STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TANYA BETH ORTMAN,

Defendant-Appellant.

UNPUBLISHED
April 18, 1997

No. 176220
Saginaw Circuit Court
LC No. 93-008592-FC

Before: Doctoroff, P.J., and MJ Kelly and Young, JJ.

PER CURIAM.

Defendant appeals by right from jury convictions of two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c; MSA 28.788(3). We affirm.

I

Defendant was tried on one count of first-degree criminal sexual conduct (CSC I) and two counts of CSC II. Although defendant was acquitted of the CSC I charge, she nonetheless first contends that there was insufficient evidence to warrant instructing the jury on CSC I. We disagree. To support a conviction for CSC I, it was only necessary for the prosecution to prove that (1) defendant engaged in "sexual penetration" with the complainant, i.e., defendant touched the complainant's genital area with defendant's mouth or tongue; and (2) the complainant was less than thirteen years old at the time. MCL 750.520b(1)(a); MSA 28.788(2)(1)(a); CJI2d 20.1. Defendant only disputes the first element of the proof. However, the record reveals that the complainant clearly testified that there was oral-genital contact between defendant and the complainant. Nothing more is necessary to support a CSC I conviction. MCL 750.520h; MSA 28.788(8). Since the complainant's veracity was for the jury to evaluate, the trial court's instruction on CSC I was proper.

Defendant nonetheless contends that rebuttal evidence presented at trial "obliterated" the probative value of the complainant's testimony, citing *People v Vail*, 393 Mich 460, 464; 227 NW2d 535 (1975), for the familiar proposition that a jury may not be allowed to consider a charge "unwarranted by the proofs." *Id*. at 464. However, defendant apparently confuses the applicable concept of whether the CSC I charge was "warranted," i.e., whether sufficient evidence was presented

in support of it, with the inapplicable concept of whether a CSC I conviction would have been proper in the face of conflicting evidence of great weight.

II

Defendant next contends that there was insufficient evidence to warrant instructing the jury on CSC II. We disagree. To support each of the convictions for CSC II, it was only necessary for the prosecution to prove that (1) defendant engaged in "sexual contact" with the complainant, i.e., defendant touched the complainant's breast, genital area or clothing covering those areas for sexual purposes; and (2) the complainant was less than thirteen years old at the time. MCL 750.520c(1)(a); MSA 28.788(3)(1)(a); CJI2d 20.2. Again, defendant only disputes the first element of the proof. However, the record reveals that the complainant clearly testified that defendant touched complainant's breast and genital area. Again, nothing more is necessary to support a CSC II conviction, MCL 750.520h; MSA 28.788(8), and since the complainant's veracity was for the jury to evaluate, the trial court's instruction on CSC II was proper.

III

Finally, defendant contends that the trial court's refusal to instruct the jury regarding the lesser included offense of gross indecency upon such a request by defendant deprived defendant of a fair trial. We disagree. In *People v Hendricks*, 446 Mich 435, 443-445; 521 NW2d 546 (1994), our Supreme Court set forth two considerations necessary to define a "cognate" lesser offense and to determine whether an instruction on such an offense is required: (1) the principal offense and the lesser offense must be of the same class or category; and (2) the evidence adduced at trial must support a conviction of the lesser offense.

With regard to the first *Hendricks* consideration, we conclude that, at all times relevant to the instant case,[1] the offense of gross indecency was not of the same class or category as that of CSC II. This issue was recently decided in *People v Hack*, 219 Mich App 299; 556 NW2d 187 (1996), in which this Court stated:

> Defendant was entitled to an instruction on gross indecency only if it has an "inherent relationship" to first degree criminal sexual conduct. This "inherent relationship" is established if there is a common purpose between the statutes that protect the same societal interests.
>
> We are not persuaded that there is an inherent relationship between gross indecency and criminal sexual conduct. While both obviously involve sex offenses, they protect different societal interests. The focus of criminal sexual conduct statute is the prevention of sexual assaults. Gross indecency, on the other hand, punishes sexual conduct that society considers indecent and improper. * * * Because these statutes address different purposes, there is no inherent relationship between the two. [*Id.* at 307-308 (citations omitted).]

Although *Hack* involved a charge of CSC I, we believe the reasoning of the decision is equally applicable to this case involving CSC II. Accordingly, we find that gross indecency is not a cognate lesser offense of CSC II. Thus, the trial court properly declined to give an instruction regarding gross indecency.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Michael J. Kelly
/s/ Robert P. Young, Jr.

[1] We note that the specific instruction in question, CJI2d 20.31 ("Gross Indecency"), was amended in September of 1995 to reflect our Supreme Court's plurality rejection of the "common sense of society" standard previously used to define the crime of gross indecency. See *People v Lino*, 447 Mich 567; 527 NW2d 434 (1994). However, we necessarily review the trial court's decision to not give CJI2d 20.31 in light of the version of the instruction in effect at that time, and therefore all references to CJI2d 20.31 herein are to that pre-9/95 version.