STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ERIC STEVEN CARLSON,

Defendant-Appellee.

UNPUBLISHED
March 9, 2001

No. 228566
Ottawa Circuit Court
LC No. 00-023763-AR

Before: Wilder, P.J., and Hood and Cavanagh, JJ.

PER CURIAM.

The prosecutor appeals by leave granted from an order dismissing the charge of third-degree criminal sexual conduct, MCL 750.520d(1)(b); MSA 28.788(4)(1)(b) (force or coercion). We reverse and remand for proceedings consistent with this opinion.

On January 23, 2000, complainant was a sixteen-year-old high school student who had known defendant for approximately two years. They attended the same school. Complainant testified that she did not date defendant, and she classified him as an acquaintance. In early January, defendant picked up complainant in a vehicle, and they went to the Meijer's parking lot. They sat in the car, talked, wrote notes to each other, and "made out and stuff." When asked to describe what she meant by "made out and stuff," complainant stated that defendant "fingered" her and she gave him a "hand job." She clarified that she consented to defendant's insertion of his finger in her vagina.

On January 23, 2000, defendant picked up complainant in the same vehicle and went to the YMCA parking lot. They started to make out again in the front seat. The "same stuff" occurred, and defendant wanted to have "sex" with her, but she said no. Defendant asked why, and she said that she "did not want to." Defendant continued to request sexual intercourse, but she continued to say no. Complainant was wearing jeans and a long sleeve shirt. She could not recall if she was wearing underwear. Her pants were unbuttoned at the time defendant requested sexual intercourse because she had allowed defendant to unbutton her pants in order to engage in consensual digital penetration. Defendant continued to ask for sexual intercourse, and complainant stopped answering him. When asked why she just sat there, complainant stated that she did not want to answer him anymore. Complainant did not attempt to physically restrain defendant by pushing or shoving him away from her. Defendant got on top of complainant while she was still in the front bucket seat and penetrated her for approximately five minutes. During

this time, in response to a question by defendant, complainant told him she did not want to "do it," but defendant did not respond and continued. She did not push him off because she did not know what to do. Defendant did not use a condom during the sexual intercourse. After five minutes, they put their clothes back on, and complainant asked defendant to stop at a gas station for a beverage. They spoke after the sexual act, although complainant did not "want to." Defendant asked if complainant wanted to be taken home, and she responded, "I don't care."

On cross-examination, complainant denied having any communication with defendant after the incident. Complainant was shown a letter that she had written defendant the day after the sexual intercourse. In the letter, complainant addressed defendant by his nickname, "Beeker" and called him "sweetie," although she testified that she referred to everyone as "sweetie." Defendant had asked complainant if she still wanted to go out with him. Complainant responded that she did not want to have a relationship with him and asked if he was mad because she did not want a relationship with him. She also told him that he owed her a letter in response. Complainant personally delivered the letter to defendant.

The same day that the letter was written, complainant testified that she was angry with defendant and spoke to her friends about it. Her friend, Amy Dempsey, told complainant that what occurred was rape. Dempsey told complainant that she had also been raped by defendant. Complainant could not recall exactly when she learned this information, but she learned it *before* she went out with defendant. Complainant was "a little upset" with defendant about "that," but went out with defendant anyway. Complainant worried that she might have gotten pregnant or contracted a sexually transmitted disease from defendant. She later learned that she did have chlamydia. When asked if her answers would be different if complainant knew that defendant did not have a sexually transmitted disease, she responded "I don't think so." When asked to clarify what she meant by that statement, complainant said that no, her answers would not be different. Complainant denied that she reported the incident as a sexual assault because she was embarrassed and angry about the fact that she had contracted a sexually transmitted disease. Complainant believed that defendant had given her chlamydia because her last sexual experience occurred in August or September, and she had not experienced symptoms after that act. However, she admitted that she did not experience symptoms after the sexual intercourse with defendant either. Complainant admitted that she was not qualified to render an opinion on when or from whom she contracted chlamydia.

Deputy Sarah Flick interviewed defendant on February 9, 2000, after complainant reported the incident. Defendant stated that complainant had gone with him to the YMCA and agreed to have sex. Both participants undressed and got into the back seat. In fact, defendant characterized complainant as the aggressor and the one who wanted to engage in sexual relations.

