

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

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH L. BANTER,

Defendant-Appellant.

---

UNPUBLISHED

March 23, 1999

No. 205539

Recorder's Court

LC No. 96-005885

Before: Gribbs, P.J., and Griffin and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions of fourth-degree criminal sexual conduct, MCL 750.520e(1)(a); MSA 28.788(5)(1)(a), and indecent exposure, MCL 750.335a; MSA 28.567(1). Defendant was sentenced to two years' probation. We affirm.

Defendant's first issue on appeal is that his convictions were against the great weight of the evidence. We disagree. A conviction is not considered to be against the great weight of the evidence unless the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998).

The fourth-degree criminal sexual conduct statute, MCL 750.520e; MSA 28.788(5), that was in effect at the time of defendant's criminal conduct provided in pertinent part:

(1) A person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and if any of the following circumstances exists:

(a) Force or coercion is used to accomplish the sexual contact. Force or coercion includes but is not limited to any of the circumstances listed in section 520b(1)(f)(i) to (iv).

MCL 750.520a(k); MSA 28.788(1)(k), provides the definition of "sexual contact," as used in section 750.520e; MSA 28.788(5):

“Sexual contact” includes the intentional touching of the victim’s or actor’s intimate parts or the intentional touching of the clothing covering the immediate area of the victim’s or actor’s intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification.

The indecent exposure statute provides, in pertinent part, that “[a]ny person who shall knowingly make an open or indecent exposure of his or her person or of a person of another shall be guilty of a misdemeanor.” MCL. 750.335a; MSA 28.567(1).

Defendant’s primary contention is that the victim was not a credible witness. This Court has consistently held that credibility issues regarding witness testimony are to be resolved by the trier of fact, not the reviewing court. *People v Velasquez*, 189 Mich App 14, 16; 472 NW2d 289 (1991). The trial court saw and heard the witnesses and was in the best position to determine the weight such testimony should be accorded. In the present case, the trial court spoke at great length about its credibility considerations. Our Supreme Court in *Lemmon*, *supra* at 646, explained:

The credibility of a witness is determined by more than words and includes tonal quality, volume, speech patterns, and demeanor, all giving clues to the factfinder regarding whether a witness is telling the truth.

Upon review of the evidence presented in the trial court, this Court finds that there was no miscarriage of justice, the conviction verdicts were reasonably supported, and the evidence did not clearly weigh in defendant’s favor. *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993).

Defendant’s second issue on appeal is that the fourth-degree criminal sexual conduct statute, in particular the “sexual contact” provision, is unconstitutional because it permits conviction based on evidence which does not establish guilt beyond a reasonable doubt. We disagree. Constitutional challenges to statutory provisions are reviewed de novo. *People v Piper*, 223 Mich App 642, 645; 567 NW2d 483 (1997). However, statutes are cloaked in a strong presumption of validity and constitutionality. *Id.* Courts must construe statutes as constitutional absent a clear showing of unconstitutionality. *Id.*

Defendant’s argument that he was convicted under a statute that did not require that he be found guilty beyond a reasonable doubt as a consequence of the *reasonably be construed* section of the “sexual contact” definition is without merit. Defendant’s contention that he must be found to have actually had a sexual purpose is an attempt to transform a general intent crime into a specific intent crime. *Piper*, *supra* at 646; *People v Lasky*, 157 Mich App 265, 272; 403 NW2d 117 (1987). This Court has reviewed and upheld the constitutionality of the “sexual contact” provision as it relates to the criminal sexual conduct statutes on several occasions. *Piper*, *supra* at 646-647; *People v Brewer*, 101 Mich App 194, 195; 300 NW2d 491 (1980); *People v Fisher*, 77 Mich App 6, 13; 257 NW2d 250 (1977). Pursuant to MCR 7.215(H), defendant’s argument is without merit.

Further, defendant’s claim is without merit because whether defendant’s conduct could be reasonably construed as being for the purpose of sexual arousal or gratification is, itself, an element of

the offense which must be proven beyond a reasonable doubt. See CJI2d 20.13. Consequently, a defendant who intentionally touched an intimate body part in a manner that would not reasonably be considered for sexual arousal or gratification would not be convicted of fourth-degree criminal sexual conduct. In the present case, defendant's conduct of forcibly placing his hands on the victim's breasts and forcing her hand to touch his exposed and erect penis was most assuredly conduct within the contemplation of, and prohibited by, the statute.

Affirmed.

/s/ Roman S. Gibbs  
/s/ Richard Allen Griffin  
/s/ Kurtis T. Wilder