

**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UNPUBLISHED  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 6, 2007

No. 271833  
Wayne Circuit Court  
LC No. 06-002751-01

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

PER CURIAM.

Defendant appeals as of right his convictions of first-degree criminal sexual conduct, MCL 750.520b, and third-degree criminal sexual conduct, MCL 750.520d, for which the trial court sentenced him to concurrent prison terms of 12 to 24 years and 7 to 15 years, respectively. We affirm in part and remand for further factual findings by the trial court. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

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.

Defendant first contends that his due process rights were violated when his request for a polygraph examination was not honored. The right to a polygraph examination is statutory rather than constitutional and thus defendant must show that it is more probable than not that the error was outcome determinative. MCL 776.21(5); *People v Phillips*, 469 Mich 390, 396; 666 NW2d 657 (2003).

At any time prior to an adjudication of guilt, a defendant charged with criminal sexual conduct has an absolute right to receive a polygraph examination or lie detector test upon request. MCL 776.21(5); *Phillips, supra*. Because defendant admitted that the sexual encounter took place, the only issues to be resolved were whether the encounter was consensual and whether defendant knew or had reason to know that SH was mentally incapable or incapacitated. However, the results of the test on the issue of consent would not have been admissible at trial, *Phillips, supra* at 397, and the prosecutor had indicated that regardless of the outcome of the test, he would still pursue the charges. Accordingly, we conclude that defendant has failed to show that the error affected the outcome of the case.

Defendant next 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). The record discloses that the trial court failed to make the necessary factual findings on the elements of the offenses of which defendant was convicted.

The judgment of sentence indicates that defendant was convicted of first-degree CSC under MCL 750.520b(1)(g), which requires a finding that defendant knew or had reason to know that the victim was mentally incapable or mentally incapacitated. However, the trial court found that SH was capable of consenting to or refusing a sexual encounter, which indicates that the court found that SH was not mentally incapable or mentally incapacitated. Defendant was alternatively charged under MCL 750.520b(1)(f). The essential elements of that charge are that the defendant “(1) causes personal injury to the victim, (2) engages in sexual penetration with the victim, and (3) uses force or coercion to accomplish the sexual penetration.” *People v Nickens*, 470 Mich 622, 629; 685 NW2d 657 (2004).

The judgment of sentence indicates that defendant was convicted of third-degree CSC predicated on personal injury. However, personal injury is not an element of third-degree CSC. MCL 750.520d(1). Defendant was charged in the alternative with engaging in penetration through the use of force or coercion or engaging in penetration with a person who was mentally incapable or mentally incapacitated. MCL 750.520d(1)(b) and (c). Again, given that the trial court implicitly found that SH was not mentally incapable or mentally incapacitated, it appears that defendant was convicted under MCL 750.520d(1)(b).

The trial court determined that SH had not consented to the sexual encounter but failed to make any findings whether defendant utilized force or coercion as that term is defined in MCL 750.520b(1)(f) to accomplish either instance of penetration, and also failed to determine whether defendant caused personal injury as that term is defined in MCL 750.520a(m) while engaging in anal penetration. Because of the deficiencies in the trial court's findings and the inconsistencies in the judgment of sentence, we remand this case to the trial court for the necessary findings with respect to the elements of the crimes of which defendant was convicted.

Affirmed in part and remanded for further proceedings consistent with this opinion. We retain jurisdiction.

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

**Court of Appeals, State of Michigan**

**ORDER**

People of the State of Michigan v Antonio D Rios

Docket No. 271833

LC No. 06-002751-01

Mark J. Cavanagh  
Presiding Judge

Pat M. Donofrio

Deborah A. Servitto  
Judges

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Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 28 days of the Clerk's certification of this order and they shall be given priority on remand until they are concluded. As stated in the accompanying opinion, the trial court within 14 days thereof shall remedy the deficiencies in the trial court's findings and the inconsistencies in the judgment of sentence, and on remand of this case, make the necessary findings with respect to the elements of the crimes of which defendant was convicted.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

SEP 06 2007

Date

*Sandra Schultz Mengel*  
Chief Clerk