The district court acknowledged that complainant testified that she had said no to sexual intercourse on numerous occasions following a consensual act of digital penetration. However, it concluded that there was insufficient evidence that complainant was overcome through the use of physical force or violence as required by the statute. There was no evidence that defendant threatened or coerced complainant or threatened to retaliate in the future. The district court acknowledged that the requirement of force could be satisfied by surprise, however, that only applied when someone jumped out at another or where there was some sort of concealment

causing surprise. The district court held that saying no three times was insufficient to establish overcoming force. After being advised by the prosecutor and defense attorney that the jury instructions provided that there need not be resistance to establish force, the district court took a break to examine the instructions. The district court then acknowledged that the jury instructions did not require resistance, but nonetheless, stated that it was required to interpret what the Legislature intended by physical force or violence. The district court held that there must be "some evidence" that defendant used physical force to overcome complainant other than getting on top of her, and it was not satisfied that merely saying no was the law because the Legislature intended some evidence of actual physical force. There was no indication that defendant held complainant down or forced her legs apart. The district court also noted complainant had engaged in consensual sexual acts and had written a letter to defendant the next day referring to him as sweetie. The district judge noted that this evidence factored into his decision, but he did not expressly make a finding regarding complainant's credibility. The district court declined to bind defendant over on the charged offense. On appeal, the circuit court affirmed. The circuit court, without citation to authority, held that the prosecutor erroneously focused on the complainant's verbal response of "no" when the focus should have been on the acts and words of defendant to establish force or coercion. The circuit court noted that complainant stopped answering defendant's request for sexual intercourse and stated:

> In this case there is no evidence that by getting on top of her the Complainant was rendered helpless or that Defendant used superior strength to overcome her. Although the Prosecuting Attorney would like the Court to draw that inference it is just as fair an inference that in doing this Defendant did nothing more than assume a normal sexual position. There is no evidence that Defendant forced Complainant's legs apart or placed her body in a position to receive him. This may have happened but there is no evidence of it in the record leaving only speculation for the Court to draw such a conclusion. The inference from the record is just as probable that in addition to no longer answering Defendant's questions about engaging in sex she also cooperated by placing her body in a position to receive Defendant just as she had cooperated in the prior sexual activity.

The circuit court also stated that there was no direct or circumstantial evidence of force and affirmed the failure to bindover.

The prosecutor argues that the district court erred in concluding that there was insufficient evidence of force or coercion to bindover defendant. We agree. Appellate review of a bindover decision is for an abuse of discretion. *People v Justice (After Remand)*, 454 Mich 334, 344; 562 NW2d 652 (1997). However, the disputed issue involves a question of statutory interpretation. Statutory interpretation presents a question of law that is reviewed de novo. *People v Nimeth*, 236 Mich App 616, 620; 601 NW2d 393 (1999). Questions of law and the application of the law to the facts are reviewed de novo. *People v Barrera*, 451 Mich 261, 269, n 7; 547 NW2d 280 (1996). The proofs presented at the preliminary examination must only establish probable cause to believe that a crime was committed and probable cause to believe that the defendant committed the crime. *People v Goecke*, 457 Mich 442, 469; 579 NW2d 868 (1998). Some evidence of each element of the crime must be presented, or evidence from which an element

may be inferred must be presented. *Id*. Where the evidence conflicts or raises a reasonable doubt of the defendant's guilt, it is not the function of the examining magistrate to discharge the accused because that is the assigned task of the jury. *Id*. at 469-470. However, an examining magistrate may weigh the credibility of witnesses. *People v Laws*, 218 Mich App 447, 452; 554 NW2d 586 (1996); *People v Coons*, 158 Mich App 735, 738; 405 NW2d 153 (1987).

MCL 750.520d(1); MSA 28.788(4) provides:

> A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exist:
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> ***
>
> (b) Force or coercion is used to accomplish the sexual penetration. Force or coercion includes but is not limited to any of the circumstances listed in section 520b(1)(f)(*i*) to (*v*).

MCL 750.520b(1)(f); MSA 28.788(2)(f) provides:

> The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration. Force or coercion *includes but is not limited to* any of the following circumstances:
>
> (*i*) When the actor overcomes the victim through the actual application of physical force or physical violence.
>
> (*ii*) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats.
>
> (*iii*) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute this threat. As used in this subdivision, "to retaliate" includes threats of physical punishment, kidnapping, or extortion.
>
> (*iv*) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable.
>
> (*v*) When the actor, through concealment or by the element of surprise, is able to overcome the victim. [Emphasis added.]

