A lesser included offense may be either a necessarily included lesser offense or a cognate lesser included offense. A necessarily included lesser offense is one which must be committed as part of the greater offense. It is impossible to commit the greater offense without first committing the lesser offense. *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001). If a lesser offense is a necessarily included offense, the evidence at trial will always support the lesser offense if it supports the greater offense. *People v Alter*, 255 Mich App 194, 199; 659 NW2d 667 (2003). An instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support the instruction. *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). If either party requests an instruction on a necessarily included lesser offense, the trial court must give the instruction if the evidence would support it. *People v Torres* (*On Remand*), 222 Mich App 411, 416; 564 NW2d 149 (1997). A cognate lesser included offense is one that shares some common elements with and is of the same class as the greater offense, but also has elements not found in the greater offense. *People v Perry*, 460 Mich 55, 61; 594 NW2d 477 (1999). An instruction on a cognate lesser included offense is not permissible. *People v Smith*, 478 Mich 64, 73; 731 NW2d 411 (2007).

Defendant argues that the trial court erred by refusing to instruct the jury on CSC IV as a necessarily included lesser offense of CSC I. Defendant asserts that the instruction should have been given because if the jury had concluded that penetration did not occur, it also could have concluded that complainant did not suffer mental anguish. Therefore, the evidence would have supported a finding that defendant engaged in sexual contact with complainant by using force or coercion. We disagree.

The offense of CSC IV requires the prosecution to prove that sexual contact was done for a specific purpose, i.e., for sexual arousal or gratification, for a sexual purpose, or for revenge, to inflict humiliation, or out of anger. MCL 750.520a(o). The offense of CSC I requires the prosecution to prove sexual penetration. This penetration may have been done for any purpose.

People v Lemons, 454 Mich 234, 253; 562 NW2d 447 (1997).[1] Therefore, because CSC IV requires proof of an intent not required for CSC I, CSC IV is a cognate lesser included offense of CSC I. Thus, the trial court did not err by refusing to instruct the jury on the offense of CSC IV. *Smith*, *supra* at 73.

Furthermore, even assuming that CSC IV is a necessarily included lesser offense of CSC I, the trial court's refusal to instruct the jury on CSC IV was correct. Complainant testified that defendant achieved slight penetration of her anus. The testimony of a sexual assault victim need not be corroborated. MCL 750.520k. Moreover, complainant's testimony, as well as that given by other witnesses, supported a finding that complainant was extremely upset by the incident, and that it resulted in mental anguish. In fact, complainant testified that she required counseling to deal with the stress brought on by the incident. A rational view of the evidence did not support an instruction on the offense of CSC IV. *Cornell*, *supra* at 357.

Affirmed.

/s/ William C. Whitbeck
/s/ Kathleen Jansen
/s/ Alton T. Davis

[1] The *Lemons* Court held that CSC II is a cognate lesser included offense of CSC I. *Id*. at 253-254. See also *People v Nyx*, 479 Mich 112; 734 NW2d 548 (2007).