

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES DARNELL BYERS,

Defendant-Appellant.

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UNPUBLISHED

November 21, 2006

No. 262330

Washtenaw Circuit Court

LC No. 04-001456-FH

Before: Murphy, P.J., and Meter and Davis, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(b)(ii) (sexual contact with related victim at least 13 but less than 16 years of age). He was sentenced as a second habitual offender, MCL 769.10, to 4 to 22 ½ years' imprisonment. Defendant appeals as of right. We affirm.

The sole argument presented on appeal concerns an alleged error by the trial court when the court informed the jury, in response to a question, that it did not matter whether defendant specifically intended the inappropriate touching to be directed at the victim, his minor daughter, as opposed to defendant's adult girlfriend. During closing arguments, defense counsel had argued, in part, that defendant believed that he had been touching his girlfriend while in his girlfriend's bed with the victim in the bedroom of the girlfriend's apartment. Defendant maintains that the trial court's response to the jurors' question denied him due process and the right to a jury trial and effectively directed a verdict against him.

We find it unnecessary to determine whether a defense, predicated on mistake of fact relative to identity, can be raised in a prosecution for CSC II. Assuming that such a defense can be maintained, the evidence did not support the defense and the jury's question was thus irrelevant for purposes of deliberation. In essence, the trial court's response to the question posed by the jury disallowed consideration of a mistake-of-fact defense, which was the correct result under the circumstances.

The only evidence presented by defendant at trial was the testimony of his girlfriend, and she contended that she had slept with defendant in her bed on the night in question and that the victim was never in the bedroom. The main focus of defendant's closing argument regarded the credibility of the prosecution's witnesses in light of the girlfriend's testimony that contradicted those witnesses. But defendant also proposed the contradictory alternative argument that if he

did touch his daughter in the bedroom it was merely because he mistakenly thought she was his girlfriend. Defendant's alternative argument relied on testimony presented during the prosecutor's case in chief. Although this testimony indicated that defendant was intoxicated and had been laying in his girlfriend's bed when the sexual assault against the victim occurred, there was no testimony that defendant was touching the victim in a mistaken belief that she was his girlfriend, much less any testimony supporting the conclusion that defendant honestly and reasonably believed that he was touching his girlfriend or that he exercised due care. The victim's testimony showed that she and her brothers, along with defendant, had been watching television on the night of the incident in the bedroom. The victim's brothers eventually left the room, but the victim remained in the bedroom after defendant encouraged her to lie in bed with him. The victim fell asleep; however, she later arose to use the bathroom, and when she returned to the bed defendant began to fondle her. Defendant then stopped, rose from the bed and went to a dresser, and then returned to the bed and again began to fondle the victim. The victim testified that defendant's girlfriend was not even in the home at the time of the incident because of a fight with defendant. With respect to a mistake-of-fact defense, there was no testimony that defendant spoke his girlfriend's name during the fondling or otherwise referred to the victim as his girlfriend. Further, there was no testimony that defendant acknowledged a mistake when the victim tried to evade the fondling. Additionally, defendant did not testify in support of a mistake-of-fact defense. We also note that no instruction was given relative to such a defense.

The defense of mistake of fact requires, in part, that the mistake relate to facts and not the law and that the mistake be honest and reasonable. 21 Am Jur 2d, Criminal Law, § 152, pp 232-233. "A mere belief, unsupported by a showing of due care and bona fide, reasonable effort to ascertain the facts, is insufficient to constitute a mistake of fact defense." *People v Quinn*, 440 Mich 178, 196; 487 NW2d 194 (1992) (citation omitted). Here, there was a lack of evidence supporting the conclusion that defendant actually acted in a mistaken manner, that any mistake was honest and reasonable, or that defendant exercised due care relative to the situation. A trial court is only required to give an instruction on a theory or defense when it is supported by the evidence. *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). Because a mistake-of-fact defense was not available to defendant on the basis of the proofs presented, there could be no error in the trial court's response to the jury's question that effectively precluded such a defense.

Affirmed.

/s/ William B. Murphy  
/s/ Patrick M. Meter  
/s/ Alton T. Davis