

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UNPUBLISHED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.

CAVANAGH, J. (*dissenting*).

I respectfully dissent and would affirm the decision of the circuit court which held that there was insufficient evidence of force or coercion to bind defendant over.

Whether sexual penetration was accomplished by force or coercion is determined in light of all of the circumstances, including but not limited to the use of or threat of physical force or violence. *People v Crippen*, 242 Mich App 278, 282-283; 617 NW2d 760 (2000). The majority has compared the instant facts to those found in *People v Brown*, 197 Mich App 448; 495 NW2d 812 (1992). However, in *Brown* the defendant gave money to a man who physically brought the victim to the defendant's house for the purpose of having sex with the defendant, the woman was naked and crying in the bedroom, she stated that she did not want to be there, she stated that she did not want to have sex with the defendant, she continued to cry during and after the assault, and she requested to go home. *Id.* at 450, 452.

The majority also compares the instant case to that of *People v Kline*, 197 Mich App 165; 494 NW2d 756 (1992). However, in *Kline* the defendant was the victim's stepfather, the victim believed that she was being forced to remove her undergarments, the defendant grabbed the victim's breasts at the same time he told her to remove her undergarments and not to tell her mother, and one instance of penetration occurred in an isolated area of the house. *Id.* at 167.

I disagree that this case is similar to *Brown* and *Kline*. I also disagree that the totality of the circumstances establishes sufficient evidence of sexual penetration accomplished by force or coercion. There was no evidence that the victim was intimidated, helpless, afraid, crying, in a

vulnerable state, position, or condition, or being physically assaulted in any other way. Although there is no specific set of circumstances that establishes the force or coercion requirement, precedent requires that the totality of the circumstances lead to the conclusion that some form of force or coercion existed. In this case, I would hold that there was insufficient evidence of force or coercion, consistent with the intent of the statute, to bind defendant over.

/s/ Mark J. Cavanagh