STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 16, 2014
v	No. 318053 Wayne Circuit Court
ANTHONY JEROME STEELE, Defendant-Appellant.	LC No. 13-003176-FC

Before: O'CONNELL, P.J., and BORRELLO and GLEICHER, JJ.

PER CURIAM.

Defendant was convicted by a jury of three counts of first-degree criminal sexual conduct (CSC-1), MCL 750.520b, and one count of fourth-degree CSC (CSC-4), MCL 750.520e, in connection with his sexual assault of the mentally handicapped daughter of his longtime live-in girlfriend. The prosecutor concedes that the trial court erred in giving identical jury instructions for the offense of CSC-1 and the lesser included offense of third-degree CSC (CSC-3). As argued by the prosecutor, the proper remedy for this error is to vacate defendant's convictions for CSC-1 and remand either for entry of convictions on the lesser offense or to allow the prosecutor to refile and retry the CSC-1 charges. However, defendant's challenge to the sufficiency of the evidence regarding the victim's handicap is without merit and he therefore is not entitled to reversal of his convictions.[1]

I. BACKGROUND

Defendant was convicted of sexually assaulting his girlfriend's daughter, a 28-year-old mentally disabled woman. Defendant had been in a relationship with the victim's mother for approximately 18 years and the victim viewed defendant as a father figure. The victim was unable to care for herself and therefore lived with her mother and defendant.

[1] We need not reach defendant's challenges to his CSC-1 sentences as we have vacated those convictions. On remand, the trial court will be required to resentence defendant based on his CSC-3 convictions.

In March 2013, the victim's mother was hospitalized for an extended period, leaving defendant and the victim alone in the family home. The victim testified that on March 17, defendant gave her beer, a beverage she had never before consumed. Defendant then watched "naked movies" on the computer, the "kind that have the man and the woman getting on top of each other." The victim asserted that defendant told her, "I want to show you how it's done," meaning "[h]ow the lady and the man do it to each other" "[w]hen they having sex with each other."

On defendant's instructions, the victim removed her clothes. The victim complied, she explained, because she was scared that defendant might "beat" her. Defendant told her "[t]o do the damn thing [i.e. sex] and don't tell nobody." Defendant then engaged in penile-vaginal penetration and two acts of cunnilingus with the victim. The victim contended that defendant also fondled her breasts. After defendant left the victim, she immediately telephoned her mother to report that defendant had "hurt'ed" her "[i]n a bad way." The victim then contacted her aunts "[b]ecause I supposed to let them know if something go wrong." The victim's aunts rushed to the scene and summoned the police and an ambulance.

Defendant admitted to engaging in sexual activity with the victim on March 17, but claimed that the activity was consensual and was the victim's idea. Defendant speculated that the victim contacted her aunts and told them what happened because she was upset by the experience.

II. JURY INSTRUCTIONS

The prosecutor charged defendant with three counts of CSC-1 (sexual penetration of a mentally disabled victim). The jury was also permitted to consider as alternative lesser charges three counts of CSC-3. Defendant argues that the trial court erred by failing to instruct the jury on two essential elements of the CSC-1 charges: that he was in a position of authority over the victim and that he used his authority to coerce the victim to submit to the sexual acts. See MCL 750.520b(1)(h)(*ii*). Our review of the trial transcript reveals that the lower court gave identical instructions in regard to CSC-1 and CSC-3 and omitted the elements cited by defendant. The prosecutor concedes this error on appeal, and further concedes that the error was not harmless as defendant challenged the element of coercion at trial.[2]

This error does not warrant reversal, however. The jury found defendant guilty of the greater offense of CSC-1 based on the elements read in the incomplete instructions. The elements as presented to the jury coincide with the elements of CSC-3. Pursuant to MCL 750.520(d)(1)(c), a defendant is guilty of CSC-3 if he engages in sexual penetration and "knows

[2] The prosecutor hypothesizes that the court reporter may have omitted elements actually read to the jury when creating the transcript from her trial notes. The record does not support this hypothesis. Rather, the instructions flow naturally, suggesting no omission. It is more likely that the trial court forgot to return to the elements of defendant's authoritative position and the use of force or coercion after reading the detailed definitions of mental incapacity, disability and retardation to the jury.

or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless." Therefore, the jury actually found that the evidence supported the elements of CSC-3. We vacate defendant's CSC-1 convictions and remand for entry of a judgment of conviction of three counts of CSC-3. In the alternative, however, the prosecutor may choose to refile CSC-1 charges against defendant and pursue trial anew.

