STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 24, 2009
v	No. 286549 Macomb Circuit Court
ROBERT EDWARD TATMAN, Defendant-Appellant.	LC No. 2007-005626-FH

Before: Talbot, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Defendant was charged in the alternative with two counts of third-degree criminal sexual conduct under MCL 750.520d(1)(b) (force or coercion) and (1)(c) (physically helpless victim). The jury found defendant guilty under § 520d(1)(c). Defendant was sentenced to a prison term of 45 to 180 months for each conviction, to be served concurrently. Defendant appeals as of right. We affirm defendant's convictions and sentences, but remand for correction of the judgment of sentence which erroneously indicates that defendant was convicted under MCL 750.520d(1)(b) (force or coercion), rather than under MCL 750.520d(1)(c) (sexual penetration with a physically helpless person). This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that the evidence was insufficient to support his third-degree CSC convictions. In reviewing the sufficiency of the evidence in a criminal case, this Court must review the record de novo and, viewing both direct and circumstantial evidence in a light most favorable to the prosecution, determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997); *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995). Circumstantial evidence and reasonable inferences drawn therefrom are sufficient to prove the elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). "It is for the trier of fact . . . to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). All conflicts in the evidence are to be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The victim testified that she was sleeping when she felt someone in the bed next to her rubbing her back and stomach and then digitally penetrate her vagina. She described herself as drunk, and "like half asleep, . . . in and out of it" and not "really with it." She stated that she was

unsure whether what she was experiencing was really happening and "felt like maybe it could have been like a dream almost" and thus she did not move or open her eyes. She felt the person roll her over and attempt vaginal intercourse, at which time she "started realizing, okay, this is really happening. I can really feel something is going on." She then started to sit up, which caused her assailant to roll off. She then saw that defendant was in bed with her.

Defendant challenges only the "physically helpless" element of the offense. A person is "physically helpless" when she is "unconscious, asleep, or for any other reason is physically unable to communicate unwillingness to an act." MCL 750.520a(m). A conviction under MCL 750.520d(1)(c) requires proof that the defendant engaged in sexual penetration with another person, that the other person was physically helpless, and that the defendant knew or had reason to know that the person was physically helpless. Sexual penetration includes "any . . . intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body . . . ." MCL 750.520a(r). "[T]he essence of physical helplessness is that the victim is unable to communicate unwillingness to an act." *People v Perry*, 172 Mich App 609, 622; 432 NW2d 377 (1988). A case of third-degree CSC predicated on sleep-induced helplessness is made out where the victim is penetrated while asleep and awakens during that process from the sensation of being penetrated. It is not made out when the victim is awake when the penetration occurs and is physically able to communicate her unwillingness to act. *Id*.

In this case, the victim testified that she consumed a considerable amount of alcohol the night before and into the early morning hours and had been sleeping. The victim asserted that she was still partially asleep when she felt someone digitally penetrate her vagina, and that she still did not fully realize what was happening when she initially felt a person attempt penile intercourse. Defendant denied being in the victim's room and physically assaulting her. On appeal, defendant argues that his conviction cannot be sustained because there was insufficient evidence that the victim was asleep and "physically helpless." In ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court views the evidence in a light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the role of the trier of fact in determining the weight of evidence or the credibility of witnesses. *Id.* at 514. "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *Nowack, supra* at 400. Viewed most favorably to the prosecution, the victim's testimony was sufficient to permit the jury to find beyond a reasonable doubt that she was unable to communicate an unwillingness to act, and thus was physically helpless at the time of the charged offenses.[1]

[1] Other jurisdictions specifically recognize that different levels of sensory perception may exist, rendering a victim physically helpless. For example, in *Woodward v Commonwealth*, 12 Va App 118, 121; 402 SE2d 244 (1991), the court observed that "common experience tells us that sleep is not an all or nothing condition." Thus, "the fact that a victim has some sensory perception during an incident involving sexual intercourse, does not preclude a jury from finding that the victim was asleep, and therefore 'physically helpless,' during sexual intercourse." *State v Shields*, 328 Mont 509, 518; 122 P3d 421 (2005). See also *State v Contreras-Cruz*, 765 A2d

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Defendant next argues that the trial court erred in scoring 25 points for offense variable (OV) 11 of the sentencing guidelines. OV 11 considers the number of sexual penetrations that occurred during an offense. Twenty-five points are to be scored for one criminal sexual penetration. MCL 777.41(1)(b). The trial court is instructed to "[s]core all sexual penetrations of the victim by the offender arising out of the sentencing offense," but points are not to be assessed "for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense." MCL 777.41(2)(a) and (c). Defendant argues that because each penetration formed the basis for a separate conviction for which he was sentenced, no points should have been scored under OV 11. We disagree. Case law clearly holds that where the defendant engages in multiple penetrations during a single episode, the court is to score each penetration other than the one forming the basis of the sentencing offense. *People v Cox*, 268 Mich App 440, 455-456; 709 NW2d 152 (2005); *People v McLaughlin*, 258 Mich App 635, 676; 672 NW2d 860 (2003); *People v Mutchie*, 251 Mich App 273, 280-281; 650 NW2d 733 (2002), aff'd 468 Mich 50 (2003). Thus, the trial court did not err in scoring 25 points for OV 11.

Affirmed and remanded for correction of the judgment of sentence to reflect that defendant was convicted under MCL 750.520d(1)(c). We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Peter D. O'Connell
/s/ Alton T. Davis

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849, 857 (RI, 2001) (victim was physically helpless where she was "so far within the realm of sleep that she was unable to communicate" her lack of consent). Accord *State v Tapia*, 751 NW2d 405, 406-407 (Iowa App, 2008).