

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ANTHONY BRANCH, JR.,

Defendant-Appellant.

UNPUBLISHED

February 8, 2007

No. 262899

Wayne Circuit Court

LC No. 05-000528-01

Before: Sawyer, P.J., and Fitzgerald and Donofrio, JJ.

PER CURIAM.

Defendant was charged with two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a) (engag[ing] in sexual penetration with another person and . . . [t]hat other person is at least 13 years of age and under 16 years of age). Following a bench trial, defendant was convicted on one count of third-degree CSC and acquitted on the other count. Defendant was sentenced as an habitual offender, second offense, MCL 769.12, to 4 to 15 years' imprisonment for his third-degree CSC conviction. We affirm.

Defendant argues that the trial court rendered an inconsistent verdict, and he requests that this Court vacate his conviction and sentence. Defendant asserts that, if the trial court had a reasonable doubt as to either count of CSC, it had to acquit defendant on both counts. We disagree.

In actions tried without a jury, this Court reviews a trial court's factual findings for clear error and its conclusions of law de novo. MCR 2.613(C); *People v Connor*, 209 Mich App 419, 423; 531 NW2d 734 (1995).

Verdicts and decisions by trial courts and appellate courts must be logically consistent. *People v Burgess*, 419 Mich 305, 310-311; 353 NW2d 444 (1984). A trial court sitting without a jury must make specific findings of fact and state conclusions of law, *People v Shields*, 200 Mich App 554, 558; 504 NW2d 711 (1993), and "may not enter an inconsistent verdict." *People v Ellis*, 468 Mich 25, 26; 658 NW2d 142 (2003), quoting *People v Walker*, 461 Mich 908; 603 NW2d 784 (1999). If the verdict's underlying findings of fact are inconsistent, then the verdict is inconsistent. See *People v Fairbanks*, 165 Mich App 551, 557; 419 NW2d 13 (1987).

Defendant was charged with two counts of third-degree CSC for allegedly inserting his finger and later his penis into the 15-year-old victim's vagina. The victim testified that

defendant removed her pants and rubbed inside her vagina. Then, she testified that defendant put on a condom and *started to insert* his penis into her vagina. At trial the prosecution asked the following question:

Q. When he asked you if he was hurting you, did you want him to stop, did he have his penis in your vagina?

A. Yes.

The prosecution did not attempt to rephrase its compound question or to clarify the victim's response.

The trial court found that the victim was a credible witness, but concluded that defendant committed one sexual penetration with the victim's genitals, when defendant touched "inside" of the victim's vagina.¹ However, the trial court was not convinced that a second penetration occurred, as it was unwilling to find defendant guilty of penile penetration based on the victim's ambiguous testimony and the prosecution's failure to expand on her response to the compound question involving that penetration. In reaching its conclusion, the trial court noted:

Whether or not [sexual intercourse] actually was completed or carried out is difficult to determine from the evidence. He stopped when she asked him to. She left voluntarily without interference when he did that.

The trial court's factual findings and legal conclusions are not inconsistent in this case. The trial court concluded that the prosecution proved one count of third-degree CSC beyond a reasonable doubt. We will not reverse defendant's conviction because the verdict reached in the trial was not inconsistent based on the findings of fact and conclusions of law.

In reaching our conclusion, we note that this case is easily distinguished from *Fairbanks, supra* at 552, upon which defendant relies. In that case, the prosecution charged the defendant with two counts first-degree CSC and with felony-firearm. After a bench trial, the trial court found the defendant guilty of one count of assault with intent to commit second-degree CSC. *Id.* at 552-553. While the trial court found the victim's testimony credible, it concluded that "the felony-firearm wouldn't be supported by the evidence." *Id.* at 554.

The *Fairbanks* verdict confounded this Court, because the only way an assault could have been established in that case was if the defendant possessed a firearm, and the trial court found that he did not. *Id.* at 557. The *Fairbanks* verdict was inconsistent because this Court reasoned since the trial court found no firearm as a matter of fact, there could not be an assault with intent to commit second-degree CSC as charged. *Id.* The *Fairbanks* verdict was not logically consistent. That is not so in the instant case.

¹ The victim's mother also testified that defendant admitted to touching the victim.

We affirm.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Pat M. Donofrio