STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDREW JAY BOYLE, JR.,

Defendant-Appellant.

UNPUBLISHED
June 23, 2009

No. 281047
Lapeer Circuit Court
LC No. 06-008986-FH

Before: Jansen, P.J., and Meter and Fort Hood, JJ.

JANSEN, P.J. (*dissenting*).

Because I do not believe that there was sufficient evidence to establish that defendant committed any criminal assaults in this case, I must respectfully dissent.

A jury convicted defendant of two counts of assault with intent to commit criminal sexual conduct (AWICSC) involving penetration, MCL 750.520g(1). In order to convict a defendant of AWICSC involving penetration, the prosecution must establish (1) that an assault occurred, and (2) that the defendant acted with the intent to commit criminal sexual conduct involving penetration. *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005). The evidence presented at trial must be viewed in a light most favorable to the prosecution to determine whether a rational trier of fact could have concluded that the essential elements were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005).

In Michigan, while the penalty for and constituent elements of aggravated assaults such as AWICSC involving penetration are codified, "the definition of assault is left to the common law." *People v Reeves*, 458 Mich 236, 239; 580 NW2d 433 (1998). A common-law assault is either (1) an attempt to commit a battery, or (2) an unlawful act that places another person in reasonable apprehension of receiving an immediate battery. *People v Johnson*, 407 Mich 196, 210; 284 NW2d 718 (1979); *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995). "The first type is referred to as an 'attempted-battery assault,' whereas the second is referred to as an 'apprehension-type assault.'" *People v Nickens*, 470 Mich 622, 628; 685 NW2d 657 (2004). "As such, an assault can occur in one of two ways." *Id*. "'[P]resent ability" is a necessary component of all criminal assaults." *Reeves*, 458 Mich at 244.

With respect to the "apprehension-type" category of assaults, I have found no evidence that either woman was placed in reasonable apprehension of an immediate battery in this case. It is true that both women testified that they were scared by defendant. However, neither woman

indicated that she feared an imminent battery upon her person. I fully concede that the women were afraid of defendant in general, but a victim's unspecific and generalized fears of a defendant are insufficient to prove that the victim had a reasonable apprehension of an immediate battery. See, e.g., *Commonwealth v Gorassi*, 432 Mass 244, 249; 733 NE2d 106 (2000). Moreover, a victim's apprehension of imminent harm must be objectively reasonable. *Reeves*, 458 Mich at 244. Defendant never actually attempted to force his way into either woman's house. Although the evidence showed that defendant reached for the screen door of one woman's house, there was no evidence that defendant used force or that he made any threats of violence. In both situations, defendant merely remained on the doorstep and continued to knock after he was asked to leave. While this behavior likely constituted criminal trespassing, MCL 750.552(1)(b), I simply cannot conclude that defendant's behavior placed either woman in an objectively reasonable apprehension of an immediate battery. I perceive no "apprehension-type" assaults on the facts of this case.

Nor can I conclude that defendant committed any "attempted-battery" type assaults in this case. As noted previously, defendant did not use force and made no threats of violence. Furthermore, neither woman testified that defendant attempted to inflict any type of injury or physical touching. In fact, I note that because the first woman's screen door remained locked at all times, and because the second woman immediately locked her main door and proceeded to a locked interior bathroom, there was no evidence that defendant possessed the present ability to inflict an immediate battery on either woman. *Reeves*, 458 Mich at 244. Given the complete lack of evidence that defendant actually attempted to inflict a battery or bodily touching, I cannot conclude that defendant committed any "attempted-battery" type assaults.

I would hold that the evidence presented in this case was insufficient as a matter of law to permit a rational trier of fact to conclude beyond a reasonable doubt that defendant committed either of the charged assaults.

