

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

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
December 11, 2012

v

JEREMY LUCAS OWENS,  
  
Defendant-Appellant.

No. 306578  
Wayne Circuit Court  
LC No. 10-009455-FC

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Before: SAAD, P.J., and K. F. KELLY and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions for two counts of second-degree criminal sexual conduct (CSC) involving a person under the age of 13, MCL 750.520c(1)(a). Defendant was sentenced to 3 to 15 years' imprisonment for each of the two CSC convictions. We affirm.

**I. BASIC FACTS**

This case arises out of allegations of sexual assault that occurred in October 2009. The victim was 11 years old at the time and defendant was 17 years old. The victim's mother owned horses that she kept at a horse farm where defendant worked doing manual labor. The victim met defendant at the farm when he accompanied his mother there. The victim testified that defendant was a "good friend" to him and they would play games at the farm, including Truth or Dare, which they played in a trailer located on the property. The victim testified as to two separate instances of sexual abuse. In the first, defendant dared the victim to perform fellatio on him. The victim testified that after he performed fellatio on defendant, defendant inserted his penis into the victim's anus.

After that day, the victim's mother noticed a change in the victim's attitude towards the farm. The victim returned to the farm, but he had to be forced or bribed to go. However, the victim testified that he went back into the trailer with defendant a second time because he "was still worried about losing a friend." The victim testified that the second encounter was almost the same as the first, but defendant did not put his penis into the victim's mouth during the second encounter. At the preliminary examination, the victim had previously testified that defendant put his penis into the victim's mouth on this second occasion as well. When the victim was cross-examined about this inconsistency in his testimony, he stated, "I was kind of

confused[,] and I was nervous.” When asked if he was sure how many times defendant put his penis in the victim’s mouth, the victim responded that he was “not too sure.”

The victim testified that after the first two encounters, defendant asked him to go to a corn maze with him, and the victim agreed. At the preliminary examination, the victim testified that his mother would not take him, so he asked defendant for a ride. It was dark outside in the maze and defendant told the victim to “pull [his] pants down so [his] butt [was] showing.” The victim responded, “[N]o, I’m done. I’m done with this,” and he left the corn maze and called his mother, who picked him up. The victim’s mother testified that she thought the victim had been left alone at the maze and drove to pick him up. The victim’s mother noted that when defendant returned to the farm that evening, he was “very agitated” and tried to talk to the victim, but she would not allow defendant to speak to her son. The victim’s mother had always been concerned that defendant showed so much interest in a young child. After the corn maze incident, the victim’s mother told the victim she did not want him to “hang out” with defendant any more, and the victim did not protest.

It was only several months later when the victim was playing an online computer game that he told anyone about the abuse. The online participant encouraged the victim to tell someone right away. The victim told his mother, who contacted the victim’s father and the police. A physical examination revealed no evidence of tears or fissures and no anal warts or other injury.

Defendant testified on his own behalf at trial. He denied having sexual contact with the victim. Defendant testified that sometimes he spoke to the victim at the farm, but at no time was he alone inside the trailer with the victim.

Before rendering its verdict, the trial court reviewed the testimony as well as the charges against defendant, which were as follows:

**COUNT 1: CRIMINAL SEXUAL CONDUCT – FIRST DEGREE (PERSON UNDER 13)** did engage in sexual penetration to-wit: penis in anal opening with [the victim], said person being under 13 years of age; contrary to MCL 750.520b(1)(a).

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**OR**

**COUNT 2: CRIMINAL SEXUAL CONDUCT – SECOND DEGREE (PERSON UNDER 13)** did engage in sexual contact with another person, to-wit: [the victim], said person being under 13 years of age; contrary to MCL 750.520c(1)(a).

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**COUNT 3: CRIMINAL SEXUAL CONDUCT – FIRST DEGREE (PERSON UNDER 13)** did engage in sexual penetration to-wit: penis in anal opening with

[the victim], said person being under 13 years of age; contrary to MCL 750.520b(1)(a).

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**OR**

**COUNT 4: CRIMINAL SEXUAL CONDUCT – SECOND DEGREE (PERSON UNDER 13)** did engage in sexual contact with another person, to-wit: [the victim], said person being under 13 years of age; contrary to MCL 750.520c(1)(a).

