STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 30, 2000
v	No. 215112 Marquette Circuit Court
WAYNE MICHAEL SELDEN, Defendant-Appellant.	LC No. 97-033300-FH

Before: Hood, P.J., and Saad and O'Connell, JJ.

PER CURIAM.

Defendant appeals by leave granted from his conditional nolo contendere plea to the charge of attempted third-degree criminal sexual conduct (CSC III), MCL 750.92; MSA 28.287; MCL 750.520d(1)(b); MSA 28.788(4)(1)(b). The trial court sentenced defendant to twelve months in jail and thirty-six months' probation, but granted a stay of defendant's sentence pending the present appeal. Defendant's plea preserved his right to challenge on appeal the constitutionality of MCL 750.520d(1)(d); MSA 28.788(4)(1)(d) and MCL 750.520e(1)(g); MSA 28.788(5)(1)(g), as well as the sufficiency of the evidence presented at the preliminary examination to bind him over for trial. We affirm.

Defendant first argues that MCL 750.520d(1)(d); MSA 28.788(4)(1)(d) and MCL 750.520e(1)(g); MSA 28.788(5)(1)(g), insofar as they prohibit sexual activity between persons related by affinity to the third degree, are unconstitutional. This Court will decline to address constitutional issues when an appeal may be resolved on a nonconstitutional ground. *Booth Newspapers, Inc v University of Mich Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993); *MacLean v State Bd of Control for Vocational Ed*, 294 Mich 45, 50; 292 NW 662 (1940). In this case, the prosecutor charged defendant under alternative theories of criminal sexual conduct. The information alleged that defendant had sexual contact and committed sexual penetration with a person to whom he was related by affinity to the third degree, MCL 750.520d(1)(d); MSA 28.788(4)(1)(d) and MCL 750.520e(1)(g); MSA 28.788(5)(1)(g), and that defendant had sexual contact and committed sexual penetration through "force or coercion," MCL 750.520d(1)(b); MSA 28.788(4)(1)(b) and MCL 750.520e(1)(b); MSA 28.788(5)(1)(b). We conclude that the testimony presented at the preliminary

examination was sufficient to support the prosecutor's charge that defendant engaged in sexual contact and committed sexual penetration by way of force or coercion. We therefore conclude that defendant's sufficiency of the evidence issue is dispositive of this case and do not address his constitutional challenge.

Defendant contends that the evidence adduced during the preliminary examination was insufficient to bind him over for trial, and that the trial court erred in failing to quash the information. Defendant asserts that the prosecutor introduced no evidence to establish the "force or coercion" element of MCL 750.520d(1)(b); MSA 28.788(4)(1)(b) and MCL 750.520e(1)(b); MSA 28.788(5)(1)(b). We review de novo a circuit court's decision to deny a motion to quash a felony information for a determination whether the district court abused its discretion in ordering bindover. *People v Northey*, 231 Mich App 568, 574; 591 NW2d 227 (1998); *People v Djordjevic*, 230 Mich App 459, 461; 584 NW2d 610 (1998).

The purpose of a preliminary examination is to determine whether probable cause exists to believe that the defendant committed a crime. *People v Hamblin*, 224 Mich App 87, 92; 568 NW2d 339 (1997). A magistrate must bind the defendant over for trial in the circuit court if, at the conclusion of the preliminary examination, the magistrate determines that probable cause exists to believe that a felony has been committed and that the defendant committed it. MCL 766.13; MSA 28.931; MCR 6.110(E); *Hamblin*, *supra* at 92. The prosecutor must present some evidence from which each element of the crime may be inferred. *Hamblin*, *supra* at 92; *People v Coddington*, 188 Mich App 584, 591; 470 NW2d 478 (1991).

For purposes of MCL 750.520d(1)(b); MSA 28.788(4)(1)(b) and MCL 750.520e(1)(b); MSA 28.788(5)(1)(b), force is present in a situation where the defendant "overcomes the victim through the actual application of physical force or physical violence." MCL 750.520b(1)(f)(i); MSA 28.788(2)(1)(f)(i). Force includes the exertion of strength or power on another person. *People v Premo*, 213 Mich App 406, 409; 540 NW2d 715 (1995). Coercion may be actual, as where physical force is used to compel one to act against one's will, or constructive, as where one is constrained by subjugation to do what his free will would refuse. *Id*. at 410-411. "The existence of force or coercion is to be determined in light of all the circumstances and is not limited to acts of physical violence." *Id.* at 410.

