STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MAX CHRISTENSEN,

Defendant-Appellant.

UNPUBLISHED
July 2, 1996

No. 185480
LC No. 93061583 FH

Before: Marilyn Kelly, P.J., and Neff and J. Stempien,* JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of two counts of first-degree criminal sexual conduct (causing injury and using physical force or coercion) (CSC), MCL 750.520b(1)(f); MSA 28.788(2)(1)(f). Defendant was sentenced to serve twenty to thirty-five years in prison for each conviction. Defendant now appeals and we affirm.

I

First, defendant claims that the trial court erred by allowing, over defendant's objection, the prosecutor to amend the information on the first day of trial. We disagree. MCR 6.112(G) provides that the trial court may, at any time, permit the prosecutor to amend the information unless the amendment would unfairly surprise or prejudice the defendant. Even if an objection is made and the trial court allows an amendment of the information, this Court will not reverse such a decision unless it finds that the defendant was prejudiced in his defense or that a failure of justice resulted. *People v Prather*, 121 Mich App 324, 333-334; 328 NW2d 556 (1982).

Defendant was originally charged with two counts of first-degree CSC under subsection (h)(i)--sexual penetration with a victim that was physically helpless and related by blood or affinity. On the first day of trial, plaintiff moved to amend the information to include an alternate theory under subsection (f)--sexual penetration through force or coercion and causing physical injury. Defendant argues that this

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

amendment unfairly surprised and prejudiced him, as evidenced by the fact that he was convicted under this alternate theory.

However, this amendment neither unfairly surprised nor prejudiced defendant. The victim in this case was defendant's seventy-two-year-old mother who, as a result of a previous stroke, was confined to a wheelchair and unable to speak. After a weekend visit with defendant, a nurse at her care center noticed visible, physical injuries on her person. As a result, she was taken to the hospital. The report of the attending emergency room physician was made available to defendant, and there was testimony at the preliminary examination regarding the victim's injuries. Although defense counsel's theory in his opening statement was a denial of involvement, defendant took the stand and admitted to the sexual penetrations, claiming instead that the acts were consensual. Evidence of physical injury not only assists in finding force, but also in finding a lack of consent. See CJI2d 20.27. Therefore, evidence of the physical injuries would have been admitted even without the amendment to the information. This amendment did not result in defendant's being convicted of a new crime, and there is no indication that defendant would have presented a different defense at trial if the charge had originally been first-degree CSC under subsection (f). *People v Stricklin*, 162 Mich App 623, 633-634; 413 NW2d 457 (1987). Under the circumstances of this case, it cannot be said that the amendment unfairly surprised or prejudiced defendant.

II

Next, defendant claims that the trial court erred by finding defendant competent to stand trial. A defendant is presumed competent to stand trial, and shall be declared incompetent only if he is incapable, because of his mental condition, of understanding the nature and object of the proceedings against him, or of assisting in his defense in a rational manner. MCL 330.2020; MSA 14.800(1020). The trial court's determination of a defendant's competence is reviewed for an abuse of discretion. *People v Harris*, 185 Mich App 100, 102; 460 NW2d 239 (1990).

Defendant was originally declared incompetent in August 1993. After treatment at the Center for Forensic Psychiatry, both plaintiff's and defendant's experts opined that defendant was competent. In January 1995, the trial court declared defendant competent to stand trial. On the first day of trial, defendant's expert testified that it was "questionable" whether defendant was still capable of adequately assisting defense counsel. However, the expert agreed that defendant had the ability to do those tasks reasonably necessary for defendant to help prepare for trial. It is precisely this ability that is required by statute for a defendant to be considered able to adequately assist defense counsel. MCL 330.2020; MSA 14.800(1020). Based on the expert's equivocal testimony, along with the presumption that defendant is competent, the trial court did not abuse its discretion in finding defendant competent to stand trial. MCL 330.2020; MSA 14.800(1020).

III

Last, defendant claims that the trial court erred by denying defense counsel's request for a jury instruction on the necessarily lesser included offense of third-degree CSC. A defendant has a right, upon request, to have the jury instructed on necessarily included offenses. *People v Kamin*, 405 Mich 482, 493; 275 NW2d 777 (1979). However, in this case, although defense counsel requested the instruction, defendant stated, on the record, that he did not want an instruction on the lesser offense. Under such circumstances, the trial court was not required to submit the instruction to the jury. *People v Jones*, 424 Mich 893; 382 NW2d 168 (1986).

Affirmed.

/s/ Marilyn Kelly
/s/ Janet T. Neff
/s/ Jeanne Stempien