# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EARL WILBUR PORTER, JR.,

Defendant-Appellant.

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UNPUBLISHED
January 9, 1998

No. 199792
Eaton Circuit Court
LC No. 95-000020-FH

Before: Saad, P.J., and Holbrook and Doctoroff, JJ.

PER CURIAM.

Defendant appeals by right his jury conviction of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(a); MSA 28.788(4)(1)(a). The conviction stemmed from defendant having sexual intercourse with the victim when she was thirteen years old. We affirm.

I

Defendant argues that his due process rights were violated when Detective O'Brien testified that, while investigating the case, he tried to contact defendant by telephone and left a message at defendant's workplace but defendant did not return the call. O'Brien also testified about an encounter with defendant's attorney in the hall after a hearing when O'Brien asked if he could speak to defendant at that time and defendant's counsel said "no." Defendant claims that this testimony impermissibly used his silence against him. We disagree. In neither instance was defendant the subject of custodial interrogation nor was his silence predicated on a reliance on *Miranda*[1] warnings. Accordingly his "silence" in these instances was not constitutionally protected and his rights were not violated by O'Brien's testimony. *People v Stewart (On Remand)*, 219 Mich App 38, 43; 555 NW2d 715 (1996); *People v Schollaert*, 194 Mich App 158, 166-167; 486 NW2d 312 (1992).

II

Defendant next argues that the trial court erred when it failed to sua sponte give a jury instruction on CSC IV. We disagree. Defendant argues that he was entitled to a CSC IV instruction because "this assault necessarily involves contact," citing *People v Green*, 86 Mich App 142; 272 NW2d 216 (1978), *People v Thompson*, 76 Mich App 705; 257 NW2d 268 (1977), and *People v*

*Baker*, 103 Mich App 704, 304 NW2d 262 (1981). However, this Court has clarified that "sexual contact" as defined in the criminal sexual conduct statutes is not a necessarily included lesser offense of "penetration" because sexual contact contains the additional element that the defendant do the act for the purpose of sexual arousal or gratification. See, *People v Wilhelm*, 190 Mich App 574, 577; 476 NW2d 753 (1991), cert den, sub nom *Wilhelm v Michigan,* 508 US 917; 113 S Ct 2359; 124 L Ed2d 266 (1993); *People v Norman*, 184 Mich App 255, 259-260; 457 NW2d 136 (1990); *People v Garrow*, 99 Mich App 834, 838-840; 295 NW2d 627 (1980). Although there was a split of decisions on this issue, *Wilhelm* was decided after November 1, 1990 and is therefore binding pursuant to Administrative Order 1996-4, 445 Mich xxxii. Consequently, we reject defendant's argument, premised on the assertion that charges of sexual penetration necessarily include the lesser charge of sexual contact.

Because the statutory subsection relied on by defendant requires sexual contact rather than penetration and requires that defendant be at least five years older than the victim (elements not contained in CSC III), CSC IV would be at best a cognate lesser offense. See *People v Hendricks,* 446 Mich 435, 443; 521 NW 2d 546 (1994). At trial, defendant argued that no sexual activity occurred between him and the victim. Consequently, defendant cannot allege error now based upon the absence of an instruction that would have been inconsistent with his theory of defense and for which no evidence was offered at trial. *Wilhelm, supra* at 577.

III

Finally, defendant argues that he was denied the effective assistance of counsel at trial based upon the two preceding issues. The first requirement under such a claim is that defendant demonstrate an error on the part of his trial counsel. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). Because we conclude that O'Brien's testimony was not impermissible, there can be no ineffective assistance for failure to object on this basis.

Further, in order to prevail on an ineffective assistance claim, defendant must overcome the presumption that counsel's actions were trial strategy. *Id*. In this light, defendant's ineffective assistance claim regarding the failure to request a jury instruction on CSC IV must also fail. As noted previously, defendant's theory of the case was that he did not have *any* sexual contact with the victim. Under these circumstances, it is reasonable to presume that defense counsel did not request the instruction because it would have been inconsistent with defendant's position. Defendant has not offered any argument that would suggest the failure to request an instruction on CSC IV was not trial strategy. Therefore, defendant's argument must fail.

Affirmed.

/s/ Henry William Saad
/s/ Donald L. Holbrook, Jr.
/s/ Martin M. Doctoroff

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).