III. SUFFICIENCY OF THE EVIDENCE

To support a conviction for a charge of either CSC-3 or CSC-4, the prosecutor was required to prove that defendant "knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless." See MCL 750.520d(1)(c); MCL 750.520e(1)(c). Defendant contends that the prosecution presented insufficient evidence that the victim was mentally incapable, mentally disabled, mentally incapacitated, or physically helpless. We review de novo challenges to the sufficiency of the evidence, viewing the evidence in a light most favorable to the prosecution to determine whether a rational jury could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012).

MCL 750.520a defines the terms relevant to the charged offenses as follows:

> (i) "Mentally disabled" means a person has a mental illness, is intellectually disabled, or has a developmental disability.
>
> (j) "Mentally incapable" means a person suffers from a mental disease or defect that renders that person temporarily or permanently incapable of appraising the nature of his or her conduct.
>
> (k) "Mentally incapacitated" means that a person is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or other substance administered to that person without his or her consent, or due to any other act committed upon that person without his or her consent.

In addition, the statute defines "developmental disability," "intellectual disability," and, "mental illness," all of which are a part of the definition of "mentally disabled," as follows:

> (b) "Developmental disability" means an impairment of general intellectual functioning or adaptive behavior that meets all of the following criteria:
>
> (*i*) It originated before the person became 18 years of age.
>
> (*ii*) It has continued since its origination or can be expected to continue indefinitely.
>
> (*iii*) It constitutes a substantial burden to the impaired person's ability to perform in society.

(*iv*) It is attributable to 1 or more of the following:

(A) Intellectual disability, cerebral palsy, epilepsy or autism.

(B) Any other condition of a person that produces a similar impairment or requires treatment and services similar to those required for a person described in this subdivision.

* * *

(d) "Intellectual disability" means that term as defined in . . . MCL 330.1100b.[3]

* * *

(h) "Mental illness" means a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life. [MCL 750.520a.]

The prosecutor established the victim's mental disability through her own testimony and that of her aunt. Reading the victim's testimony, it is clear that she does not function as a 28-year-old woman. The victim's language choice, inability to understand questions, and childlike

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[3] MCL 330.1100b(12) provides:

"Intellectual disability" means a condition manifesting before the age of 18 years that is characterized by significantly subaverage intellectual functioning and related limitations in 2 or more adaptive skills and that is diagnosed based on the following assumptions:

(a) Valid assessment considers cultural and linguistic diversity, as well as differences in communication and behavioral factors.

(b) The existence of limitation in adaptive skills occurs within the context of community environments typical of the individual's age peers and is indexed to the individual's particular needs for support.

(c) Specific adaptive skill limitations often coexist with strengths in other adaptive skills or other personal capabilities.

(d) With appropriate supports over a sustained period, the life functioning of the individual with an intellectual disability will generally improve.

"Adaptive skills" is defined to include communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. MCL 330.1100a(3)(a)-(j).

responses reveal her limited intellectual capacity. The victim further asserted that she has a "disability" and needs assistance with reading and counting. Moreover, the victim explained that she has always lived with responsible family members who gave her chores and set her rules. Family members also controlled the victim's income garnered through Social Security Disability payments.

The victim's aunt testified that the victim developed slowly throughout her young life, and never progressed to independent living. The victim's aunt described how the victim began school in a special education classroom at a general education school, but "she couldn't handle that." According to the witness, the school psychologist identified the victim as having "mental deficits." The victim later transferred to a school for moderately to severely cognitively impaired students from which she did not graduate until the age of 26. The witness further claimed that the victim functioned at the level of an eight or nine-year-old child. She reached this assessment because the victim looked to her for guidance like a child and required additional explanation to understand conversations and instructions: "I have to re-explain things to her, I break it down so that she understands. I give her an opportunity to process and make sure that she's understanding what we're talking about."

The nurse who conducted the victim's sexual assault examination also testified regarding the victim's limitations. The witness noted that the victim's aunt remained because the victim's "special needs" rendered her unable to consent to the examination.

Viewed in the light most favorable to the prosecution, the evidence was sufficient to enable the jury to find beyond a reasonable doubt that the victim was mentally disabled as defined in MCL 750.520a(i) because she had a developmental disability as defined in MCL 750.520a(b). The evidence established that the victim had suffered from a development disability since infancy and had not progressed beyond the level of an eight or nine-year-old child. The victim's disability impaired her ability to perform in society based on evidence that she required a fulltime caregiver to serve a parental role. And the jury could reasonably infer from the evidence that the victim's condition was caused by an intellectual disability or some other type of neurological condition. Accordingly, the evidence was sufficient to prove that the victim had a mental disability that rendered her "mentally incapable" or "mentally disabled," satisfying the elements of MCL 750.520c and MCL 750.520e.

We affirm in part, vacate in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher