

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK SHAWN LAMAY,

Defendant-Appellant.

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UNPUBLISHED

November 13, 2008

No. 277553

Washtenaw Circuit Court

LC No. 06-000520-FC

Before: Fitzgerald, P.J., and Bandstra and Schuette, JJ.

PER CURIAM.

A jury convicted defendant of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(c), one count of third-degree criminal sexual conduct, MCL 750.520d, and one count of photographing or capturing the image of an unclothed person, MCL 750.539j(2)(b).<sup>1</sup> The trial court later vacated defendant's convictions of third-degree CSC and photographing or capturing the image of an unclothed person, and sentenced defendant to a prison term of 2 to 15 years for the first-degree CSC conviction. Defendant appeals as of right. We affirm.

Defendant was convicted of first-degree CSC under a theory that he engaged in sexual penetration under circumstances involving the commission of any other felony, MCL 750.520b(1)(c), with the underlying felony being photographing or capturing the image of an unclothed person, MCL 750.539j(2)(b). Defendant argues that he is entitled to a new trial because the trial court did not instruct the jury that consent is a defense to the underlying felony.

Jury instruction issues involving questions of law are reviewed de novo on appeal. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). But a trial court's decision whether an instruction is applicable to the facts of the case is reviewed for an abuse of discretion. *Id.* This Court reviews jury instructions as a whole to determine if there is error requiring reversal. *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999). The instructions must include all elements of the charged offense and must not exclude material issues, defenses, and theories that are supported by the evidence. *Id.* Even if somewhat imperfect, there is no error if the

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<sup>1</sup> The jury acquitted defendant of two additional counts of first-degree CSC.

instructions fairly present the issues to be tried and sufficiently protect the defendant's rights. *People v Clark*, 274 Mich App 248, 255-256; 732 NW2d 605 (2007).

Defendant was charged under alternative theories with a total of four counts of first-degree CSC based on two separate acts of sexual penetration. He was charged with two counts of first-degree CSC for engaging in separate acts of oral sex and vaginal intercourse under a theory that he was aided or abetted by another person and either had reason to know that the victim was physically helpless, MCL 750.520b(1)(d)(i), or used force or coercion to accomplish the penetration, MCL 750.520b(1)(d)(ii). He was also charged with two counts of first-degree CSC under the alternative theory that he engaged in the same acts of oral sex and vaginal intercourse under circumstances involving the commission of another felony, MCL 750.520b(1)(c). The jury acquitted defendant of both counts involving oral sex, but convicted him of both counts involving vaginal intercourse, finding him guilty of the lesser offense of third-degree CSC for the count charging him under an aiding or abetting theory, and guilty as charged for the count charging him with engaging in sexual penetration under circumstances involving the commission of another felony. The jury also found defendant guilty of a separately charged count of photographing or capturing the image of an unclothed person, MCL 750.539j(2)(b).<sup>2</sup>

At trial, the court instructed the jury that while consent was a defense to the force or coercion theory for the first two counts, it was not a defense to the physically helpless theory for those counts, or to either of the counts involving sexual penetration under circumstances involving the commission of another felony. Defendant now argues on appeal that consent is a defense to photographing or capturing the image of an unclothed person and, therefore, the jury was improperly precluded from considering it as a defense to the CSC charge involving sexual penetration under circumstances involving the commission of another felony.

Consent is not a defense to a charge under MCL 750.520b(1)(c) unless it is a defense to the underlying felony. *People v Wilkens*, 267 Mich App 728, 737; 705 NW2d 728 (2005). Thus, the availability of a defense of consent to a charge under MCL 750.520b(1)(c) depends on the underlying felony.

The underlying felony here, photographing or capturing the image of an unclothed person, consists of the following elements: (1) photographing or recording an image; (2) of a person's unclad genitalia or buttocks, or if female, breasts; (3) under circumstances in which the individual would have a reasonable expectation of privacy. As is evident from the elements of this offense, a person cannot be guilty of photographing or capturing the image of an unclothed person if the person being photographed does not have a reasonable expectation of privacy. It is axiomatic that a person who consents to being photographed while unclothed would not have a reasonable expectation of privacy with respect to that act of being photographed. Thus, the jury

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<sup>2</sup> The trial court later vacated the third-degree CSC conviction based on its determination that it was an alternative charge to the same act underlying defendant's first-degree CSC conviction, and vacated the conviction for capturing or recording the image of an unclothed person because it was an element of defendant's first-degree CSC conviction.

here could not have convicted defendant of photographing or capturing the image of an unclothed person if it found that the victim consented to that activity. Contrary to what defendant argues, the trial court did not remove this issue from the jury by specifically instructing that consent was not available as a defense to photographing or capturing the image of an unclothed person. Rather, the court addressed the availability of a consent defense only in the context of the CSC charges. The court never instructed the jury that consent either could be a defense, or could not be a defense, to the charge of photographing or capturing the image of an unclothed person. Rather, the court accurately instructed the jury on the elements of that offense, including the requirement that the charged photographing occur under circumstances in which the individual being photographed would have a reasonable expectation of privacy. Thus, the court's instructions allowed the jury to consider the issue of consent in the context of the reasonable expectation of privacy element of this offense and, accordingly, were sufficient to protect defendant's rights.

Defendant also argues that there was insufficient evidence to support his conviction for first-degree CSC. This Court reviews the evidence presented in a light most favorable to the prosecution to determine whether the evidence was sufficient to justify a rational trier of fact in finding the defendant guilty beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere in the trier of fact's role of determining the weight or credibility of the witnesses, and all conflicts in the evidence must be resolved in favor of the prosecution. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005).

A conviction of first-degree CSC under MCL 750.520b(1)(c) requires proof of (1) sexual penetration (2) under circumstances involving the commission of another felony. *Wilkens, supra* at 737. The prosecutor presented evidence that defendant engaged in sexual intercourse with the victim, thereby establishing the element of penetration. With respect to the charged underlying felony, photographing or capturing the image of an unclothed person, the prosecutor presented evidence that the sexual encounter was videotaped and that the videotape captured the victim's unclad genitalia. With respect to the reasonable expectation of privacy element, the evidence showed that the victim had been drinking and was heavily intoxicated to the point that she was feeling sick and throwing up. There was evidence that defendant asked the victim to allow him to perform oral sex on her, and that a codefendant asked defendant and the victim to go into the bedroom. The victim testified that she thought that only she and defendant were going into the bedroom, and that she denied giving anyone permission to videotape her, or even being aware that she was being videotaped. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the jury to find beyond a reasonable doubt that the videotaping occurred under circumstances in which the victim had a reasonable expectation of privacy. Accordingly, the evidence was sufficient to support defendant's first-degree CSC conviction.

Affirmed.

/s/ E. Thomas Fitzgerald  
/s/ Richard A. Bandstra  
/s/ Bill Schuette