I would also hold that defendant's admission that he would have engaged in forcible sex with the women was insufficient to establish that AWICSC involving penetration in fact occurred. The only evidence that defendant acted with the intent to commit criminal sexual conduct involving penetration was defendant's own uncorroborated, extrajudicial statement during the police interview. However, the prosecution is required to prove the corpus delicti of an offense with independent evidence before being allowed to use the defendant's confession. *People v Mumford*, 171 Mich App 514, 517; 430 NW2d 770 (1988). "[T]he corpus delicti of a crime must be established by evidence independent of an accused's confession." *People v Rockwell*, 188 Mich App 405, 407; 470 NW2d 673 (1991).

It is true that the corpus delicti rule "is limited . . . to admissions which are confessions, and not to admissions of fact which do not amount to confessions of guilt." *Id.*; see also *People v Porter*, 269 Mich 284, 289-290; 257 NW 705 (1934). Moreover, "[i]f . . . the fact admitted does not of itself show guilt, but needs proof of other facts, which are not admitted by the accused, in order to show guilt, it is not a confession, but an admission . . . ." *Id.* at 290. However, I conclude that defendant's admission to the police in this case was a confession of guilt and was not dependent on other unadmitted facts. Among other things, I am persuaded by our Supreme Court's decision in *People v Lee*, 231 Mich 607; 204 NW 742 (1925), in which the defendant was convicted of arson, solely on the basis of a note that he had written, which tended to suggest that he had set the fire in question. The note did not specifically admit to the elements

of the crime of arson, and was cryptic and unclear with respect to its exact meaning. Nonetheless, our Supreme Court observed that the note "was in the nature of a confession" and held that if the note had been eliminated from evidence, there would not have been sufficient evidence to establish that the fire was set by anyone or that it was anything other than an accident. *Id*. at 613. Because the corpus delicti of arson had not been established, the *Lee* Court reversed the defendant's conviction. *Id*.

In this case, defendant's statement to the police was, in effect, a complete confession of guilt. As explained above, there was no independent evidence that defendant had acted with the intent to commit criminal sexual conduct involving penetration. The only evidence leading to defendant's convictions of AWICSC involving penetration was his own uncorroborated, extrajudicial statement to the police. I conclude that this statement to the police "necessarily amount[ed] to a confession of guilt," and was therefore inadmissible under the corpus delicti rule to prove that the crimes occurred. *Porter*, 269 Mich at 290; *Lee*, 231 Mich at 613; see also *People v Lane*, 49 Mich 340, 341; 13 NW 622 (1882).

Of course, it is true that once a criminal assault is established by sufficient independent evidence, "[a] defendant's confession then may be used"—without violating the corpus delicti rule—"to elevate the crime to one of a higher degree or to establish aggravating circumstances." *People v Cotton*, 191 Mich App 377, 389; 478 NW2d 681 (1991); see also *People v Ish*, 252 Mich App 115, 116-117; 652 NW2d 257 (2002). Thus, in *Cotton*, once sufficient independent evidence had been presented to show that the defendant had committed a criminal assault, the prosecution was entitled to introduce the defendant's uncorroborated confession that he had intended to rob the victim using a gun to elevate the offense to assault with intent to rob while armed, MCL 750.89. *Cotton*, 191 Mich App at 392. In contrast, there was insufficient evidence presented in the instant case to establish that any criminal assaults occurred. Therefore, I conclude that the prosecution was not entitled to introduce defendant's uncorroborated confession to elevate the charged offenses to AWICSC involving penetration. See *id*.

In sum, I conclude that the prosecution failed to prove that defendant committed either of the charged assaults in this case. Consequently, I do not believe that the prosecution was entitled to elevate the charged offenses to AWICSC involving penetration by introducing defendant's uncorroborated, extrajudicial confession that he had intended to engage in forcible sex with the women. I would reverse defendant's convictions and sentences.[1]

/s/ Kathleen Jansen

[1] Given my position on this issue, I would also reverse the order requiring defendant to reimburse the court for the costs of his appointed counsel.