

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTONIO D. RIOS,

Defendant-Appellant.

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UNPUBLISHED

September 23, 2008

No. 271833

Wayne Circuit Court

LC No. 06-002751-01

Before: Cavanagh, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

AFTER REMAND

We remanded this case to the Wayne Circuit Court for further “findings with respect to the elements of the crimes of which defendant was convicted” and retained jurisdiction. On order of the Court,<sup>1</sup> the Wayne Circuit Court’s findings having been received, we again consider defendant’s argument on appeal that the evidence was insufficient to support his convictions of first-degree criminal sexual conduct, MCL 750.520b, and third-degree criminal sexual conduct, MCL 750.520d. After reviewing the record in light of the trial court’s clarified factual findings and conclusions of law, we conclude that sufficient evidence existed on the record to support defendant’s convictions, and affirm. However, we must once again remand this matter to the trial court with directions to actually enter an amended judgment of sentence in accordance with its February 27, 2008 “Order Amending Judgment of Sentence.” This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant contends that the evidence was insufficient to support his convictions. In reviewing a verdict reached in a bench trial, we review the trial court’s factual findings for clear error and its conclusions of law de novo. *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006).

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<sup>1</sup> An accompanying order of remand was also issued. *People v Rios*, unpublished order of the Court of Appeals, entered September 6, 2007 (Docket No. 271833).

In our original unpublished per curiam opinion in this case, our recitation of the facts was as follows:

The complainant, SH, is a 23-year-old physically and mentally impaired person with the functional capacity of a teenager who was under the care of a legal guardian. A witness testified that defendant was once at her house while SH was visiting. Defendant asked the witness if there was something wrong with SH and was told that “she has a mental disability.”

SH testified that defendant was at her family’s home visiting her brother, who had invited defendant to spend the night. When SH’s brother went to find defendant a blanket and a pillow, defendant told SH that he wanted to talk to her. When she got up to see what he wanted, he grabbed her arm, pulled her down to the floor, and placed his hands on her breasts beneath her shirt. When defendant heard SH’s brother returning, he stopped. Later that night, when SH got up to get a drink of water, defendant assaulted her again. SH testified that defendant pulled her over by a stairway, pulled down her pants, and threatened to hurt her when she protested. He touched her vagina with his finger and then inserted his penis into her anus. SH said she was unable to get away because defendant was holding her sides. Afterward, SH discovered blood and “nasty stuff” leaking from her anus. A medical examination the following night was negative for rectal bleeding and external injuries. Rectal swabs and smears were negative for sperm or seminal fluid. SH’s panties tested positive for sperm but negative for blood.

A police detective took a statement from defendant, who referred to SH as his friend’s “dumb sister” and explained that she was dumb because she was 23 and “doesn’t know how to talk.” Defendant first denied any wrongdoing but then admitted to having anal intercourse with SH. He said he was not initially forthcoming because “he had heard that he could get in trouble if he had done something to a mental person[.]”

Defendant testified that he had no idea there was anything wrong with SH, but also admitted that a friend of hers had told him that SH was retarded. He stated that he asked permission to touch SH’s breasts and she consented. Later that night, SH voluntarily performed fellatio on defendant and voluntarily engaged in anal intercourse. During that episode, defendant admitted that he was “fingering” SH.

In our previous opinion, we were unable to address defendant’s sufficiency of the evidence argument due to “deficiencies in the trial court’s findings and the inconsistencies in the judgment of sentence.” On remand, the trial court clarified its findings of fact and conclusions of law. The trial court’s clarified conclusions of law are as follows:

The trial court evaluated the testimony and implicitly found that SH was not mentally incapable or mentally incapacitated. Defendant is guilty of Criminal Sexual Conduct in the First Degree, MCL 750.520b(1)(f). The complainant did not consent to the sexual encounter with the defendant. The defendant caused personal injury to the complainant while engaging in anal penetration and she

sought medical treatment complaining of chronic pain in the rectal area, MCL 750.520(a)(m). Defendant utilized force to accomplish penetration of her anus with his penis when he held her on her sides so that she could not get away.

In addition, defendant is guilty of Criminal Sexual Conduct in the Third Degree, MCL 750.520d(1)(b). The complainant did not consent to the sexual encounter with the defendant. The defendant used physical force to accomplish penetration of her vagina with his finger and restrained her by holding her sides. MCL 750.520b(1)(f)(i). He also coerced her to consent by threatening to hurt her when she protested after he pulled down her pants and she believed that he had the present ability to carry out the threat, MCL 750.520(b)(1)(f)(ii).

