STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC DERILLER CHARLESTON,

Defendant-Appellant.

UNPUBLISHED
July 19, 1996

No. 182142
LC No. 94-005569

Before: Wahls, P.J., and Young and H.A. Beach,* JJ.

PER CURIAM.

Defendant was charged in this case with first-degree criminal sexual conduct (CSC), MCL 750.520b; MSA 28.788(2), and kidnapping, MCL 750.349; MSA 28.581. Following a bench trial, the trial court acquitted defendant of the kidnapping charge, but convicted him of the CSC charge. When defense counsel objected that aggravated CSC could not be found because of the acquittal on the kidnapping charge, the trial court found that defendant had committed a separate felony, that of intentionally selling controlled substances. The trial court sentenced defendant to a term of six to fifteen years' imprisonment. We vacate defendant's conviction and remand to allow the trial court to further articulate its findings of fact.

Both the Michigan and the United States Constitutions require that a criminal defendant be informed of the nature of the offense with which he is charged, be allowed time to prepare his defense, and secure the assistance of counsel. *People v Johns*, 384 Mich 325, 331; 183 NW2d 216 (1971); *Sands v Sands*, 192 Mich App 698, 702-703; 482 NW2d 203 (1992), aff'd 442 Mich 30; 497 NW2d 493 (1993); see also *People v Weathersby*, 204 Mich App 98, 101; 514 NW2d 493 (1994) (based on statutory, not constitutional, grounds). First-degree CSC occurs when a person engages in sexual penetration with another person and at least one of several aggravating circumstances exists. MCL 750.520b; MSA 28.788(2).

* Circuit judge, sitting on the Court of Appeals by assignment.

Here, the information charged defendant with a count of first-degree CSC and a count of kidnapping. The count charging defendant with first-degree CSC stated that defendant "did engage in sexual penetration, to-wit: Sexual Intercourse, with [the complainant], under the following existent circumstance(s), to-wit: defendant coerced said victim to submit by exerting his/her authoritative position." This language from the information apparently referred to the aggravating circumstance where the victim is at least thirteen but less than sixteen years of age and "[t]he actor is in a position of authority over the victim and used this authority to coerce the victim to submit." MCL 750.520b(1)(b)(iii); MSA 28.788(2)(1)(b)(iii).

A separate aggravating circumstance is where the "[s]exual penetration occurs under circumstances involving the commission of any other felony." MCL 750.520b(1)(c); MSA 28.788(2)(1)(c). Although this factor was not explicitly mentioned in the information on the CSC count, the information did state that "multiple variables" were involved in this count. This parenthetical, combined with the count of kidnapping contained in the information, at least arguably put defendant on notice that he would be charged with a sexual penetration involving the commission of kidnapping.

However, even assuming arguendo that defendant was put on notice about felony CSC involving kidnapping, the information did not allow defendant to prepare a defense on the charge of a sexual penetration involving the commission of a controlled substances offense. Generally, a trier of fact may not find that a defendant has committed a felony not listed in the information in order to satisfy the "any other felony" circumstance in aggravated CSC. See *People v McCurtis*, 84 Mich App 460, 462; 269 NW2d 641 (1978).

Neither was it possible to infer from the information that defendant could be tried for a sexual penetration during the commission of a controlled substances offense. One case where an inference for an uncharged felony was possible was *People v Mahone*, 97 Mich App 192; 293 NW2d 618 (1980). In that case, the information charged the defendant with first-degree murder and possession of a firearm during the commission of first-degree murder. The defendant was convicted of involuntary manslaughter and felony-firearm. After trial, the defendant moved to dismiss the felony-firearm conviction because the information had never been amended. *Id.*, p 195. The trial court allowed the information to be amended, holding that a defendant is not prejudiced by an amendment to the information to cure a defect in the offense charged when the original information was sufficient to inform the defendant and the court of the nature of the charge. *Id.* However, whereas involuntary manslaughter is a cognate lesser included offense of murder, *People v Heflin*, 434 Mich 482, 496-497; 456 NW2d 10 (1990), the controlled substances offenses are not lesser included offenses of kidnapping. See generally *id.*, p 495. Accordingly, *Mahone* is distinguishable. We hold that the information here was insufficient to inform defendant of the nature of a count charging a sexual penetration during the commission of a narcotics offense or to allow defendant to prepare his defense on that count. *Johns, supra*, p 331; *McCurtis, supra*, p 462.

It is clear that defendant's conviction must be set aside. However, a prosecutor may list and argue more than one aggravating circumstance which accompanies a single sexual penetration. *People*

v Johnson, 406 Mich App 320, 331 n 3; 279 NW2d 534 (1979). Here, although the trial court found that defendant had not been proved guilty of kidnapping, it did not make a finding of fact as to whether the other aggravating circumstance existed – i.e. whether defendant coerced the complainant by exerting his authoritative position. Accordingly, we remand to the trial court to allow it to make further findings of fact, and to enter an appropriate verdict and sentence. If, upon further articulating its findings of fact, the trial court finds that defendant's sexual penetration existed under this separate aggravating circumstance, MCL 750.520b(1)(b)(iii); MSA 28.788(2)(1)(b)(iii), it may still find defendant guilty of first-degree CSC. If, however, the trial court finds that this aggravating circumstance did not exist, then it may, if appropriate, enter a verdict of guilty of third-degree CSC. See MCL 750.520d; MSA 28.788(4). We do not retain jurisdiction.

Remanded.

/s/ Myron H. Wahls
/s/ Robert P. Young, Jr.
/s/ Harry A. Beach