

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of KAHMIERE RASHARDE
BRINSON-LEWIS, a/k/a SHARDE BRINSON, a
Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

KAHMIERE RASHARDE BRINSON-LEWIS,
a/k/a SHARDE BRINSON,

Respondent-Appellant.

UNPUBLISHED

August 31, 1999

No. 207862

Oakland Probate Court

LC No. 97-063215 DL

Before: Cavanagh, P.J., and Hoekstra and Gage, JJ.

PER CURIAM.

Following a bench trial, respondent was convicted of fourth-degree criminal sexual conduct (CSC), MCL 750.520e(1)(b); MSA 28.788(5)(1)(b).¹ The trial court imposed an indefinite term of probation and ordered that respondent participate in a sex offender evaluation and treatment program. Respondent appeals as of right. We affirm.

Respondent first contends that insufficient evidence existed to support his conviction and that the referee's findings were clearly erroneous. When reviewing a claim of insufficient evidence to support a bench trial conviction, this Court views the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find the elements of the crime were proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985). In reviewing the referee's factual determinations, this Court will only set aside findings that are clearly erroneous. MCR 2.613(C). The referee's findings are clearly erroneous if, after a review of the entire record, this Court is left with the firm and definite conviction that a mistake has been made. *People v Miller*, 199 Mich App 609, 612-613; 503 NW2d 89 (1993).

To obtain respondent's conviction, the prosecutor had to show that (1) respondent engaged in sexual contact with the victim, (2) by utilizing force or coercion. MCL 750.520e(1)(b); MSA 28.788(5)(1)(b). "Sexual contact" constitutes an intentional touching of intimate parts, including genitals, "if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification." MCL 750.520a(k); MSA 28.788(1)(k). Coercion may be actual, direct or positive, as where physical force is used to compel action against one's will, or implied, legal or constructive, as where one party is constrained by subjugation to do what his free will would refuse. *People v Reid*, 233 Mich App 457, 468-469; 592 NW2d 767 (1999); *People v Regts*, 219 Mich App 294, 295; 555 NW2d 896 (1996).

Respondent argues there was insufficient evidence that he used force or coercion to accomplish the sexual contact at issue and that the evidence does not indicate that the contact was accomplished for a sexual purpose. We find, however, that the prosecutor presented evidence from which the referee could have reasonably concluded that respondent unlawfully coerced complainant to touch respondent's penis for the purpose of respondent's sexual arousal or gratification. The six-year-old victim testified that while he, his five-year-old cousin and ten-year-old respondent were building a fort, the boys' conversation turned to the sexual subject of "dirty movies." Sometime thereafter, respondent stood approximately five to six feet from the victim with his pants down and stated, "Suck my wiener." Respondent, who was physically larger than both the victim and his cousin, then approached the victim. Although the victim testified that he did not want to do so, he touched respondent's penis. Given the nature and context of respondent's statement and these surrounding circumstances, we cannot conclude that the referee clearly erred in finding contact for a sexual purpose and that respondent's actions were sufficient to create within the victim a reasonable fear of dangerous consequences in the event he did not comply with respondent's demand. *People v Cowley*, 174 Mich App 76, 81; 435 NW2d 458 (1989).

Respondent next asserts that the statutory definition of "sexual contact" is unconstitutional. We review de novo questions involving the constitutionality of statutes. *People v Piper*, 223 Mich App 642, 645; 567 NW2d 483 (1997). Statutes are accorded a strong presumption of validity and constitutionality; courts must construe statutes as constitutional absent a clear showing of unconstitutionality. *Id.*

Specifically, respondent suggests that he was improperly convicted of fourth-degree CSC because the prosecutor was not obligated to prove beyond a reasonable doubt that respondent actually had a sexual purpose, but instead was permitted under the statute to show only that it was reasonable to construe respondent's actions as directed toward a sexual purpose. Respondent further alleges that "the statute creates a mandatory, irrebuttable presumption that the [respondent] had such an improper intent, from proof that [t]he evidence 'could be reasonably be construed' to show an improper intent," and that "the statute is so indefinite that it confers unstructured and unlimited discretion to the fact-finder to define and determine whether an offense has been committed, and fails to provide fair notice to a person of what actions are criminal." Respondent apparently attempts 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); *People v Brewer*, 101 Mich App 194, 195-196; 300 NW2d 491 (1980). The *Piper* Court previously rejected arguments similar to respondent's instant arguments.

We note at the outset that criminal sexual conduct is a general intent crime; a defendant's *specific* intent is not at issue.

This Court has discussed the predecessor of the statute at issue here, which statute used the same language under challenge here. *People v Fisher*, 77 Mich App 6, 12-13; 257 NW2d 250 (1977). The *Fisher* panel noted that the Legislature rejected a proposed version of the statute that would have required proof that the defendant specifically acted with the purpose of deriving sexual gratification. *Id.* at 13, n 2. Instead, the statute, as adopted, required proof of an intentional touching, but not proof of the defendant's actual purpose for the intentional touching. *Id.* at 13. Consequently, *Fisher* ruled that a *defendant's* specific intent was not an element of the crime. *Id.*

The language of the current statute at issue here similarly requires proof that the defendant engaged in the intentional touching of the complainant's intimate parts or the clothing immediately covering that area. MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), MCL 750.520a(k); MSA 28.788(1)(k). Thus, proof of intentional touching, alone, is insufficient to establish guilt. The statute further requires that the prosecution prove that the intentional touch could "*reasonably be construed* as being for [a] sexual purpose." MCL 750.520a(k); 28.788(1)(k) (emphasis added). The statute's language is clear and its inclusion of a reasonable person standard provides a structure to guide the jury's determination of the purpose of the contact. Consequently, contrary to defendant's argument, a jury is properly limited to a determination whether the defined conduct, when viewed objectively, could reasonably be construed as being for a sexual purpose. Accordingly, we hold that the statute is not unconstitutionally vague.

Defendant makes a corollary constitutional argument that the statute shifts the burden of proof to the accused. This claim is without merit. As stated above, the statute requires that the prosecution establish an intentional contact that could reasonably be construed as being for a sexual purpose. As such, it does not shift the burden of proof. [*Piper, supra* at 646-647 (emphasis in original) (some citations omitted).]

The statute does not presume that any contact to one's intimate body parts are for a sexual purpose or sexual gratification. Whether respondent's conduct could be reasonably construed as being for the purpose of sexual arousal or gratification is itself an element of the offense that was required to be proven beyond a reasonable doubt. We therefore conclude that respondent's arguments are without merit.

Lastly, respondent contends that the trial court erred in failing to review the trial transcript before it denied defendant's request for review of the referee's findings and recommendation and

affirmed the referee's recommendation. Respondent claims that MCR 5.991 required the trial court to analyze the full trial record to properly consider his request for review. No language within this court rule, however, requires that a court reviewing a referee's recommendation examine the full trial record. Furthermore, even assuming that the trial court erred in this respect, respondent suffered no prejudice when the referee's report accurately reflected the trial testimony. MCL 769.26; MSA 28.1096.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Joel P. Hoekstra

/s/ Hilda R. Gage

¹ Respondent also pleaded guilty of second-degree retail fraud, MCL 750.356d; MSA 28.588(4), stemming from a separate incident. The retail fraud conviction is not an issue on appeal.