

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN JEFFREY BOKOR,

Defendant-Appellant.

UNPUBLISHED

April 27, 1999

No. 205957

Recorder's Court

LC No. 97-500393

Before: Saad, P.J., and Murphy and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). The trial court sentenced defendant as a habitual offender, second-offense, MCL 769.10; MSA 28.1082, to 7-1/2 to 15 years' imprisonment. We affirm.

Defendant's first argument on appeal is that the trial court's jury instruction regarding second-degree criminal sexual conduct violated his right to due process by lowering the burden of proof necessary to convict. We disagree. Defendant's failure to object to the jury instruction regarding second-degree criminal sexual conduct limits our review of the issue to whether relief is necessary to avoid manifest injustice. *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). Jury instructions are reviewed by this Court in their entirety to determine whether the trial court committed error requiring reversal. *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). Even if somewhat imperfect, instructions do not create error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.*

Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them. *Id.* A defendant is guilty of second-degree criminal sexual conduct if the defendant engages in sexual contact with another person and that other person is under thirteen years of age. MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). Sexual contact is defined by MCL 750.520a(k); MSA 28.788(1)(k) to include

the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification.

In this case, the trial court instructed the jury as follows:

Now in this case, ladies and gentlemen, the defendant is charged with the crime of second degree criminal sexual conduct. To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt. It's the prosecutor's burden. First, that the defendant intentionally touched [the victim] either in the breast or buttocks area or the clothing covering that area. Second, that this was done for sexual purposes or could reasonably be construed as having been done for sexual purposes. And third, that [the victim] was less than 13 years old at the time of the alleged act.

The trial court's instructions to the jury regarding second-degree criminal sexual conduct were consistent with the statutory definition of sexual contact and were substantially similar to the instructions this Court found appropriate in *Piper, supra* at 650. Therefore, the jury instruction on second-degree criminal sexual conduct, as given, "sufficiently protected defendant's rights and fairly presented the issues to be tried." *Id.* Accordingly, manifest injustice will not result if we do not grant the requested relief because the instructions created no error.

In the alternative, defendant argues that he was denied effective assistance of counsel by his trial counsel's failure to object to the second-degree criminal sexual conduct instruction. We disagree. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, that the result of the proceeding was fundamentally unfair or unreliable, and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Poole*, 218 Mich App 702, 717-718; 555 NW2d 485 (1996). Defense counsel is not required to raise a meritless objection. *People v Torres*, 222 Mich App 411, 425; 564 NW2d 149 (1997). As previously discussed, the trial court properly instructed the jury on second-degree criminal sexual conduct. Therefore, any objection to that instruction would have been meritless. Accordingly, defendant cannot sustain his claim of ineffective assistance of counsel.

Defendant next argues that the trial court's failure to instruct the jury on the offense of attempted second-degree criminal sexual conduct constitutes reversible error. We disagree. Defense counsel requested the trial court to instruct the jury on attempted second-degree criminal sexual conduct, which the trial court denied. Because second-degree criminal sexual conduct is a general intent crime and attempted second-degree criminal sexual conduct is a specific intent crime, attempted second-degree criminal sexual conduct is a cognate lesser included offense of second-degree criminal sexual conduct. *People v Leo*, 188 Mich App 417, 424-425; 470 NW2d 423 (1991). "The requested instruction on the cognate offense must be consistent 'with the evidence and defendant's theory of the case.'" *People v Lemons*, 454 Mich 234, 254; 562 NW2d 447 (1997), quoting *People v Heflin*, 434 Mich 482,

499; 456 NW2d 10 (1990). The instruction on a requested cognate offense will be required if there is a dispute in evidence that would support a conviction of that charge. *Id.*

The prosecution presented evidence that defendant put his hands down the victim's pants and touched her buttocks and put his hands up her shirt and pinched her breasts through her bra. Defendant testified that he never sexually touched the victim. During closing argument defense counsel stated, "[defendant] didn't do anything to her. We don't know why she said what she said but he didn't do anything to her and I ask that you find him not guilty." No evidence was presented that defendant attempted to commit second-degree criminal sexual conduct. Because the requested instruction on the cognate offense of attempted second-degree criminal sexual conduct was not consistent with the evidence and defendant's theory of the case, the trial court did not err by refusing to give the instruction to the jury.

Affirmed.

/s/ Henry William Saad

/s/ William B. Murphy

/s/ Peter D. O'Connell