STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN RUSSELL FALCONE,

Defendant-Appellant.

UNPUBLISHED
July 11, 1997

No. 186364
Berrien Circuit Court
LC No. 94-001048-FH

Before: Hoekstra, P.J., Murphy and Smolenski, JJ.

PER CURIAM.

Defendant was charged with fourth-degree criminal sexual conduct, MCL 750.520e(1)(b); MSA 28.788(5)(1)(b) (sexual contact accomplished by force or coercion), and convicted by a jury of attempted fourth-degree criminal sexual conduct, MCL 750.92; MSA 28.287. Defendant was sentenced to two years' probation, with the first 120 days to be served in jail. Defendant appeals as of right. We affirm.

Defendant first argues that the evidence was insufficient to support a conviction for attempted fourth-degree criminal sexual conduct. We disagree.

At trial, the complainant testified that she visited a next-door neighbor's trailer pursuant to the neighbor's invitation for the purpose of meeting defendant. While engaging in conversation with defendant, the complainant became increasingly uncomfortable with certain personal questions asked of her by defendant. The complainant left and returned to her trailer by herself. A few minutes later, defendant and the neighbor unexpectedly entered the complainant's trailer, with defendant stating that they were there to look at the trailer (the complainant and defendant had earlier discussed a sale of the trailer). After the complainant showed defendant the trailer, the neighbor left but defendant remained. The complainant and defendant eventually ended up in the complainant's bedroom sitting on the complainant's bed and conversing. Defendant attempted to "scoot" toward the victim and touched her face.

The complainant left the bedroom when the telephone rang. The complainant conversed on the telephone with the neighbor's wife for a while until defendant told the complainant in vulgar language to

end the call. Defendant's attitude changed and he appeared angry that the complainant had been talking on the telephone. The complainant began getting scared and anxious. Defendant then suggested that the complainant would be more comfortable if she removed her jeans. Defendant became obnoxious, stating that he would like to see various intimate parts of her body, including her "crotch." The complainant voluntarily unbuttoned her jeans because she was scared. Defendant pulled off the complainant's jeans, grabbed her buttocks and then sat her on the couch. Defendant pulled his pants down and began to masturbate in front of the complainant. Defendant pulled his pants up, laid on top of the complainant on the couch, grabbed her breasts, lifted up her shirt and put his mouth on her breasts. Defendant and the complainant sat up and defendant touched the complainant's upper inner thigh. Defendant then left the complainant's trailer. During defendant's course of conduct, the complainant told defendant that she did not want the sexual contact to occur.

Viewing the complainant's testimony in a light most favorable to the prosecution, we conclude that sufficient evidence was presented that the crime of fourth-degree criminal sexual conduct was completed. *People v McCoy*, ___ Mich App ___; ___ NW2d ___ (Docket No. 191854, issued 5/16/97), slip op p 1; *People v Premo*, 213 Mich App 406, 408; 540 NW2d 715 (1995). A jury may convict a defendant of an attempt even where the evidence shows a completed crime. *People v Jones*, 443 Mich 88, 103-104; 504 NW2d 158 (1993).

Next, defendant takes issue with the trial court's decision to give the prosecutor's requested instruction on attempted fourth-degree criminal sexual conduct. In deciding to the give this instruction over defendant's objection, the trial court reasoned as follows:

> I believe it was proper. The jury could interpret some of the actions of the defendant as an attempt but not—not a completed act, and therefore, if there was some question in their minds, again, I felt it was reasonable within—and it should be left to the-to the discretion of the jury to at least consider that. Perhaps your argument is right, but at least I felt there was some evidence to indicate that it could be an attempt rather than the completed act.

Defendant argues that the instruction was not supported by the evidence because the evidence indicates only that the completed offense of fourth-degree criminal sexual conduct either was or was not committed.

The prosecutor, as well as the defendant, may request an instruction on a lesser-included offense. *People v Torres (On Remand)*, ___ Mich App ___; ___ NW2d ___ (Docket No. 197735, issued 3/25/97). The offense of attempted fourth-degree criminal sexual conduct is a cognate lesser-included misdemeanor offense of the substantive misdemeanor offense of fourth-degree criminal sexual conduct. MCL 750.520e(1)(b); MSA 28.788(5)(1)(b); MCL 750.92(3); MSA 28.287(3); *Jones*, *supra* at 103, n 21. With respect to jury instructions as a whole, as well as instructions on cognate lesser-included offenses and misdemeanor offenses specifically, the general rule is that the requested instruction need not be given if not supported by the evidence.[1] *People v Mills*, 450 Mich 61, 81; 537 NW2d 909 (1995); *People v Hendricks*, 446 Mich 435, 445, n 16; 521 NW2d 546 (1994); *People*

v Flowers, ___ Mich App ___; ___ NW2d ___ (Docket No. 175047, issued 4/15/97), slip op p 1. With respect to the offense of attempt, our Supreme Court has stated as follows:

> [A] judge . . . is obliged to instruct on attempt when the defense is that there was only an attempt and there is evidence that the completed offense may not have been committed *or the defense is that the jury should not credit evidence tending to show that it was completed.* [*People v Adams*, 416 Mich 53, 60; 330 NW2d 634 (1982) (emphasis added.]

In this case, the prosecution's theory of the case, as evidenced by the complainant's testimony, was that defendant had engaged in progressive touching culminating in sexual contact[2] of the complainant. The complainant's testimony was corroborated, in certain respects, by the testimony of the remaining prosecution witnesses, i.e., the neighbor, the neighbor's wife and the police officer who took the complainant's complaint.

Defendant's theory of the case was that he had not committed fourth-degree criminal sexual conduct and that the complainant was lying. As part of this defense, defense counsel sought to discredit various aspects of the complainant's testimony, including whether sexual contact occurred. For instance, defense counsel elicited evidence that the complainant had known that defendant and the neighbor were coming over to her trailer, and that they accompanied her to her trailer. Defense counsel elicited evidence that the complainant had previously told the police officer that she had taken her jeans completely off by herself and that defendant had not pulled down his pants but instead had rubbed himself over his pants. Defendant also elicited evidence that the complainant had not told the police officer the following information: (1) that defendant had lowered his pants and masturbated in front of her; (2) that defendant had requested to see her "crotch," and; (3) that defendant had "licked" her breast.[3]

We conclude that the attack on the victim's credibility, including the evidence of her apparently contradictory or inconsistent statements concerning whether defendant had committed at least one act of sexual contact, constituted evidence supporting the prosecution's request for an instruction on attempted fourth-degree criminal sexual conduct. We conclude that the trial court did not err in giving the instruction on attempted fourth-degree criminal sexual conduct.

Finally, defendant has effectively abandoned his remaining issues on appeal by failing to refer this Court to any authority supporting his positions. *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995).

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski

[1] In addition, where the charged crime is a felony, the misdemeanor for which an instruction is requested must be supported by a rational view of the evidence. *Hendricks, supra*. However, in this case, the charged offense was also a misdemeanor.

[2] See MCL 750.520a(k); MSA 28.788(1)(k) (defining sexual contact).

[3] We note that the victim also explained that she had not told the officer everything because she was scared, ashamed, and not comfortable talking to a male police officer.