

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LIONEL L. VINCENT,

Defendant-Appellant.

UNPUBLISHED

May 26, 1998

No. 196342

Oakland Circuit Court

LC No. 94-135581-FC

Before: Hood, P.J., and MacKenzie and Doctoroff, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of kidnapping, MCL 750.349; MSA 28.582, first-degree criminal sexual conduct, MCL 750.520b(1)(e); MSA 28.788(2)(1)(e), possession of a short-barreled shotgun, MCL 750.224b(1); MSA 28.421(2)(1), being a felon in possession of a firearm, MCL 750.224f(2); MSA 28.421(6)(2), and two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He subsequently pleaded guilty to being an habitual offender, second offense, MCL 769.10(1); MSA 28.1082(1). Defendant was sentenced to twenty to forty years' imprisonment for the kidnapping conviction, twenty to forty years' imprisonment for the first-degree CSC conviction, forty to ninety months' imprisonment for both the possession of a short-barreled shotgun conviction and the felon in possession of a firearm conviction, and two years' imprisonment for the felony-firearm convictions. Defendant appeals as of right. We affirm.

Defendant's convictions arise from a series of events in which he removed his ex-girlfriend at gunpoint from her mother's house, drove her to his brother's house, and finally took her to his sister's apartment. At some point during the trip, defendant ordered the complainant to get into the trunk of the car. At his sister's apartment, defendant, still armed, forced the complainant to have sexual intercourse. Someone in the apartment building eventually called the police with a report of "a man with a shotgun [and] a woman who didn't want to be there." Responding officers intercepted defendant and the complainant in the hallway of the apartment building. The complainant had ended her relationship with defendant about two weeks earlier, after defendant hit her in the face and threw a weight at her during an argument.

On appeal, defendant first argues that error requiring reversal occurred during the jury selection process when the trial court allowed the attorneys to exercise more than one peremptory challenge at the same time. This Court has held that it is improper to exercise more than one peremptory challenge in one turn. *People v Lewis*, 160 Mich App 20, 32; 408 NW2d 94 (1987); *People v Lawless*, 136 Mich App 628, 635-636; 357 NW2d 724 (1984). See also MCR 2.511(E)(3)(a) and (F). In the this case, however, defense counsel did not object when the prosecutor exercised two peremptory challenges at the same time. Accordingly, reversal is not required. *Lawless, supra*, p 636; *Lewis, supra*, p 32. Moreover, defendant also specifically requested this method of jury selection. A party may not request an action of the trial court and then challenge that action on appeal as erroneous. *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995). Finally, defense counsel did not express dissatisfaction with the jury panel that was ultimately selected. Under these circumstances, we conclude that reversal is not warranted.

Next, defendant argues that the trial court abused its discretion by allowing (1) the complainant and her mother to testify concerning defendant's assault on the complainant two weeks before the events in this case, and (2) a police officer to testify about shotgun damage caused by defendant at his brother's house. Defendant contends that the testimony regarding both matters should have been excluded under MRE 404(b). We disagree.

The evidence concerning the prior assault was proper under MRE 404(b) since it established defendant's pattern of conduct with respect to the complainant and it helped to prove the intent with which he acted at the time of the events in this case. *People v VanderVliet*, 444 Mich 52, 64-65; 508 NW2d 114 (1993), modified 445 Mich 1205; 520 NW2d 338 (1994). Moreover, it was relevant since defendant asserted that the complainant consented to come with him and to have sex with him, see *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996), and its probative value was not substantially outweighed by the danger of unfair prejudice, *People v Fisher*, 449 Mich 441, 451-453; 537 NW2d 577 (1995). With regard to the police officer's testimony, defendant failed to object to the evidence based on MRE 404(b). Therefore, we will review this issue only if necessary to avoid manifest injustice. *People v King*, 210 Mich App 425, 433; 534 NW2d 534 (1995). Because the shotgun damage took place during the kidnapping – the complainant was able to hide in a closet after she was taken to defendant's brother's house, prompting defendant to shoot at the closet door – this testimony was proper under MRE 404(b). See *People v Sholl*, 453 Mich 730, 740-742; 556 NW2d 851 (1996) (evidence that the defendant used marijuana the evening he and the complainant had sexual relations was admissible under MRE 404(b) because it was a criminal act connected with the crime for which defendant was accused, and the jury was entitled to hear the “complete story.”). Admitting the officer's testimony did not result in manifest injustice.