In *People v Brown*, 197 Mich App 448, 450; 495 NW2d 812 (1992), this Court held that the element of force or coercion upon the victim was satisfied. In that case, the defendant gave money to a man, who had brought the victim to a home, then had sex with the victim. When the defendant found the victim, she was sitting in a bedroom, alone, naked, and crying. The defendant disregarded the victim's statements that she wanted to go home, did not want to be

there, and did not want to have intercourse. *Id*. The statements, indicating that she did not consent to sexual intercourse, and the defendant's disregard of the victim's statements were sufficient evidence of force or coercion to support the conviction.

Additionally, in *People v Kline*, 197 Mich App 165, 167; 494 NW2d 756 (1992), the sixteen-year-old victim testified that she believed that she was being forced to engage in sexual acts by the defendant, her stepfather. The defendant grabbed the victim's breasts, told her to remove her panties, and told her not to tell her mother what happened. The victim told the defendant to stop, but the defendant failed to comply. One act of penetration occurred in the basement where, arguably, the victim was isolated from help. Accordingly, we held that the evidence was sufficient to establish that the defendant compelled the victim to participate in sexual intercourse by force or coercion. *Id*.

These cases clearly establish that when a victim refuses to engage in sexual activities and the defendant ignores the refusal and penetrates the victim anyway, sufficient evidence exists to satisfy the force or coercion requirement. The district court concluded that the Legislature intended to require evidence of physical force or coercion. However, the Legislature is presumed to be aware of and legislate in harmony with existing laws when enacting new laws. *Walen v Dep't of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993). MCL 750.520d; MSA 28.788(4) was amended in 1996. The Legislature presumably was aware of the judicial decisions interpreting the force or coercion element following a refusal to engage in sexual relations by a victim, but did not amend the statute to nullify the judicial decisions or further define the terms force and coercion. Accordingly, the district court erred in concluding that there was insufficient evidence of force or coercion to bind defendant over. *Brown, supra*; *Kline, supra*. Alternatively, one could argue that the element of force or coercion was satisfied based on the surprise factor. MCL 750.520b(1)(f)(*v*); MSA 28.788(2)(1)(f)(*v*). That is, complainant may have been surprised that an acquaintance, defendant, would disregard her failure to consent and proceed against her wishes. Statutory language should be construed in a reasonable manner, keeping in mind the purpose of the statute. *People v Seeburger*, 225 Mich App 385, 391; 571 NW2d 724 (1997). Accordingly, the district court's conclusion that the surprise factor is limited to "jumping" at a victim or concealment is without merit because it would be contrary to the purpose of the statute and lead to absurd results. *Id*.; *People v Stephan*, 241 Mich App 482, 497; 616 NW2d 188 (2000).

Following de novo review of the application of the facts to the law, *Barrera, supra*, we conclude that the examining magistrate erroneously concluded that the element of force or coercion had not been established. However, the examining magistrate did not premise its decision solely on the statutory interpretation. Rather, without making an express finding regarding the credibility of complainant, the examining magistrate cited to the letter written to defendant following the sexual relations and complainant's conduct. Because it is unclear if the examining magistrate's failure to bind defendant over was also premised on a credibility

assessment of complainant, we remand for clarification of the opinion. *People v Taylor*, 422 Mich 554, 569; 375 NW2d 1 (1985).[1]

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Harold Hood
/s/ Kurtis T. Wilder

[1] The circuit court affirmed the district court's determination that the statutory requirements were not established. However, the circuit court added that there was no evidence that defendant used superior strength to overcome complainant and there was an inference, that was just as probable, that complainant placed her body in a position to receive defendant, indicating her cooperation or consent. The totality of the facts, rather than mere strength, should be considered when determining the sufficiency of the force or coercion requirement. Complainant testified that the parking lot was not crowded. See *People v McGill*, 131 Mich App 465, 472; 346 NW2d 572 (1984). Furthermore, there was no testimony to establish how complainant placed her body. When competent evidence can both support and negate an inference, a factual question arises that must be left to the jury. *People v Northey*, 231 Mich App 568, 575; 591 NW2d 227 (1998). Accordingly, the circuit court rationale does not provide an alternative basis for affirming the failure to bind defendant over.