

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS L. NICKENS,

Defendant-Appellant.

UNPUBLISHED

April 24, 2003

No. 237794

Wayne Circuit Court

LC No. 00-013258-01

Before: Meter, P.J., and Cavanagh and Cooper, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit criminal sexual conduct involving penetration, MCL 750.520g(1). Defendant was sentenced to three years' probation. He appeals as of right. We reverse.

Defendant's conviction arises from allegations that he sexually assaulted his former girlfriend. The complainant and defendant dated intermittently for several years and had two children. At some point, the complainant began dating another man named Frank. According to the complainant, defendant did not accept this new relationship. When the complainant ultimately ended her relationship with Frank in August 2000, she discussed the possibility of reconciling with defendant.

On September 9, 2000, at approximately 4:30 a.m., the complainant claimed that Frank unexpectedly came to her home and stayed for half an hour. According to the complainant, defendant called during this time and "exchanged some words" with Frank over the telephone. Later that day, the complainant stated that defendant visited her house. The complainant testified that defendant asked her to kiss him and when she refused, he became violent. She claimed that defendant straddled her, tore her clothes, and pulled down her pants. Throughout his assault, the complainant asserted that defendant accused her of being intimate with Frank, called her derogatory names, and punched her repeatedly in the head.

The complainant indicated that defendant subsequently dragged her into her bedroom, pushed her over a chair, and punched her in the stomach. Defendant then told her to stand up, pushed her backwards, and said, "[s]uck my [penis], bit--." The complainant claimed that when she attempted to stand up, defendant punched her in the stomach again and caused her to regurgitate. Defendant ultimately pulled her head up, placed his penis on the side of her mouth, and ejaculated "all over" her. As a result of defendant's actions, the complainant stated that she

suffered a blood clot in her stomach, bruising on her chest and left eye, and a swollen left cheek. On September 14th, the complainant reported the sexual assault to the police. She later obtained a personal protection order against defendant.

On appeal, defendant argues that the trial court erroneously instructed the jury on the cognate lesser included offenses of assault with intent to commit CSC involving penetration and aggravated assault. We agree. This Court reviews de novo a defendant's claim of instructional error. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). Jury instructions are reviewed in their entirety to determine if error requiring reversal occurred. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

Our Supreme Court in *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002), recently determined that MCL 768.32 only permits a trial court to instruct on necessarily lesser included offenses, not on cognate lesser offenses.¹ See *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002). Because the instant case was pending on appeal when *Cornell* was decided and defendant objected to the trial court's decision to instruct the jury on the lesser included offenses, *Cornell* is applicable. *Id.* at 367; see also *People v Alter*, ___ Mich App ___; ___ NW2d ___ (Docket No. 228005, issued January 24, 2003), slip op at 3-4.

Defendant was originally charged with first-degree criminal sexual conduct (personal injury), MCL 750.520b(1)(f). It is undisputed that neither assault with intent to commit CSC involving penetration nor aggravated assault are necessarily lesser included offenses of CSC I.² Accordingly, the trial court erred by instructing the jury on these offenses. Moreover, this error was not harmless given the fact that defendant was acquitted of the charged offense and convicted of assault with intent to commit CSC involving penetration. Reversal of defendant's conviction is therefore mandated.

¹ A necessarily included offense is one which must be committed as part of the greater offense; it would be "impossible to commit the greater without first having committed the lesser." *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001) (citation omitted); see also *People v Veling*, 443 Mich 23, 36; 504 NW2d 456 (1993). In contrast, "a cognate offense has [only] some elements in common with the charged offense." *Bearss*, *supra* at 627.

² As related to this case, a person is guilty of CSC I if "[t]he actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration." MCL 750.520b(1)(f). Conversely, the elements of assault with intent to commit CSC involving penetration are: (1) an assault; (2) with an improper sexual purpose or intent; (3) an intent to commit an act involving penetration; and (4) an aggravating circumstance. MCL 750.520g(1); *People v Snell*, 118 Mich App 750, 754-755; 325 NW2d 563 (1982). Unlike CSC I, assault with intent to commit CSC involving penetration requires evidence of specific intent. *People v Swinford*, 150 Mich App 507, 516; 389 NW2d 462 (1986); see also *People v Sabin (After Remand)*, 463 Mich 43, 68-69; 614 NW2d 888 (2000). Finally, to establish aggravated assault the prosecution must prove: (1) an assault without a weapon; (2) the infliction of serious or aggravated injury; and (3) no intent to commit murder or to inflict great bodily harm. MCL 750.81a(1); *People v Brown*, 97 Mich App 606, 610-611; 296 NW2d 121 (1980).

In light of our decision to reverse, we decline to address defendant's remaining issues on appeal.

Reversed.

/s/ Mark J. Cavanagh

/s/ Jessica R. Cooper