Defendant next claims that the court should have suppressed his statement – given to a police officer in the apartment building hallway after defendant was apprehended and handcuffed – in response to the officer's inquiry about the location of defendant's gun. According to defendant, the statement should have been suppressed because he had not been read his *Miranda* rights [*Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966)] before informing the officer that the gun was in his sister's apartment. Additionally, defendant contends that the shotgun should have been suppressed

as evidence since it was the product of the officer's improper inquiry. We find no clear error in either instance. *People v Peebles*, 216 Mich App 661, 664; 550 NW2d 589 (1996).

Miranda warnings are required "when a person is in custody or otherwise deprived of freedom of action in any significant manner." *People v Mayes (After Remand)*, 202 Mich App 181, 190; 508 NW2d 161 (1993). An exception to the *Miranda* requirement exists where considerations of public safety justify an officer's questioning of the accused about the location of an abandoned weapon. *New York v Quarles*, 467 US 649, 657-659; 104 S Ct 2626; 81 L Ed 2d 550 (1984); see also *People v O'Brien*, 113 Mich App 183, 193-196; 317 NW2d 570 (1982); *People v Coppagnol*, 59 Mich App 745, 750-751; 229 NW2d 913 (1975); *People v Ramos*, 17 Mich App 515, 518-519; 170 NW2d 189 (1969). That exception applies here. The responding officer had been informed that defendant was armed and that there was a potential hostage-type situation. He also knew that there were other people in the building, including small children. Thus, as long as the location of the gun was not known, it posed a danger not only to police, but also to the general public, and the trial court properly allowed defendant's statement giving the location of the gun. Because the gun itself was not the product of a *Miranda* violation, the court also did not err in allowing it into evidence. Moreover, the gun was discovered in defendant's sister's apartment after she consented to the search; the gun was therefore the product of a proper search, which, in any event, defendant lacks standing to challenge. See *People v Jordan*, 187 Mich App 582, 587, 589; 468 NW2d 294 (1991).

Defendant also contends that the trial court erroneously denied defense counsel's request for jury instructions on several lesser included offenses and erroneously failed to sua sponte instruct on additional lesser included offenses. We find no error requiring reversal.

First, defendant contends the trial court erred in denying his request for jury instructions on second- and fourth-degree CSC. Second-degree CSC is a cognate lesser included offense of first-degree CSC. *People v Lemons*, 454 Mich 234, 253-254; 562 NW2d 447 (1997). Likewise, fourth-degree CSC is a cognate lesser included offense of first-degree CSC. See *People v Mosko*, 441 Mich 496, 501 n 7; 495 NW2d 534 (1992). A requested instruction on a cognate lesser offense must be given only when the instruction is consistent with the evidence and defendant's theory of the case, and the evidence would support a conviction of the lesser offense. *People v Hendricks*, 446 Mich 435, 444; 521 NW2d 546 (1994); *Lemons, supra*, p 254. Here, defendant admitted that he sexually penetrated the complainant, but claimed that she consented to having sexual intercourse with him. Thus, defendant's request for second and fourth-degree criminal sexual conduct instructions was not supported by the evidence or defendant's theory, and the trial court properly declined to give the instructions. See *People v Wilhelm (On Rehearing)*, 190 Mich App 574, 577; 476 NW2d 753 (1991).

Second, defendant contends that the trial court erred in denying his request for jury instructions on (1) assault and battery, (2) felonious assault, (3) assault with intent to do great bodily harm less than murder, and (4) assault with intent to commit a felony, all as lesser included offenses of kidnapping. Again, we find no error. There is no inherent relationship between the offenses of kidnapping and assault and battery because kidnapping is not necessarily an assaultive crime. *People v Rollins*, 207 Mich App 465, 468-469; 525 NW2d 484 (1994). The trial court therefore properly denied

defendant's request for an instruction on assault and battery as a lesser included misdemeanor. *Id.* Similarly, we do not believe that felonious assault, assault with intent to do great bodily harm less than murder, or assault with intent to commit a felony are cognate lesser offenses of kidnapping since they do not "share several elements, and are [not] of the same class or category," *Lemons, supra*, p 253, as the higher offense. Even if these assault crimes are considered to be cognate offenses, however, jury instructions on these offenses were not required since they would have been inconsistent with defendant's claim that he did not assault the complainant. *Id.*, p 254.

Finally, defendant contends that the trial court should have sua sponte instructed the jury on the offenses of assault with intent to commit unarmed robbery, larceny from a person, and unarmed robbery. This argument is without merit because there is nothing in the record to suggest that defendant intended to rob or steal something from the complainant. Defendant's ineffective assistance of counsel argument premised on the failure to request these instructions is therefore also without merit. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997).

Affirmed.

/s/ Harold Hood

/s/ Barbara B. MacKenzie

/s/ Martin M. Doctoroff