

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JOSEPH RUSSELL VOSTRIRANCKY,

Defendant-Appellee.

UNPUBLISHED

June 11, 1999

No. 215394

Montcalm Circuit Court

LC No. 98-000148 FC

Before: Markey, P.J., and McDonald and Fitzgerald, JJ.

PER CURIAM.

Defendant was charged with one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), involving a five-year-old child. Following a preliminary examination, defendant was bound over to the circuit court, which court granted his motion to quash the bindover. The prosecution appeals as of right. We reverse and remand.

The victim in this case testified that defendant touched her “gee-gee”¹ with either his finger or the palm of his hand. Dr. Vincent Palusci, an expert in pediatric medicine with a sub-specialty in child abuse and neglect, testified that his examination of the victim revealed an abrasion on the victim’s labia minora and both sides of the anterior labia. He opined that the abrasions and redness were likely caused by “trauma to those structures which are internal to the labia majora.” Dr. Palusci did not find evidence of vaginal penetration.

The district judge found that Dr. Palusci’s findings of redness and abrasions “inside the genitals, specifically moving from outside to in of the labia majora,” were sufficient to support a finding that defendant penetrated the victim’s genital openings. The circuit court granted defendant’s motion to quash on the legal ground that vaginal penetration is a necessary element of first-degree CSC. We review questions of law for error. *People v Thomas*, 438 Mich 448, 452; 475 NW2d 288 (1991).

To establish first-degree CSC, the prosecution must prove that the victim was sexually penetrated. “Sexual penetration” is statutorily defined as “sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body, but emission of semen is not required.” MCL

750.520a(1); MSA 28.788(2). Use of the term “genital opening” includes the labia. *People v Bristol*, 115 Mich App 236; 320 NW2d 229 (1981); see also *People v Whitfield*, 425 Mich 116; 388 NW2d 206 (1986); *People v Legg*, 197 Mich App 131; 494 NW2d 797 (1992). Hence, the circuit court erred as a matter of law by concluding that the statute necessarily requires proof of vaginal penetration.

Our decision that the first-degree CSC statutes does not necessarily require proof of vaginal penetration requires us to address the prosecutor’s argument that the circuit court also erred by concluding that the evidence was not sufficient to establish probable cause that defendant sexually penetrated the victim. This Court’s review of the circuit court’s analysis of the bindover is de novo. This Court must determine if the district court committed an abuse of discretion in determining whether there was probable cause to believe that defendant sexually penetrated the victim. *People v Reigle*, 223 Mich App 34, 36-37; 566 NW2d 21 (1997).

Although the circuit court properly noted that “touching the labia majora or lips is not enough,” to establish penetration, evidence was presented at the preliminary examination that the victim suffered abrasions to the labia *minora*, which refers to the “inner folds of skin of the external female genitalia.” *Random House Webster’s College Dictionary* (1997) (emphasis added). Dr. Palusci opined that the victim’s labia majora had to be penetrated in order for the labia minora to be abraded. Given this testimony, the evidence presented to the district court at the preliminary examination was sufficient to establish probable cause that defendant sexually penetrated the victim. Accordingly, the district court did not abuse its discretion in binding defendant over to circuit court. The circuit court erred in dismissing the charge.

Reversed and remanded for trial. We do not retain jurisdiction.

/s/ Jane E. Markey

/s/ Gary R. McDonald

/s/ E. Thomas Fitzgerald

¹ “Gee gee” is the term the victim’s mother taught her to use to refer to her vagina.