STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEPHEN EUGENE GOODMAN,

Defendant-Appellant.

UNPUBLISHED
June 24, 2021

No. 353248
Macomb Circuit Court
LC No. 2019-002420-FC

Before: K. F. KELLY, P.J., and SHAPIRO and SWARTZLE, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial convictions of three counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a) (sexual penetration of a person under 13 years old). The trial court sentenced defendant to serve two concurrent terms of 25 to 55 years in prison for his first two CSC-I convictions, and a consecutive term of 25 years to 55 years in prison for his third CSC-I conviction. On appeal, defendant argues that the trial court erred in declining to instruct the jury regarding the cognate lesser offense of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(a) (sexual contact with a person under 13 years old). Because the trial court correctly instructed the jury, we affirm.

I. BACKGROUND

In August 2019, the prosecutor charged defendant with three counts of CSC-I. These charges were based on the statement of the 17-year-old victim that defendant had sexually assaulted her several times, beginning when she was four years old. According to the victim, defendant repeatedly instructed her to take off her pants, laid on top of her with his penis "in between . . . the lips of [her] vagina," rubbed his penis against her, and ejaculated. On one occasion, defendant also used his mouth to touch in and around the victim's vagina. When she was 12 years old, the victim confronted defendant about his actions and he agreed to stop, but he instructed her not to tell anyone what he had done. The victim did not tell anyone for many years because she was scared of defendant, but when she was 16 years old, she told her mother about defendant's sexual abuse.

Defendant was tried before a jury over the course of a three-day trial. After the witnesses testified, defendant requested that the trial court instruct the jury regarding the elements of CSC-II. Defendant based his request on the purported discrepancy in the victim's testimony regarding whether defendant penetrated her vagina with his penis and mouth, or just sexually touched her, arguing that this discrepancy created a question of fact for the jury to determine. Citing our Supreme Court's decision in *People v Nyx*, 479 Mich 112; 734 NW2d 548 (2007), the trial court held that the elements of CSC-II "are not all subsumed within" CSC-I. Therefore, the trial court concluded that the CSC-II instruction should not be given to the jury, and denied defendant's request.

The jury found defendant guilty of all three counts of CSC-I. This appeal followed.

II. ANALYSIS

On appeal, defendant argues that he was denied a fair trial because the jury was not instructed regarding the elements of CSC-II. Defendant argues that there was a dispute of fact regarding whether penetration occurred, and that this dispute of fact required the trial court to grant his request that the jury be instructed regarding the elements of CSC-II, in addition to the elements of CSC-I.

This Court reviews de novo questions of law, including questions regarding the applicability of jury instructions. *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003). We review a trial court's determination of whether a jury instruction is applicable to the facts of the case for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). "Jury instructions must include all the elements of the offenses charged against the defendant and any material issues, defenses, and theories that are supported by the evidence." *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). This Court "examines jury instructions as a whole, and, even if there are some imperfections, there is no basis for a reversal if the instructions adequately protected the defendant's rights by fairly presenting to the jury the issues to be tried." *People v Dumas*, 454 Mich 390, 396; 563 NW2d 31 (1997).

The jury convicted defendant of three counts of CSC-I, under MCL 750.520b(1)(a). The statute provides that a person is guilty of CSC-I "if he or she engages in sexual penetration with another person and if . . . [t]hat other person is under 13 years of age." MCL 750.520b(1)(a). "The elements of CSC-I under MCL 750.520b(1)(a) are that (1) the defendant engaged in sexual penetration with another person and (2) the other person was under 13 years of age." *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012). "Sexual penetration" is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body." MCL 750.520a(r).

Defendant requested that the trial court instruct the jury regarding the offense of CSC-II under MCL 750.520c(1)(a). The statute provides that a person is guilty of CSC-II "if the person engages in sexual contact with another person and if . . . [t]hat other person is under 13 years of age." MCL 750.520c(1)(a). The statutory definition of "sexual contact" includes: " 'the intentional

touching of the victim's or actor's intimate parts . . . if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, [or] done for a sexual purpose.' " *People v Duenaz*, 306 Mich App 85, 106-107; 854 NW2d 531 (2014), quoting MCL 750.520a(q) (brackets in original).

