

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KWAME R. LOWERY,

Defendant-Appellant.

UNPUBLISHED

September 16, 2010

No. 292710

Kalamazoo Circuit Court

LC No. 2008-001717-FH

Before: OWENS, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of fourth-degree criminal sexual conduct (CSC), MCL 750.520e(1)(b), and sentenced to 184 days in jail. Defendant appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On appeal, defendant argues there was insufficient evidence to support his conviction. We disagree. We review de novo claims of insufficient evidence. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). The evidence is viewed in the light most favorable to the prosecution to determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Circumstantial evidence and reasonable inferences arising from the evidence may be sufficient to prove the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). The trier of fact, not this Court, determines what inferences may be drawn from the evidence and the weight to be given to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Fourth-degree CSC is governed by MCL 750.520e, which provides, in pertinent part:

(1) A person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and if any of the following circumstances exist:

(b) Force or coercion is used to accomplish the sexual contact.

“Sexual contact” is defined in MCL 750.520a(q) as including:

[T]he intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose[.]

“Intimate parts” is defined by MCL 750.520a(e) as the “primary genital area, groin, inner thigh, buttock, or breast of a human being.” Regarding “force or coercion,” MCL 750.520e(1)(b) provides, in relevant part:

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.

(v) When the actor achieves the sexual contact through concealment or by the element of surprise.

Defendant first argues that there was insufficient evidence to prove sexual contact. The facts demonstrate that defendant underwent a voluntary psychiatric evaluation conducted by a psychiatrist and the victim, who was a caseworker. During the evaluation, defendant put his hands in his pockets, moved them up and down, and back and forth. He also placed his hands under the table and rocked back and forth. This led the psychiatrist and the victim to believe defendant was masturbating. After the evaluation, defendant accompanied the victim to a nearby pharmacy to fill his prescription. During the brief walk, defendant made numerous sexual comments. While the victim was at the pharmacy window filling the prescription, defendant came up behind her and pressed what she perceived to be an erection against her back. Defendant then bent over her and pressed his erection below her buttock. On these facts, we conclude there was sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that defendant intentionally touched the victim's intimate parts, or the clothing covering that area, for a sexual purpose. *Johnson*, 460 Mich at 723. Although defendant contends that the conduct preceding the incident at the pharmacy is irrelevant, the jury is entitled to hear the complete story surrounding the matter in issue. *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996).

Next, defendant argues that there was insufficient evidence to prove force or coercion. The force or coercion requirement for purposes of fourth-degree criminal sexual conduct may be satisfied when the defendant achieves sexual contact by the element of surprise. MCL 750.520e(1)(b)(v). Review of the record reveals that the victim testified that she was startled and shocked when defendant pressed his body into her back. The prosecutor expressly asked the victim if she was surprised by defendant's actions, and she responded affirmatively. In his testimony, defendant denied any contact with the victim. The jury resolved this credibility dispute in favor of the victim. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). In light of the prosecutor's theory of surprise to support the force or coercion element of the

crime, we conclude this was sufficient evidence for a reasonable trier of fact to find beyond a reasonable doubt that defendant used force to accomplish the sexual contact.

Affirmed.

/s/ Donald S. Owens
/s/ William C. Whitbeck
/s/ Karen M. Fort Hood