The first-degree CSC charge was predicated on the incident of anal intercourse. The prosecutor charged defendant with first-degree CSC under alternative theories, either sexual penetration of a mentally incapacitated person, MCL 750.520b(1)(g), or sexual penetration through force and coercion, MCL 750.520b(1)(f). Defendant's judgment of sentence indicates that defendant was convicted of first-degree CSC under MCL 750.520b(1)(g), which requires a finding that the defendant knew or had reason to know that the victim was mentally incapable or mentally incapacitated. Such a person "is presumed to be incapable of truly consenting to the sexual act." *People v Breck*, 230 Mich App 450, 455; 584 NW2d 602 (1998). But according to the trial court's clarified findings, it determined that Henderson was not mentally incapable or mentally incapacitated and instead indicated that it found defendant guilty first-degree CSC under the alternative theory that defendant used force or coercion and caused personal injury, MCL 750.520b(1)(f); *People v Nickens*, 470 Mich 622, 629; 685 NW2d 657 (2004), despite the charge listed on the judgment of sentence.

Initially, the trial court made no findings regarding force or coercion, or personal injury but on remand stated that the evidence supported both force or coercion and personal injury. Our review of the record reveals that the evidence presented was sufficient to sustain defendant's conviction on that basis. Henderson's testimony indicated that defendant was holding her down by her sides during the penetration. One could reasonably infer that defendant overcame her through the actual application of physical force. MCL 750.520b(1)(f)(i). Further, given Henderson's testimony that defendant told her to "shut up or I'm going to hurt you," one could reasonably infer that force or coercion was established under MCL 750.520b(1)(f)(ii) ("the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats"). Personal injury is defined to include "bodily injury, disfigurement, mental anguish, chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ." MCL 750.520a(m). This Court has held that bruising is sufficient to constitute personal injury. *People v Hollis*, 96 Mich App 333, 337; 292 NW2d 538 (1980). Henderson indicated that immediately after intercourse, she experienced some rectal bleeding, an indication of bodily trauma. Although the medical examination did not reveal any external injuries, the doctor admitted that he did not perform an internal examination of the rectum for injury. Therefore, since the trial court intended to convict defendant under MCL 750.520b(1)(f), the evidence was sufficient to sustain his conviction.

The third-degree CSC charge was predicated on defendant's insertion of his finger into Henderson's genitals. Defendant's judgment of sentence indicates that defendant was convicted of "CSC 3rd degree (personal injury)." As both parties point out, personal injury is not an

element of third-degree CSC. Instead, the trial court had to find either that defendant overcame Henderson by force or coercion or that he knew or had reason to know that she was mentally incapable or incapacitated. MCL 750.520d(1)(b) and (c). As discussed above, according to the trial court's clarified findings, it determined that Henderson was not mentally incapable or mentally incapacitated and instead indicated that it found defendant guilty predicated on force or coercion.

Again, initially the trial court made no findings regarding force or coercion, but on remand stated that the evidence supported force or coercion. Our review of the record reveals that the evidence presented was sufficient to sustain defendant's conviction on that basis. Henderson testified that defendant touched her vagina. Defendant does not dispute that penetration occurred. Given Henderson's testimony that defendant pulled her over to the stairway at the outset of the episode and threatened to hurt her if she did not shut up, one could reasonably infer that defendant utilized force or coercion to accomplish the penetration. Therefore, because the trial court convicted defendant under MCL 750.520d(1)(b), the evidence was sufficient to sustain the conviction.

The record also reveals that the February 27, 2008 "Order Amending Judgment of Sentence" issued by the trial court included the following language:

IT IS HEREBY ORDERED that the judgment of sentence be amended to reflect the factual findings and conclusions of law stated in this opinion.

However, for reasons unknown to this Court, the trial court never actually amended defendant's judgment of sentence. Thus, we must once again remand this matter to the trial court with explicit instructions to amend defendant's judgment of sentence to reflect the charges of which defendant was actually convicted. Specifically, charge one should not be listed as "CSC 1 (INJ INCAPACITATED PERSON) 750.520B1G" but instead should reflect that defendant was actually convicted of first-degree CSC predicated on force or coercion, or personal injury, MCL 750.520b(1)(f). Also, with regard to charge two, third-degree CSC, defendant's judgment of sentence should indicate that his conviction was predicated on force or coercion, MCL 750.520d(1)(b), not personal injury.

Affirmed and remanded for entry of amended judgment of sentence. We do not retain jurisdiction.

/s/ Mark J. Cavanagh  
/s/ Pat M. Donofrio  
/s/ Deborah A. Servitto