

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED

v

No. 168558
LC No. 93-001118

SOLOMON F. GOLIDAY,
Defendant-Appellant.

WAHLS, J. (dissenting)

I respectfully dissent. I would hold that the trial court erred by refusing defendant's request for an instruction as to third-degree criminal sexual conduct (CSC).

I believe that the majority has misinterpreted the elements of third-degree CSC. The majority opinion states that third-degree CSC requires the actor to cause personal injury and to use force or coercion to accomplish sexual penetration. However, where those elements are present, the actor has committed first-degree CSC. MCL 750.520b(1)(f); MSA 28.788(2)(1)(f); *People v Petrella*, 424 Mich 221, 239; 380 NW2d 11 (1985). Indeed, the element of personal injury is precisely the aggravating element which elevates third-degree to first-degree CSC. *Petrella, supra*, p 239; *People v Armstrong*, 100 Mich App 423, 427; 298 NW2d 752 (1980). In addition, a person who has committed a sexual penetration while armed with a weapon has necessarily committed third-degree CSC by using force or coercion. See MCL 750.520b(1)(f)(ii); MSA 28.788(2)(1)(f)(ii). Accordingly, I would hold that third-degree CSC is a necessarily included lesser offense of first-degree CSC under these facts.

I would also hold that the trial court's refusal to give the third-degree CSC instruction requires reversal. Unlike the defendant in *People v Mosko*, 441 Mich 496, 501, 506; 495 NW2d 534 (1992), defendant here disputed the existence of the relevant aggravating factor, possession of a weapon. At trial, defendant testified that he was not armed during the intercourse. Importantly, a defendant does not

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

have possession of a weapon for purposes of first-degree CSC where the weapon is actually in the hands of another party. *People v Benard*, 138 Mich App 408, 411; 360 NW2d 204 (1984).

It is true that if defendant's *only* defense was consent, then the trial court's failure to give an instruction on third-degree CSC would have been harmless. See *Mosko, supra*, p 506. In that case, a jury that believed the defense of consent would have had to acquit defendant of third-degree CSC as well as first-degree CSC. However, a defendant in a criminal matter may advance inconsistent claims and defenses. *People v Cross*, 187 Mich App 204, 205-206; 466 NW2d 368 (1991). Here, defendant's testimony presented a defense separate from consent: the lack of a weapon. If a jury disbelieved defendant's defense of consent, but believed defendant's testimony that he was not armed, then it could have found him not guilty of first-degree CSC, but guilty of third-degree CSC. This was a reasonable possibility given the fact that the jury acquitted defendant of the additional charge of armed robbery.

It is the prosecution's obligation to prove every element of the crime beyond a reasonable doubt. *People v Gaydosh*, 203 Mich App 235, 238; 512 NW2d 65 (1994). An instruction must not exclude from jury consideration material issues, defenses, or theories if there is evidence to support them. *Id.* Here, because there was evidence before the jury which would have supported an acquittal of first-degree CSC, but a conviction of third-degree CSC, I would hold that the trial court's error could have had an effect on the verdict, and accordingly, was not harmless. *People v Considine*, 196 Mich App 160, 162-163; 492 NW2d 465 (1992).

I would reverse defendant's convictions and remand for a new trial.

/s/ Myron H. Wahls