"When reviewing the propriety of a requested lesser included offense instruction, we first determine if the lesser offense is necessarily included in the greater charge, or if it is a cognate lesser included offense." *People v Bailey*, 451 Mich 657, 667; 549 NW2d 325 (1996). "Necessarily included lesser offenses must be such that it is impossible to commit the greater without first having committed the lesser." *Id*. (cleaned up).

The Michigan Supreme Court has established that "CSC II is a cognate lesser offense of CSC I." *People v Lemons*, 454 Mich 234, 253-254; 562 NW2d 447 (1997). This is because "CSC II requires proof of an intent not required by CSC I—that defendant intended to seek sexual arousal or gratification." *Id*. at 253. "In short, it is possible to commit CSC I without first having committed CSC II." *Id*. at 254. See also *Nyx*, 479 Mich at 117-118.

In *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002), the Supreme Court examined the implications of MCL 768.32(1), which provides:

> Except as provided in subsection (2), upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a 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.

Applying this statutory language to the case before it, the Supreme Court held that "a requested 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 it." *Id*. at 357.

In *Nyx*, the Supreme Court applied these rules in the context of CSC-I and CSC-II, and held that "a defendant charged with an offense consisting of various degrees may not, consistent with MCL 768.32(1), be convicted of a lesser degree of the charged offense where the lesser degree contains an element not found within the higher degree." *Nyx*, 479 Mich at 115. In that case, the defendant was charged with CSC-I, and the defendant disputed whether penetration occurred. *Id*. at 115. After a bench trial, the trial court concluded that the victim's assertion that penetration occurred was not credible, and the court then convicted the defendant of CSC-II. *Id*. at 115-116. The Supreme Court noted that the "elements of CSC II are not all subsumed within CSC I," and restated the rule that "CSC II is not a necessarily included lesser offense of CSC I. Rather, it is a cognate lesser offense." *Id*. at 117-118. Applying MCL 768.32(1) and its earlier holding in *Cornell*, the Court concluded that the statute precluded the defendant's conviction of CSC II because that offense was a cognate lesser offense of CSC I, rather than a necessarily included lesser offense. *Id*. at 121.

In this case, defendant claims that he was denied a fair trial because the jury was not instructed on CSC-II. He maintains that the CSC-II instruction was required because there is a disputed fact—whether defendant penetrated the victim—that is not part of CSC-II, which only requires sexual touching.

But, "CSC II is not a necessarily included lesser offense of CSC I. Rather, it is a cognate lesser offense." *Nyx*, 479 Mich at 117-118. A conviction of CSC-II requires proof beyond a reasonable doubt of "an intent not required by CSC I." *Lemons*, 454 Mich at 253. A defendant "charged with an offense consisting of various degrees may not, consistent with MCL 768.32(1), be convicted of a lesser degree of the charged offense where the lesser degree contains an element not found within the higher degree." *Nyx*, 479 Mich at 115. In other words, because defendant was not charged with CSC-II, he could not have been convicted of such a charge, and instructing the jury on a charge that defendant legally could not be convicted of would have been error.[1] Accordingly, the trial court properly declined defendant's request that it instruct the jury regarding the cognate lesser offense of CSC-II.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Brock A. Swartzle

[1] The dissenting opinion raises an interesting issue involving the splintered opinions in *Nyx*. With that said, the dissenting opinion goes too far by suggesting that there was a sufficiently clear holding by a majority of the Justices "that the failure to instruct on CSC-II as an inferior offense to CSC-I constitutes error." (Dissent at p 1). We know this because (1) a majority of the Justices in *Nyx* voted to vacate the defendant's CSC-II conviction, and, more importantly, (2) both *Lemons*, 454 Mich at 253-254 (holding that CSC-II is a cognate lesser offense of CSC-I) and *Cornell*, 466 Mich at 354-355 (holding that MCL 768.32(1) precludes conviction (and hence instruction) on a cognate lesser offense) remain binding precedent. In other words, even in the absence of *Nyx*, the combined logic of *Lemons* and *Cornell* are sufficient to affirm here. If the dissent's view is the proper one, it is for our Supreme Court to decide, not this panel.