STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES ARTHUR NOFS,

Defendant-Appellant.

UNPUBLISHED
May 24, 1996

No. 167804
LC No. 91-1173-FC

Before: O'Connell, P.J., and Gribbs and T. P. Pickard,* JJ.

PER CURIAM.

Defendant appeals as of right his conviction by a jury of one count of first-degree criminal sexual conduct (CSC I), MCL 750.520(b)(1)(a); MSA 28.788(2)(1)(a), and one count of second-degree criminal sexual conduct (CSC II), MCL 750.520(c)(1)(a); MSA 28.788(3)(1)(a). He received concurrent sentences of eight to twenty years on the first charge and eight to fifteen years on the second charge. We affirm.

Defendant's first allegation of error is that the prosecutor improperly used facts not in evidence as substantive evidence of guilt when she attributed statements to a witness in her closing argument that the witness did not make. Because defendant did not request a curative jury instruction, this issue is not preserved for review by this Court. *People v Richardson*, 204 Mich App 71, 80; 514 NW2d 503 (1994). However, the record reveals that the facts as stated by the prosecutor were in evidence; the prosecutor merely confused the testimony of the two police officers who testified. Good-faith errors by the prosecution that do not adversely influence the jury against the rights of the accused will not be construed as prejudicial. *People v Burnstein*, 261 Mich 534, 538; 246 NW 217 (1933). Moreover, the trial judge instructed the jury specifically that attorneys' statements and arguments were not to be considered evidence. Consequently, no error occurred.

Defendant was originally charged with two counts of CSC I involving oral acts with a victim under age thirteen. At trial, a charge of CSC II was added based on evidence that defendant had anally penetrated the victim with his finger. As his second issue, defendant alleges that the trial court erred by

refusing to instruct the jury as to the lesser cognate offense of CSC II on the two counts stemming from the oral acts, and by refusing to instruct the jury as to the misdemeanor offense of indecent exposure with regard to all three counts. To require that the court give a properly requested instruction for a lesser included felony offense, two elements must be satisfied. First, the principal offense and the lesser offense must be of the same class or category and have an inherent relationship. Second, the evidence adduced at trial must be examined to determine whether that evidence would support a conviction of the lesser offense. *People v Hendricks*, 446 Mich 435, 444; 521 NW2d 546 (1994). The evidence presented with regard to the oral acts, along with defendant's theory of defense, tended to prove either that penetration occurred or no contact whatsoever occurred. Consequently, the trial court did not err in refusing to give an instruction on CSC II as it was unsupported by the evidence.

The court's denial of defendant's request to instruct the jury as to the charge of indecent exposure was not error because there is no inherent relationship between CSC I and indecent exposure. The bounds of possible offenses the jury may consider are limited to those offenses that bear a sufficient relationship to the principal charge in that they are in the same category, protect the same societal interests as the greater offense, and are supported by the evidence at trial. *Hendricks*, *supra* at 447; *People v Stephens*, 416 Mich 252, 261-265; 330 NW2d 675 (1982). The two crimes "must be so related in that . . . proof of the lesser offense is necessarily presented as part of the showing of the commission of the greater offense." *Hendricks*, *supra* at 445. This "inherent relationship" test is required to "prevent misuse of lesser included offense instructions by the defense." *Stephens*, *supra* at 262. Contrary to defendant's assertions, it is possible to commit CSC I without committing indecent exposure, such as where penetration is with a finger or an object. Therefore, no inherent relationship exists between the two crimes of indecent exposure and CSC I.

Defendant also argues that reversal is required where the prosecution's main witness, the eight-year-old victim, was not properly sworn prior to testifying. Defendant failed to object, waiving his right to assert error on appeal. *People v Cobb*, 108 Mich App 573, 575; 310 NW2d 798 (1981). We need not disregard the preservation requirements because failure to consider the issue will not result in manifest injustice. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994). MCL 600.2163; MSA 27A.2163, which sets forth the standard for swearing child witnesses, does not require that the child use a specific form of oath or raise his right hand. MRE 603 requires that the oath "be administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty" to testify truthfully. In the instant case, the trial court impressed upon the child that he could be punished seriously for lying, and the child responded that he understood. The child also repeatedly indicated that he understood the importance of telling the truth and would do so. Thus, there was no error as the child was properly sworn. The cases cited by defendant, *Dawson v Secretary of State*, 44 Mich App 390; 205 NW2d 299 (1973), and *People v Ramos*, 430 Mich 544; 424 NW2d 509 (1988), are inapposite because both cases involved an out-of-court statement by an adult. In those cases, the importance of a formal oath was preeminent since the oath was the only safeguard for assuring the truthfulness of the testimony. In contrast, defendant exercised his right to cross-examine the child, and the jury was able to observe the child's demeanor and assess his credibility.

Finally, defendant alleges that the trial court erred when it stated that defendant's second sentence was within the recommended guidelines' range. Because defendant did not object at sentencing to the guidelines calculations nor file a motion for resentencing, this issue is not preserved for review. *People v Walker*, 428 Mich 261, 266; 407 NW2d 367 (1987); *People v Eaves*, 203 Mich App 356, 358; 512 NW2d 1 (1994). Furthermore, in light of the fact that defendant's sentences are concurrent and defendant's CSC I sentence is valid, any error the trial court may have committed with regard to defendant's sentence for the CSC II conviction is harmless. MCL 769.26; MSA 28.1096.

Affirmed.

/s/ Peter D. O'Connell
/s/ Roman S. Gribbs
/s/ Timothy P. Pickard