

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JACK C. ROBINSON,

Defendant-Appellant.

UNPUBLISHED

December 30, 1996

No. 187194

LC No. 94-133200

Before: McDonald, P.J., and Bandstra and C.L. Bosman, * JJ.

PER CURIAM.

Defendant was initially charged with two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). Following a bench trial, defendant was convicted of assault with intent to commit CSC II, MCL 750.520g(2); MSA 28.788(7)(2). He was sentenced to two years' probation. Defendant now appeals as of right. We reverse.

Defendant argues that the trial court's verdicts of not guilty of CSC II but guilty of assault with intent to commit CSC II were inconsistent. We agree. Criminal verdicts in a jury trial need not be consistent because juries possess the capacity for leniency and are not held to any rules of logic. *People v Burgess*, 419 Mich 305, 310; 353 NW2d 444 (1984). However, "[t]hese considerations change when a case is tried by a judge sitting without a jury." *Id.* In addition, an appellate court does not normally enjoy the freedom to be inconsistent or to compromise. *Id.* at 310-311.

MCL 750.520c; MSA 28.788(3) provides in relevant part:

(1) A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and if any of the following circumstances exists:

(a) That other person is under 13 years of age.

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

“Sexual contact” includes the intentional touching of the victim’s intimate parts if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification. MCL 750.520a(k); MSA 28.788(1)(k).

The court acquitted defendant of CSC II, but found him guilty of assault with intent to commit CSC II. MCL 750.520g(2); MSA 28.788(7)(2). The elements of assault with intent to commit CSC II require an assault, involving the use of force or coercion, with the specific intent to touch the victim’s genital area, groin, inner thigh, buttock, breast, or clothing covering those areas, for the purpose of sexual arousal or sexual gratification. *People v Evans*, 173 Mich App 631, 634; 434 NW2d 452 (1988).

We conclude that the trial court’s verdict of guilty with regard to the assault conviction was inconsistent with its finding of fact that defendant’s touching of the victim was not done for a sexual purpose, thereby requiring the dismissal of the CSC II charges. The court stated that it believed the testimony of the victim that defendant touched her breasts and genitals while purportedly washing her. Thus, the court rejected defendant’s testimony that he did not touch or bathe the victim. The court stated, for purposes of the CSC II charges, that it could not find beyond a reasonable doubt that defendant had a sexual purpose in touching the victim. The court then articulated the elements of assault with intent to commit CSC II by reading from CJI2d 20.18 and found that defendant assaulted the victim “for the purpose of sexual gratification and/or arousal.” This finding cannot be harmonized with the court’s initial finding that defendant touched the victim, but not with a sexual purpose.

Defendant’s assault conviction is reversed because it was inconsistent with the court’s initial finding of fact that the prosecution did not prove beyond a reasonable doubt that defendant acted with an illegal sexual purpose. We leave the question of double jeopardy for resolution in the trial court if there is further prosecution. *People v Fairbanks*, 165 Mich App 551, 557, n 2; 419 NW2d 13 (1987).

We reverse.

/s/ Gary R. McDonald
/s/ Richard A. Bandstra
/s/ Calvin L. Bosman