

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MAURICE LAMONT NYX,

Defendant-Appellant.

UNPUBLISHED

January 13, 2005

No. 248094

Wayne Circuit Court

LC No. 02-007289-01

Before: Neff, P.J., and Cooper and R. S. Gribbs*, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(b)(iii). The trial court sentenced defendant to three to fifteen years in prison for each conviction. We vacate and remand.

Defendant was employed as the dean of students at a charter school in Detroit, and he was responsible for security and the discipline of students. The victim in this case is a fifteen-year-old girl who attended the school. Defendant was charged with one count of first-degree criminal sexual conduct (CSC I) by an actor who is in a position of authority over the victim and uses this authority to get the victim to submit to penis to vagina penetration and the victim is between thirteen and sixteen years of age. MCL 750.520b(1)(b)(iii). Defendant was also charged with two counts of CSC I by an actor who is in a position of authority over the victim and uses this authority to get the victim to submit to finger to vagina penetration and the victim is between thirteen and sixteen years of age. MCL 750.520b(1)(b)(iii). The trial court implicitly acquitted defendant of the CSC I charges and *sua sponte* convicted him of two counts of CSC II.

The victim and her friend skipped school one day in March 2002, and defendant caught them upon their return to the school. The victim admitted to defendant that she had skipped school to have sex with her ex-boyfriend, and she was worried that defendant would tell her parents. The victim described one incident where defendant asked her to accompany him to an off-limits area at the bottom of a staircase. The victim testified that defendant kissed her, pulled down her pants and underwear, and fondled her vagina. After penetrating her vagina with his finger, defendant placed the tip of his penis in her vagina. During cross-examination, the victim also asserted that defendant unsuccessfully attempted to force his penis into her anus. On another occasion, defendant led the victim to the same location, kissed her, and pulled down her

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

pants and underpants. Defendant inserted his fingers in the victim's vagina, but he was interrupted by students who attempted to open the door nearby.

Defendant first argues that the trial court erred in convicting him of the uncharged cognate lesser offense of CSC II. Whether an offense is a lesser-included offense of another is a question of law, which we review de novo. *People v Mendoza*, 468 Mich 527, 531; 664 NW2d 685 (2003).

MCL 768.32(1) provides:

Except as provided in subsection (2), upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense.

The language of the statute only allows consideration of those offenses that are inferior to the greater charged offense. *People v Cornell*, 466 Mich 335, 354; 646 NW2d 127 (2002). Inferior offenses are only those that are necessarily included in the greater offense, meaning that all elements of the lesser offense are included in the greater. *Mendoza, supra* at 532-533. Cognate lesser offenses share several of the same elements of the greater offense but contain at least one element not found in the greater. *Id.* at 532 n 4. Therefore, under MCL 768.32(1), courts may not convict a defendant of an uncharged cognate lesser offense. *Mendoza, supra* at 532-533; *Cornell, supra* at 354-356.

CSC II is a cognate lesser offense of CSC I. *People v Lemons*, 454 Mich 234, 253-254; 562 NW2d 447 (1997). CSC I requires the prosecutor to prove "sexual penetration," and CSC II requires the prosecutor to prove "sexual contact." MCL 750.520b(1); MCL 750.520c(1); *Lemons, supra* at 253. Sexual penetration can be for any purpose, but "sexual contact" is defined as touching that "can reasonably be construed as being for the purpose of sexual arousal or gratification." MCL 750.520a(l); MCL 750.520a(k); *Lemons, supra* at 253. "Thus, because CSC II requires proof of an intent not required by CSC I--that defendant intended to seek sexual arousal or gratification--CSC II is a cognate lesser offense of CSC I." *Lemons, supra* at 253. Therefore, it is possible to commit CSC I without first having committed CSC II. *Id.* The *Lemons* Court also noted:

Like the Court of Appeals in *People v Garrow*, "[w]e recognize that in most cases, second-degree [CSC] is a factually included offense within first-degree [CSC], for sexual penetration is usually for a sexual purpose." However, the additional intent requirement for CSC II mandates that it be considered a cognate lesser offense of CSC I. [*Id.* at 254 n 29 (brackets in original) (citations omitted).]

Given that CSC II is a cognate lesser offense of CSC I, it must be charged before the trial court may consider it or convict based on it. *Mendoza, supra* at 532-533; *Cornell, supra* at 354-356. Under MCL 768.32(1), courts may not convict a defendant of an uncharged cognate lesser offense. *Mendoza, supra* at 532-533; *Cornell, supra* at 354-356. It is undisputed that the prosecution only charged defendant with CSC I.

The prosecution argues that the holding of *Cornell* does not apply to crimes specifically divided into degrees. Basically, the prosecution argues that because the Legislature separated CSC into degrees, the lower degrees are, by necessity, inferior to CSC I regardless of whether they are cognate. This contention, however, is inconsistent with the meaning of the word inferior used in MCL 768.32(1) and defined by the Michigan Supreme Court. The Supreme Court specifically stated:

We believe that the word “inferior” in the statute does not refer to inferiority in the penalty associated with the offense, but, rather, to the absence of an element that distinguishes the charged offense from the lesser offense. The controlling factor is whether the lesser offense can be proved by the same facts that are used to establish the charged offense. As the *Membres* Court noted, the defendant’s due process notice rights are not violated because all the elements of the lesser offense have already been alleged by charging the defendant with the greater offense. This would foreclose consideration of cognate lesser offenses, which are only “related” or of the same “class or category” as the greater offense and may contain some elements not found in the greater offense. [*Cornell, supra* at 354-355 (footnote and citations omitted).]

Under this definition, only necessarily included offenses are inferior, regardless of the actual relationship of the crimes. Therefore, regardless of the use of the term “degree” in the various CSC statutes, the lower degree CSC crimes are not inferior because they are not necessarily included offenses.

Despite the prosecution’s contentions, the Supreme Court has limited the application of MCL 768.32(1) to necessarily included offenses and has excluded its application to cognate lesser offenses. *Mendoza, supra* at 532-533; *Cornell, supra* at 354-356. Because we are required to apply MCL 768.32(1) as interpreted in *Cornell*,¹ *People v McLaughlin*, 258 Mich App 635, 662 n 11; 672 NW2d 860 (2003), we conclude that the trial court erred in convicting defendant of the uncharged crimes of CSC II. We therefore vacate defendant’s CSC II convictions and sentences and remand to the trial court for entry of an order of acquittal of the three counts of CSC I.

¹ We are mindful that another panel of this Court recently distinguished *People v Cornell*, 466 Mich 335, 354; 646 NW2d 127 (2002). *People v Apgar*, ___ Mich App ___; ___ NW2d ___ (Docket No. 247544, issued November 9, 2004), slip op, p 4, lv pending. In *Apgar*, the defendant was charged with CSC I and convicted of the uncharged crime of CSC III. Because all the elements of CSC III were proved at the preliminary examination and trial without objection, the Court concluded that the defendant was not deprived of due process and received adequate notice that the jury could consider the cognate lesser offense.

Defendant raises several other issues on appeal. However, given our resolution of the first issue, we need not address the remainder of his claims on appeal.

Vacated and remanded. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Jessica R. Cooper
/s/ Roman S. Gibbs