In *Premo*, *supra* at 410, this Court determined that the defendant's mere pinching of another person's buttocks constituted "force" for purposes of MCL 750.520e(1)(a); MSA 28.788(5)(1)(a). The Court reasoned that pinching involved the actual application of physical force to another person. *Id*. In *People v Makela*, 147 Mich App 674; 383 NW2d 270 (1985), the defendant offered the victim a ride home and stopped at his motel en route. She sat on the bed and he joined her. He then "put his arm around her waist and pulled her down onto the bed. While on top of her, defendant removed her blue jeans and panties. The complainant initially testified that she was too scared to say anything. She later testified that, as defendant was removing her pants, she told him that she did not want to do anything." He nevertheless removed his own clothes and had intercourse with her. *Id*. at 677-678. This Court held that the prosecutor presented sufficient evidence of "force or coercion" to support the defendant's bindover on CSC III because the defendant "held [the victim] down and was

on top of her when he undressed her." Moreover, the defendant was older than the victim, she was afraid to resist him because he was stronger than she was, and "she told defendant she did not want 'to do it' and cried during the incident." *Id*. at 682.

In the present case, complainant testified that defendant entered the bedroom in which she slept and awoke her by tickling her feet. He left for a minute or two, but when he returned, defendant unbuckled and unzipped her pants and placed his hand inside her underwear. Complainant testified that she was in "shock" and that she "never felt so scared." Defendant again left the bedroom, but he came back less than a minute later. He put his hands inside her underwear again and turned her over. He grabbed her around her waist and pulled her around on her back. He then pulled her down her pants and separated her legs so that he could rub her vaginal area. Defendant then left the bedroom.

Complainant testified that when defendant returned a few minutes later, he pulled her pants down further, separated her legs, and penetrated her digitally. Complainant pretended to be asleep, and defendant left the room. Defendant returned, apparently within a few minutes, crawled over her, and digitally penetrated her. Afterward, defendant got on top of her, wrapped his arms around her shoulders, and attempted intercourse, but was unable to achieve penetration. He instead performed cunnilingus on her. When defendant stopped, he again grabbed her by the shoulders and attempted to force penetration. Complainant testified that she remained silent because she was shocked, embarrassed, and scared, and that she merely tried to "block it out." Defendant left the room, but when he came back he repeated his attempt to have intercourse with her. He finally resorted to digital penetration and masturbation.

In our view, the present case is similar to *Makela*, *supra*, and differs only insofar as in the present case, complainant did not protest defendant's actions. This difference is inconsequential, however, because evidence that the victim resisted is not necessary to support a conviction of criminal sexual conduct. MCL 750.520i; MSA 28.788(9). We conclude that complainant's testimony that defendant removed her clothing, manipulated her onto her back, climbed on top of her, and placed his hands behind her shoulders in an attempt to achieve penetration, as she lay frozen with fear, was sufficient "force or coercion" to satisfy MCL 750.520d(1)(b); MSA 28.788(4)(1)(b) and MCL 750.520e(1)(b); MSA 28.788(5)(1)(b). Moreover, we note that defendant's actions were at least on par with the defendant's buttock-pinching in *Premo*, *supra*. The trial court did not abuse its discretion, therefore, in denying defendant's motion to quash the information.

Defendant also urges this Court to conclude that the prosecutor engaged in selective prosecution because the information charged only him, and not complainant, with criminal sexual conduct. We review a prosecutor's charging decision under an "abuse of power" standard to determine whether the prosecutor acted contrary to the constitution or the law. *People v Barksdale*, 219 Mich App 484, 488; 556 NW2d 521 (1996). Selective enforcement is not, by itself, a constitutional violation. The selection must be based on an unjustifiable standard such as race, religion, or other arbitrary classification. *People v Monroe*, 127 Mich App 817, 819; 339 NW2d 260 (1983). Defendant argues that the prosecutor's decision to charge him, and not complainant, was the result of an arbitrary gender classification.

Defendant's argument is without merit. A person violates MCL 750.520d(1)(b); MSA 28.788(4)(1)(b) and MCL 750.520e(1)(b); MSA 28.788(5)(1)(b) if he or she "engages" in sexual contact or sexual penetration. MCL 750.520d(1); MSA 28.788(4)(1); MCL 750.520e(1); MSA 28.788(5)(1). Defendant in this case presented no evidence that complainant was anything other than a passive recipient of the imposition of defendant's will. We conclude, therefore, that the prosecutor did not commit an abuse of power in declining to also charge complainant with criminal sexual conduct.

Affirmed.

/s/ Harold Hood
/s/ Henry William Saad
/s/ Peter D. O'Connell