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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 09, 2026 9:25 AM
v	No. 371247 Ingham Circuit Court
MARK DEEN WRIGHT II, Defendant-Appellant.	LC No. 19-000166-FC

Before: BORRELLO, P.J., and BAZZI and LIEVENSE, JJ.

LIEVENSE, J. (*concurring in part, dissenting in part*).

I agree with Parts II-IV of the majority opinion and would therefore affirm defendant's unlawful imprisonment conviction.

I disagree, however, with Part V of the majority opinion that addresses defendant's claim that his constitutional rights were violated because the trial court did not provide a specific unanimity instruction for his first-degree criminal sexual conduct (CSC-I) charge. Because I believe the trial court erred in not giving such an instruction, and that decision was plain error that affected defendant's substantial rights, I dissent. I would reverse the judgment on the CSC-I charge and remand the case for a new trial on that count.

I. RELEVANT BACKGROUND

CSC-I can be proven in several ways. MCL 750.520b. To prove CSC-I in this case, the prosecution initially proceeded under two theories, both involving penile penetration of the complainant, that either: (1) occurred under circumstances involving a felony (here, telephone interference or unlawful imprisonment), MCL 750.520b(1)(c), and/or (2) caused personal injury to the complainant and force or coercion was used to accomplish sexual penetration, MCL 750.520b(1)(f). "Force or coercion" is further defined in the statute. MCL 750.520b(1)(f)(*i*)-(*iii*).

With respect to penetration, the prosecution presented evidence in its case in chief of penile penetration by defendant under the relevant attendant circumstances required by the CSC-I statute, as described in the majority opinion. At the time, the prosecution was aware that defendant claimed he and the complainant had engaged in consensual cunnilingus earlier the same night

because defendant had reported that to police the night of the incident and because defendant's attorney had referenced consensual cunnilingus in his opening statement. Even so, the prosecution did not present any evidence from the complainant about cunnilingus or that any of the attendant circumstances for CSC-I occurred during cunnilingus. Near the end of its case, however, the prosecution said it was moving to amend the CSC-I charge to include cunnilingus as a basis to support the CSC-I charge based on the defense's opening statement and that it had updated the jury instructions to reflect that change. The court, however, deferred decision on the issue since there had not been any testimony on the topic.

Defendant later testified that, among other things, he performed consensual cunnilingus on the complainant on the night in question, there was no penile penetration later that night as she had testified to, and he acknowledged that they had a physical altercation later that night, at least about an hour after the cunnilingus, though the exact timing was unclear.

Then, after the close of proofs, and right before closing arguments, the prosecution again made an oral motion to amend the information to add cunnilingus as an alternative basis to support a conviction for CSC-I. Apparently, a different judge had presided during the complainant's testimony, because the judge responded that "I'm handicapped since I didn't hear [the complainant's] testimony." Ultimately, the judge granted the motion even though there was no evidence of any of the required attendant circumstances to support a CSC-I conviction during the cunnilingus, as neither the complainant nor defendant had mentioned any. No one mentioned on the record whether the prosecutor's requested change impacted the jury instructions.

The parties proceeded to closing arguments, during which the prosecution made the following statements:

> [Defendant] is charged with two things, Criminal Sexual Conduct in the First Degree and Unlawful Imprisonment. Now, you heard me towards the end here request an amendment to Count I, and that's true. When we first read off those charges, there were multiple theories for this.
>
> Either that the defendant engaged in a sexual act that involved entry into her vagina by his penis under circumstances involving crimes of Telephone Interference and . . . or Unlawful Imprisonment. Or under circumstances that caused personal injury, which includes mental anguish. You're gonna hear about the elements from the Judge. You're gonna have a copy of them while you're back there deliberating.