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**COUNT 5: CRIMINAL SEXUAL CONDUCT – FIRST DEGREE (PERSON UNDER 13)** did engage in sexual penetration to-wit: fellatio with [the victim], said person being under 13 years of age; contrary to MCL 750.520b(1)(a).

The trial court found defendant guilty of counts two and four, but not guilty as to counts one, three and five. Defendant now appeals as of right.

## II. INCONSISTENT VERDICT

Defendant argues that the trial court’s verdicts were legally and factually inconsistent, constituting an impermissible “waiver break.” Defendant reasons that because the victim “is either credible or he is not” and the trial court found the victim incredible regarding the first-degree CSC charges, then the court’s rendering of guilty verdicts regarding the charges of second-degree CSC is inconsistent. We disagree.

This Court reviews for clear error the trial court’s findings of fact following a bench trial. *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006). “A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made.” *Id.* A jury may render an inconsistent verdict; however, a trial court, acting as the fact finder in a bench trial, is not permitted to render an inconsistent verdict because the court “is not afforded the same lenience.” *People v Ellis*, 468 Mich 25, 26; 658 NW2d 142 (2003), quoting *People v Walker*, 461 Mich 908; 603 NW2d 784 (1999). A “waiver break” occurs where a trial court, sitting as the trier of fact in a bench trial, makes findings of fact that are inconsistent with the verdict it renders. *Ellis*, 468 Mich at 26-28.

We conclude that no “waiver break” occurred in this case because the trial court’s verdicts were perfectly consistent with its factual findings. Defendant was charged with, but acquitted of, three counts of first-degree CSC for (1) penetrating the anal opening of the victim, who was under age 13, with defendant’s penis, (2) again penetrating the anal opening of the victim, who was under age 13, with defendant’s penis, and (3) engaging in fellatio with the victim, who was under age 13. In reaching this decision, the court noted that “with respect to the fellatio . . . there seems to be some confusion as to whether or not this act happened once or [twice] . . .” because some of the victim’s testimony at trial conflicted with his testimony given

at the preliminary examination. However, the court noted that it “believes it probably did happen at one point, but the [c]ourt can’t be certain.” On this basis, the court found there was enough reasonable doubt not to convict defendant of first-degree CSC on the count regarding fellatio. The court acquitted defendant of the two counts of first-degree CSC regarding the anal penetrations, and, in the alternative, found defendant guilty of second-degree CSC regarding the two acts of defendant touching the victim’s buttocks with his penis.

In convicting defendant of two counts of second-degree CSC for twice engaging in sexual contact with the victim, the trial court concluded that defendant “intentionally touched the victim[’s] buttocks with [defendant’s] penis,” that it was done or reasonably construed as being done for sexual purposes, and that defendant was 17 and the victim was 11 at the time of the incident. In reaching this decision, the court noted that the evidence in the case conflicted and that the case came down to credibility. The court also noted that while the rectal examination revealed “no evidence of damage or tears,” it was performed “about six months after” the incident took place. The court stated, “There’s no doubt in this Court’s mind that a sexual assault occurred.” Further, the court found “the testimony of [the victim] to be believable.” In order to find defendant credible, the court explained, it would have to find that the victim’s mother was lying, and “[t]he [c]ourt [could not] make that conclusion.” The court explicitly noted that it found the victim’s mother to be credible, which “makes the defendant’s testimony in part not credible or believable.”

The case consisted entirely of conflicting evidence. This Court defers to the trial court’s witness credibility determinations because the trial court has a superior ability to evaluate witness credibility. MCR 2.613(C); *People v Geno*, 261 Mich App 624, 629; 683 NW2d 687 (2004). Further, juries, and therefore judges sitting as a fact finder, have “the right to disregard all or part of the testimony of a witness.” *People v Goodchild*, 68 Mich App 226, 235; 242 NW2d 465 (1976). Accordingly, defendant’s argument, that if the court finds the victim incredible regarding certain portions of his testimony, the court must also have found him incredible regarding all other portions of his testimony, fails. The court’s language is clear that the court believed the victim; however, certain inconsistencies between the victim’s testimony at trial and his testimony at the preliminary examination caused the court to find reasonable doubt regarding the first-degree CSC charges. Thus, the trial court’s verdicts are not inconsistent with its factual findings and do not constitute a waiver break because it is logical for the court, in seemingly believing some portions of defendant’s testimony and disbelieving other portions and taking into account the victim’s testimonial inconsistencies, to decide that there was reasonable doubt regarding penetration, but that there was not reasonable doubt regarding the sexual contact charges.

