

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK KENNETH LYNN,

Defendant-Appellant.

UNPUBLISHED
November 20, 2012

No. 303280
Oakland Circuit Court
LC No. 2010-234350-FH

Before: JANSEN, P.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of fourth-degree criminal sexual conduct, MCL 750.520e(1)(b). Defendant was sentenced as fourth habitual offender, MCL 769.12, to concurrent sentences of 1 to 15 years for each count. We affirm.

I. FACTUAL BACKGROUND

The victim and her boyfriend went to defendant's residence in order to purchase marijuana. After entering the residence, the victim walked into the living room where defendant was sitting at a computer. Defendant was the only other person in the living room at that time, although the victim's boyfriend and two other females were in a nearby room. The victim talked with defendant for a couple of moments. Then, defendant began touching her breasts on the outside of her clothing. Defendant pulled down her shirt, placed his hands under her shirt and bra, and "play[ed]" with her nipples. Defendant also began to "rub[]" the victim's vagina on the outside of her clothing while making various sexual comments.

The victim repeatedly asked defendant to stop touching her. Defendant initially did not respond but eventually assured her that her boyfriend was not looking. The victim testified that defendant's behavior was unexpected, she did not know what to do, she was scared, and she was unable to process what was happening. After three or four minutes, defendant stopped touching the victim. When he attempted to touch her again, the victim left the room. The victim approached her boyfriend, she finished smoking his cigarette, they exited the residence, and she called the police.

In sharp contrast to the victim's account of the evening, defendant testified that he did not touch her inappropriately. He testified that they had a conversation about her desire to purchase marijuana, to which he responded by directing her to speak to another female at the residence.

Defendant believed that the victim was making these accusations against him because he refused to give her marijuana. Corroborating defendant's testimony was his girlfriend, who testified that she was present at the residence, she had an unobstructed view of defendant, and defendant never touched the victim. The jury found defendant guilty of two counts of fourth-degree criminal sexual conduct. Defendant now appeals.

II. SUFFICIENCY OF THE EVIDENCE

A. Standard of Review

Defendant's only claim on appeal is that there was insufficient evidence to sustain his convictions. "Due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact to conclude that the defendant is guilty beyond a reasonable doubt." *People v Tombs*, 260 Mich App 201, 206-207; 679 NW2d 77 (2003). This Court reviews "de novo a challenge on appeal to the sufficiency of the evidence." *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). "In determining whether the prosecutor has presented sufficient evidence to sustain a conviction, an appellate court is required to take the evidence in the light most favorable to the prosecutor" to ascertain "whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010) (internal quotations and citations omitted). "All conflicts in the evidence must be resolved in favor of the prosecution and we will not interfere with the jury's determinations regarding the weight of the evidence and the credibility of the witnesses." *People v Unger*, 278 Mich App 210, 222; 749 NW2d 272 (2008).

B. Analysis

"A person is guilty of criminal sexual conduct in the fourth[-]degree if he or she engages in sexual contact with another person" and "[f]orce or coercion is used to accomplish the sexual contact." MCL 750.520e(1). Defendant contends that there was insufficient evidence of the "force or coercion" element of his fourth-degree criminal sexual conduct convictions. We disagree. According to MCL 750.520e(1)(b)(i) and MCL 750.520e(1)(b)(v) respectively, force or coercion exists "[w]hen the actor overcomes the victim through the actual application of physical force or physical violence" or "[w]hen the actor achieves the sexual contact through concealment or by the element of surprise." However, "Michigan case law has consistently held that 'force or coercion' is not limited to the examples listed in the statute and that each case must be examined on its own facts." *People v Crippen*, 242 Mich App 278, 283 n 2; 617 NW2d 760 (2000). Moreover, this Court has defined the term "force" to include situations where "strength or power [is] exerted upon an object." *People v Premo*, 213 Mich App 406, 409; 540 NW2d 715 (1995) (internal quotations and citation omitted).

There was sufficient evidence to support the jury's finding that defendant used physical force, MCL 750.520e(1)(b)(i), when inflicting the sexual contact on the victim. The victim testified that defendant pulled down her shirt and placed his hand under her shirt and bra. Defendant then "play[ed]" with the victim's nipples. Defendant also used his hand to "rub[]" the victim's vagina. The victim repeatedly requested that defendant stop, and he ignored her pleas. A reasonable jury could have found that this physical contact with the victim's breast and vagina constituted an exertion of "strength or power" on her body, as defendant was physically touching

and moving his hand. See *Premo*, 213 Mich App at 409 (holding that pinching the victim's buttocks "satisfies the force element of the statute because the act of pinching requires the actual application of physical force" (internal quotations and citation omitted)). Therefore, viewing the facts in a light most favorable to the prosecution, a rational jury could have found that defendant's actions constituted physical force pursuant to MCL 750.520e(1)(b)(i).¹

Alternatively, a reasonable jury could have found beyond a reasonable doubt that defendant achieved the sexual contact with the victim through the element of surprise, MCL 750.520e(1)(b)(v). The victim testified that she had no expectation of physical contact with defendant when she went to his residence and that defendant touched her while his girlfriend and her boyfriend were in close proximity. She also testified that she was scared, she did not know what to do, and she was unable to process what was happening. A rational trier of fact could have found that these facts constituted "sexual contact . . . by the element of surprise," MCL 750.520e(1)(b)(v), especially considering the unexpectedness of defendant's behavior and the immobility it caused in the victim.

III. CONCLUSION

Viewing the facts in a light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that the elements of fourth-degree criminal sexual conduct, MCL 750.520e(1)(b), were proven beyond a reasonable doubt. We affirm.

/s/ Kathleen Jansen
/s/ Cynthia Diane Stephens
/s/ Michael J. Riordan

¹ Defendant cites *People v Berlin*, 202 Mich App 221, 226; 507 NW2d 816 (1993), to support his argument that his actions did not constitute force. However, *Berlin* involved a case where the defendant placed the victim's hand on his genital region where it rested passively. *Id.* at 226. Rather than this type of passive contact, this case involves defendant exerting his strength on the victim's body by rubbing her vagina and playing with her nipples. Hence, the facts of this case are significantly different from those in *Berlin*.