The prosecution then explained that it had decided the factual basis for the charges was penile penetration before it realized defense counsel was going to argue consensual cunnilingus occurred, then it stated, in light of the testimony, "All right, fine. So we're amending." It went on to argue:

> There's two possible theories you can find. Those same two for [penile penetration], or [cunnilingus]. If that's the story [defendant]'s going to try and go with, fine. It's not true at all, but sure.
>
> To be clear, you do not all need to agree on whether [penile penetration] or [cunnilingus occurred]. You do not all need to agree whether he committed that

> without her consent and the other crime happened, or there was personal injury. You just all need to agree that one of these scenarios happened. You could all be split about which one that is, and you still have to come back with guilty. You do not need to agree on the theory of the crime. Only if each of you agree that the crime happened based on whatever theory you believe.

The trial adjourned for the day after closing arguments. The next morning, the trial court asked the parties if they had "[a]ny matters before we bring the jury in," but did not ask if there were any objections to the instructions. The trial court then instructed the jury, including regarding the two actus reus theories outlined in the prosecution's closing argument, but did not include a specific unanimity instruction that would have required the jury to be unanimous as to what act, penile penetration or cunnilingus, constituted the penetration as required for CSC-I.

II. ANALYSIS

In this context, and in response to defendant's argument on appeal, the majority opinion concludes that no specific unanimity instruction was required because sexual penetration can be proven in multiple ways, the case "did not involve allegations of multiple, distinct incidents of nonconsensual sexual penetration," and instead the evidence established that defendant was "accused of a single, violent sexual assault." Thus, the majority concludes, jury unanimity as to the means of penetration was not required here, citing *People v Chelmicki*, 305 Mich App 58, 68; 850 NW2d 612 (2014).

Alternative acts are materially distinct "where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives." *People v Cooks*, 446 Mich 503, 524; 521 NW2d 275 (1994). "The critical inquiry is whether either party has presented evidence that materially distinguishes any of the alleged multiple acts from the others." *Id*. at 512.

It is true, as the majority states, that there was no evidence of distinct incidents of "nonconsensual" sexual penetration, but that is because there was no evidence of "nonconsensual" cunnilingus at all. Meanwhile, it is untrue that there was no evidence of two distinct incidents of penetration: the first was consensual cunnilingus, testified to by the defendant, and the second was nonconsensual penile penetration occurring with attendant circumstances relevant to CSC-I, testified to by the complainant.

Thus, the facts of this case are like *People v Parish*, unpublished per curiam of the Court of Appeals, issued October 17, 2024 (Docket No. 363307), p 4, a CSC case where this Court found, relying on *Cooks*, 446 Mich at 512-513, 530, that a specific unanimity instruction was required because there was evidence that some sexual acts were consensual and there was only evidence that one sexual act involved force or coercion. *Parish* is not binding authority,[1] but CSC cases are fact specific, and I believe its reasoning and discussion of *Cooks* should apply here. And this case is unlike those cases where a sexual assault involves different types of penetration that occur over

[1] "Unpublished authorities are not binding on this Court but may be considered as persuasive authority." *People v Swenor*, 336 Mich App 550, 563 n 7; 971 NW2d 33 (2021).

a continuous course of conduct. See, e.g., *Cooks*, 446 Mich at 522 (holding that there is no specific unanimity instruction requirement under "two circumstances—when the two offenses are so closely connected in time that they form part of one transaction or when the offense consists of a continuous course of conduct"); *People v Bailey*, 310 Mich App 703, 719; 873 NW2d 855 (2015). Indeed, the case the majority cites, *Chelmicki*, 305 Mich App at 68-69, involved one continuous course of unlawful imprisonment using different types of restraint, meaning it does not guide the result here.

Despite the testimony that distinct acts allegedly occurred under materially different circumstances, the prosecutor amended the CSC-I charge to include cunnilingus, and then argued to the jury that they did not need to agree on what act constituted "penetration" for purposes of CSC-I. But on appeal, even the prosecution now concedes that a specific unanimity instruction was required in these circumstances, and that a new trial would normally be warranted as a result, because the instances of sexual penetration were materially distinct: one instance was alleged consensual cunnilingus, and the other was penile penetration. To be sure, a specific unanimity instruction is not always required just because there is more than one type of penetration. *Cooks*, 446 Mich at -513 ("[A] specific unanimity instruction is not required in all cases in which more than one act is presented as evidence of the actus reus of a single criminal offense"). But I agree with the prosecution and the defense that one was required here.

Having conceded error, the prosecution argues that, despite the mistake in not giving a specific unanimity instruction, this Court should affirm the conviction because defendant cannot show he was prejudiced. It argues that defendant cannot show any juror would have voted to convict him based on cunnilingus, and that the complainant's testimony of forceful penile penetration was corroborated, meaning he would have been convicted anyway. This Court reviews unpreserved instructional error for "plain error affecting defendant's substantial rights."[2] *People v Waclawski*, 286 Mich App 634, 678-679; 780 NW2d 321 (2009). "To establish plain error, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 N.W.2d 130, 138 (1999). And while the prosecution does not reference the applicable legal standard, in essence it argues that the instructional error did not affect defendant's substantial rights.

The problem with the prosecution's argument, however, is that it told the jury that it could rely on defendant's admission of consensual cunnilingus to satisfy that element of CSC-I and

[2] Plain error review does not apply to unpreserved instructional error if a defendant expressly approved of the instructions, meaning he waived his challenge to the jury instructions. *People v Miller*, 326 Mich App 719, 726; 929 NW2d 821 (2019), citing *People v Carter*, 462 Mich 206, 215-216; 597 NW2d 130 (1999). Here, I see no record evidence that the defense approved of the jury instructions after the court granted the prosecution's motion to amend the information, thus, the plain error standard applies. If defendant somehow did waive his challenge to the jury instructions, the standard for ineffective assistance of counsel would apply, which is what the prosecution argues, and the issue would be reviewed for mistakes apparent from the record because no *Ginther* hearing was held. *Miller*, 326 Mich App at 726.

convict defendant, and that the jury did not need to be unanimous on that point. And the prosecution did so even though there was no evidence of any required attendant circumstances that would support cunnilingus constituting CSC-I. I cannot assume that the jury ignored the prosecutor's explicit argument.

Instead, it is just as plausible that the jury relied on it and at least some, if not all, decided that the consensual cunnilingus satisfied the penetration element of CSC-I, believed the defendant that no penile penetration occurred, but also found that defendant's actions during the physical altercation satisfied the other elements for CSC-I. And, since there was no specific unanimity instruction, if some members of the jury did so the trial court deprived defendant of his right to a unanimous verdict. "[W]hen the prosecution offers evidence of multiple acts by a defendant, each of which would satisfy the actus reus element of a single charged offense, the trial court is required to instruct the jury that it must unanimously agree on the same specific act if the acts are materially distinct or if there is reason to believe the jurors may be confused or disagree about the factual basis of the defendant's guilt." *People v Gadomski*, 232 Mich App 24, 30; 592 NW2d 75 (1998), citing *Cooks*, 446 Mich at 530.

The prosecution's closing argument highlights why a specific unanimity instruction was required, and why the lack of one impacted defendant's substantial rights. The prosecution presented two theories describing materially distinct acts to satisfy the actus reus component of the single CSC-I charge involved in this case. The first theory—nonconsensual penile penetration that occurred under circumstances that also involved telephone interference or unlawful imprisonment and/or caused personal injury to the complainant—was supported by the testimony from the complainant and her son. The second theory—consensual cunnilingus—had no supporting evidence to link it with the aggravating circumstances under MCL 750.520b(1)(c) or (f). Yet the prosecution told the jury that did not matter, even while it now concedes on appeal that convicting based on consensual cunnilingus would be a "stretch." While a trial court is not required to instruct the jury that it must reach a unanimous verdict when the facts support multiple aggravated circumstances underlying a single CSC-I charge, *Gadomski*, 232 Mich App at 31-32, the same is not true where, as here, defendant offered "materially distinct proofs regarding . . . the alleged acts." *Cooks*, 446 Mich at 528.

For these reasons, I respectfully dissent from Part V of the majority opinion.

/s/ Andrew J. Lievense