STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY ARTHUR BERSON,

Defendant-Appellant.

UNPUBLISHED
October 18, 1996

No. 183772
LC No. 94-037456-FH

Before: Neff, P.J., and Hoekstra and G. D. Lostracco,* JJ.

PER CURIAM.

Defendant was convicted of two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(10(a), for incidents involving his kindergarten-aged daughter. Following his convictions, defendant pleaded guilty to being an habitual offender, third offense, MCL 769.11; MSA 28.1083, and was sentenced to 8 ½to 30 years in prison. Defendant appeals his convictions as of right and we affirm.

A

Defendant first argues that the trial court erred in allowing the victim's mother to testify under MRE 803A to statements the victim made regarding the incidents in question. On this record, we find any error to have been harmless.

At trial, the victim testified extensively with regard to the incidents of sexual contact with defendant. Further, defendant admitted to a police officer that the victim was telling the truth, that he often slept with the victim in the nude (more than seventy times according to defendant), but that he could not remember doing the acts because he was probably asleep. Thus, contrary to defendant's assertions on appeal, the allegedly hearsay testimony was not "the missing piece of evidence against the defendant." Indeed, we find the evidence of defendant's guilt to be overwhelming. Accordingly, any error in the admission of the hearsay testimony, the substance of which the victim had already relayed, was harmless. See *People v Strand*, 213 Mich App 100, 103; 539 NW2d 739 (1995).

---

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

B

Defendant next argues that the trial court erred in failing to instruct the jury on what defendant claims is the lesser included offense of fourth-degree criminal sexual conduct. We disagree.

First, we disagree with defendant that CSC-IV is a necessarily included offense of CSC-II when age is the basis for the charge. See *People v Mosko*, 190 Mich App 204, 210; 475 NW2d 866 (1991), aff'd 441 Mich 490; 495 NW2d 534 (1992); People *v Norman*, 184 Mich App 255, 260-261; 457 NW2d 136 (1990). Accordingly, the trial court was not required to give the instruction.

We also disagree with defendant that the instruction was required because CSC-IV is a cognate lesser included offense of CSC-II. Even accepting defendant's proposition that CSC-IV is a cognate lesser offense of CSC-II, in order for the instruction on the lesser charge to be appropriate, a rational view of the evidence must support a verdict of guilty of the misdemeanor and not guilty of the felony. See *People v Malach*, 202 Mich App 266, 276; 507 NW2d 834 (1993). Here, no rational view of the evidence could support a finding of not guilty of CSC-II but guilty of CSC-IV because the victim's age, not force or coercion, formed the basis for the charge. Accordingly, the instruction was not warranted, and the trial court did not err in failing to give it.

Affirmed.

/s/ Janet T. Neff
/s/ Joel P. Hoekstra
/s/ Gerald D. Lostracco