

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANNY LEE SCHAEFFER,

Defendant-Appellant.

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UNPUBLISHED

June 28, 1996

No. 172910

LC No. 93-007048

Before: Corrigan, P.J., and MacKenzie and P.J. Clulo\*, JJ.

PER CURIAM.

Following a waiver trial defendant was convicted of two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(c), MSA 28.788(4)(1)(c), and was sentenced to concurrent terms of five to fifteen years' imprisonment. He appeals as of right. We affirm.

Defendant first claims that there was insufficient evidence that the victim was "mentally incapable," as that term is defined by the statute, to support a finding of guilt. Review of a challenge to the sufficiency of the evidence in a bench trial requires this Court to view the evidence in a light most favorable to the prosecution and determine whether the evidence was sufficient to support a conclusion by the trier of fact that the essential elements of the crime were proven beyond a reasonable doubt. *People v Vaughn*, 186 Mich App 376, 379; 465 NW2d 365 (1990); *People v Wolfe*, 440 Mich 508, 513-516; 489 NW2d 748 (1992).

MCL 750.520d(i); MSA 28.788(4)(1) provides:

A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exists:

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\* Circuit judge, sitting on the Court of Appeals by assignment.

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(b) Force or coercion is used to accomplish the sexual penetration. Force or coercion includes but is not limited to any of the circumstances in section 520b(1)(f)(i) to (v).

(c) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

A “mentally incapable” person is defined by statute as “a person suffer[ing] from a mental disease or defect which renders that person temporarily or permanently incapable of appraising the nature of his or her conduct.” MCL 750.520a(f); MSA 28.788(1)(f).

In this case, the victim testified that she did not consent to the sex act, that she forcibly resisted defendant’s attack, and that she understood what rape was, including the nonconsensual nature of the act. Hence, there was insufficient evidence to support the trial court’s finding that the victim was “mentally incapable”, as statutorily defined.

However, the trial court also based its verdict on the finding that the sexual assault was accomplished through the use of force on the victim. Taken in a light most favorable to the prosecution, the evidence of the struggle between defendant and the victim was sufficient to support this finding. The evidence showed that defendant grabbed the victim by the legs, forcibly pulled off her pants, forced sexual penetration, and threatened her life, while she struggled and screamed for him to stop. Since there was sufficient evidence to support the conviction on this independent basis, reversal of defendant’s conviction is not warranted. MCL 750.520b(1)(f)(i); MSA 28.788(2)(1)(f)(i).

With respect to defendant’s assertion that he cannot be found guilty on this alternative basis because the information did not charge him with forcible sexual assault, he has provided no authority in support, so it is effectively abandoned. *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995). In any event, we disagree with defendant’s claim. This Court will not reverse a conviction on the basis of a defect in the information where the defendant has failed to raise the issue before the trial court unless manifest injustice has been shown. *People v Covington*, 132 Mich App 79, 86; 346 NW2d 903 (1984). A defendant is not prejudiced by a defect where the information was sufficient to inform the defendant and the court of the nature of the charge. *Covington, supra* at 86. Here, the information was sufficient to inform defendant that he was charged with sexual assault. Therefore, no manifest injustice is apparent from the record.

Next, defendant asserts error on the basis of the trial court’s questioning of him. A trial judge has wide discretion and power in matters of trial conduct. *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988). In a bench trial, the judge has even more discretion to question witnesses. *In re Forfeiture of \$1,159,420*, 194 Mich App 134, 153; 486 NW2d 326 (1992). This power is not

unlimited and a trial court abuses its discretion where its conduct pierces the veil of judicial impartiality. *Collier, supra* at 698. In a bench trial, the issue of bias or prejudice is only grounds for reversal where the litigant can show that the trial judge's views controlled the decision-making process. *In re Forfeiture of \$1,159,420, supra* at 153. In this case, the court's questioning focused only on clarifying defendant's testimony, and showed no indication of bias. The questioning was therefore proper and provides no basis for reversal. *Id.*

Finally, defendant's assertion of error in his sentencing has been rendered moot by the trial court's subsequent resentencing pursuant to this Court's order remanding the case for that purpose.

Affirmed.

/s/ Maura D. Corrigan  
/s/ Barbara B. MacKenzie  
/s/ Paul J. Clulo