Even if the verdicts were inconsistent with the court’s findings of fact, such an error cannot be corrected on appeal. In *Ellis*, the trial court convicted the defendant of carjacking and felonious assault, which included a factual finding by the trial court that the defendant discharged a gun to either injure the victims or place them in fear. In spite of such a finding, the trial court acquitted the defendant of felony firearm and felon in possession of a firearm. Our Supreme Court concluded that the acquittals and the trial court’s factual findings are “plainly inconsistent” and “cannot be rationally reconciled.” *Ellis*, 468 Mich at 27. It reiterated that the judicial practice of “waiver breaks” is “improper.” *Id.*

A decision to drop or plea bargain charges is one that lies with one or both of the parties, not the court. Regardless of any benefit that may be realized by the trial court because of a party's strategic decision, such as the expedited docket management resulting from a defendant waiving his right to a jury, it is not within the power of the judicial branch to dismiss charges or acquit a defendant on charges that are supported by the case presented by the prosecutor. [*Id.* at 27-28.]

In seeking to put a stop to waiver breaks, our Supreme Court noted that such practice “violates the law and a trial judge’s ethical obligations,” constituting grounds for referral to the Judicial Tenure Commission. *Id.* at 26, 28. The Court concluded that the trial court’s “decision of not guilty, whether proper or not, is constitutionally protected by double jeopardy principles,” and “a trial judge that rewards a defendant for waiving a jury trial by ‘finding’ him not guilty of a charge for which an acquittal is inconsistent with the court’s factual findings cannot be corrected on appeal.” *Id.* at 26, 28.

### III. SUFFICIENCY OF THE EVIDENCE

Defendant next argues that because this case is a “swearing contest” and the court found the victim was not credible, there was insufficient evidence to support defendant’s conviction for second-degree CSC. We disagree.

We review de novo sufficiency of the evidence issues. *People v Kissner*, 292 Mich App 526, 533; 808 NW2d 522 (2011). We must ask “whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt,” and in doing so, view the evidence “in the light most favorable to the prosecution.” *People v Hardiman*, 466 Mich 417, 421, 428; 646 NW2d 158 (2002). “Circumstantial evidence and reasonable inferences arising therefrom may be used to prove the elements of a crime” and all essential elements of the offense must be proven beyond a reasonable doubt. *People v Brantley*, 296 Mich App 546; \_\_\_NW2d\_\_\_ (2012), slip op at 1. Questions of the weight of evidence and credibility of witnesses are for the finder of fact; we resolve any conflicting evidence in the prosecutor’s favor. *Id.*; *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009).

Sufficient evidence existed for a rational trier of fact to conclude beyond a reasonable doubt that defendant was guilty of second-degree CSC. The prosecution has the burden to prove beyond a reasonable doubt that defendant “‘engag[ed] in sexual contact with another person . . . [and] . . . [t]he other person is under 13 years of age.’” *People v Piper*, 223 Mich 642, at 645; 567 NW2d 483 (1997), quoting MCL 750.520c(1)(a). “Sexual contact” is defined as, “the intentional touching of the victim’s or actor’s intimate parts . . . if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification.” MCL 750.520a(q).

As discussed above, the evidence presented at trial shows that the victim was 11 and defendant was 17 at the time of the assaults. The victim testified that defendant sexually assaulted him while they were inside the trailer playing Truth or Dare. The trial court concluded defendant “intentionally touched the victim[’s] buttocks with [defendant’s] penis,” and that it was done or reasonably construed as being done for sexual purposes. The court noted that because the testimony presented was in conflict, the case came down to witness credibility. The

court found “the testimony of [the victim] to be believable.” The court explicitly noted that it found the victim’s mother to be credible, which “makes the defendant’s testimony in part not credible or believable.” The trial court did not doubt that a sexual assault occurred. Therefore, keeping in mind our deference to the trial court’s credibility determinations and viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to support defendant’s convictions.

Affirmed.

/s/ Henry William Saad

/s/ Kirsten Frank Kelly

/s/ Michael J. Kelly