

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DELONNIE VENARO SILLIVAN,

Defendant-Appellant.

UNPUBLISHED

August 16, 2007

No. 269501

Wayne Circuit Court

LC No. 05-009357-01

Before: Smolenski, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Defendant was convicted of first-degree home invasion, MCL 750.110a(2), and first-degree criminal sexual conduct (“CSC”), MCL 750.520(b)(1)(c) (commission of felony), and received concurrent sentences of 61 months to 20 years each. Defendant appeals as of right. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

On appeal, defendant argues that there was insufficient evidence to support either his conviction of first-degree home invasion or first-degree CSC. “This Court reviews de novo a challenge to the sufficiency of the evidence in a bench trial. The evidence is viewed in a light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Lanzo Const Co*, 272 Mich App 470, 473-474; 726 NW2d 746 (2006) (citation omitted).

Defendant first claims that first-degree home invasion requires a showing of entering a dwelling without permission with the specific intent to commit a felony therein. We disagree. Under MCL 750.110a, the element of intent is not required, as first-degree home invasion can be proven where: (1) a person breaks and enters a dwelling or enters a dwelling without permission, (2) a felony, larceny or assault is committed while the person is in the dwelling, and (3) another person is lawfully present in the dwelling. *People v Sands*, 261 Mich App 158, 163; 680 NW2d 500 (2004).

The trial court determined that there was a breaking and entering into the home. The victim testified that all the doors were locked. Defendant claimed in his statement to police that a door was wide open. Michigan courts have recognized that, “[p]articularly where the issue involves the credibility of the witness whose testimony is in conflict, the trial court’s resolution of a factual issue is entitled to deference.” *People v Parker*, 230 Mich App 337, 341; 584 NW2d 336 (1998), quoting *People v Burrell*, 417 Mich 439, 448-449; 339 NW2d 403 (1983). The trial

court's findings of fact may not be set aside unless clearly erroneous, which has been defined by this Court as a definite and firm belief that the trial court's findings of fact are mistaken. *Parker, supra* at 339 (citation omitted); MCR 2.613. The trial court believed the victim's testimony, finding it not credible that, in the middle of the night, with several adults in the home, a door would be left standing wide open. Such a conclusion was supported by the victim's testimony.

In addition, an assault was committed while defendant was in the home. This court recently reaffirmed the definition of the term "assault" as "either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery." *People v Musser*, 259 Mich App 215, 223; 673 NW2d 800 (2003) (citation omitted). Further, the *Musser* Court ruled that "fourth-degree criminal sexual conduct constitutes an assault for purposes of the home invasion statute." *Id.* at 224. Therefore, if CSC without penetration qualifies as assault, it logically follows that the greater offense of CSC with penetration also qualifies as an assault for determining criminal liability for home invasion.

The final requirement to find first-degree home invasion has been met because there were other people present in the dwelling at the time the breaking and entering occurred. It is undisputed that the victim was in the home when defendant entered. The victim also testified that her children, her mother and her mother's friend were sleeping in the home at the time of defendant's unauthorized entry. Therefore, sufficient evidence existed to convict defendant of first-degree home invasion in accordance with MCL 750.110a.

Defendant also argues there was insufficient evidence to sustain defendant's conviction of first-degree CSC. We disagree. MCL 750.520b(1)(c) provides that "[a] person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and . . . [s]exual penetration occurs under circumstances involving the commission of any other felony." Defendant does not deny having sexual contact, including penetration, with the victim. The conviction for first-degree home invasion comprises the requisite felony to complete the elements of first-degree CSC.

Affirmed.

/s/ Michael R. Smolenski
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly