

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
November 13, 2014

v

ALAN CANILLO LOON,  
  
Defendant-Appellant.

No. 317578  
Wayne Circuit Court  
LC No. 13-002933-FH

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Before: WHITBECK, P.J., and FITZGERALD and MURRAY, JJ.

PER CURIAM.

A jury convicted defendant of one count of criminal sexual conduct in the third degree (CSC III), MCL 750.520d(1)(c) (sexual penetration with knowledge or with reason to know that the victim was physically helpless), and two counts of criminal sexual conduct in the fourth degree (CSC IV), MCL 750.520e(1)(c) (sexual contact with knowledge or with reason to know that the victim was physically helpless). The trial court sentenced defendant to concurrent prison terms of 75 to 180 months for the CSC III conviction and 1 to 2 years for the CSC IV convictions. Defendant appeals as of right. We affirm.

The victim went to the emergency room at Henry Ford Wyandotte Hospital where she was given medications that can make a person very sedated and drowsy. She was admitted to the Intensive Care Unit at the hospital at 1:45 a.m. Defendant, a registered nurse, was assigned to care for her during the nighttime hours. According to the victim, defendant sexually assaulted her while she was in the ICU. The victim testified that while asleep she felt hands on her “stomach going down to her vagina” and felt something inside her vagina. She then felt a mouth on her breast. When asked whether she was awake or alert at that point, she responded, “No.” When asked if she gave anyone permission to put their mouth on her breast, she said, “[a]bsolutely not.” According to the victim, she then felt someone take her hand and put it on what she believed to be “a penis and like masturbating.” When asked whether she gave anyone permission to move her hand in this way, she responded, “No.” The victim stated that she could see a name tag on the perpetrator that read, “RN Alan.”

Defendant testified that the sexual contact with the victim was consensual. He stated that the victim pulled him toward her and he licked her breast. He then started touching her vagina and she held and stroked his penis. He testified that the victim was alert and receptive.

Defendant stated that the victim asked him to come into the bed with her, but he declined because at that point he felt bad for his kids and wife.

Defendant argues that the trial court erred by failing to instruct the jury on mistake of fact. He contends that because the offenses with which he was charged require that the defendant “knows or has reason to know” of the victim’s mental or physical condition, the mistake of fact instruction was necessary because “a defendant who makes a reasonable mistake as to the victim’s mental or physical condition will not be criminally liable.”

“A party must object or request a given jury instruction to preserve the error for review.” *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000). Defendant did not specifically request an instruction on mistake of fact. An unpreserved instructional error is reviewed for plain error affecting defendant’s substantial rights. *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). “Absent an objection or request for an instruction, this Court will grant relief only when necessary to avoid manifest injustice.” *Sabin (On Second Remand)*, 242 Mich App at 657. Under the plain error rule, defendant must demonstrate that “(1) error must have occurred; (2) the error was plain, that is, clear or obvious; (3) and the plain error affected substantial rights.” *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The third prong generally requires “a showing of prejudice, i.e. that the error affected the outcome of the lower court proceedings.” *Id.*

With regard to both the CSC III and CSC IV offenses, the trial court instructed the jury that an element of each crime was “that defendant knew or should have known that [the victim] was physically helpless at the time of the alleged act.” These instructions are consistent with § 520d(1)(c), which provides that a defendant is guilty of CSC III if he engages in sexual penetration with the victim if the defendant “knows or has reason to know that the victim is . . . physically helpless,” and § 520e(1)(c), which provides that a defendant is guilty of CSC IV if he engages in sexual contact with the victim if the defendant “knows or has reason to know that the victim is . . . physically helpless.” By including the “knows or has reason to know” language, the Legislature intended to eliminate liability where the physical helplessness is not apparent to a reasonable person. *People v Davis*, 102 Mich App 403, 407; 301 NW2d 871 (1980). See also *People v Cash*, 419 Mich 230, 241; 351 NW2d 822 (1984) (explaining that “the Legislature specifically provided for the defense of a reasonable mistake of fact by adding the language that the actor ‘knows or has reason to know’ of the victim’s condition where the prior statute contained no requirement of intent”). An additional mistake of fact instruction would not have changed the outcome of the case. Therefore, there was no plain error that affected defendant’s substantial rights.

Affirmed.

/s/ William C. Whitbeck  
/s/ E. Thomas Fitzgerald  
/s/ Christopher M. Murray