STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED June 22, 2004
v	No. 244478 Wayne Circuit Court
KIMBERLY STARKS, Defendant-Appellee.	LC No. 01-500116

Before: Markey, P.J., and Wilder and Meter, JJ.

PER CURIAM.

This matter comes before us on remand from the Supreme Court to consider the prosecutor's appeal as on leave granted. *People v Starks*, 467 Mich 889; 653 NW2d 406 (2002). The prosecutor appeals a district court magistrate's order to dismiss a charge of assault with intent to commit criminal sexual conduct involving penetration, MCL 750.520g(1). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was an employee of the Pause program at Herman Kiefer Hospital, a detention facility for delinquent boys. The evidence adduced at the preliminary examination showed that defendant was in the laundry room with two boys who were residents in the program. She sent one boy out of the room and closed the door. Once alone with the other boy, defendant offered to perform fellatio on him. When he did not respond, defendant told him to pull down his pants. He unbuckled his belt and unfastened his pants. Within moments, another employee opened the closed door and found defendant and Jones in the compromising situation. The district court dismissed the charge, finding that the proofs were insufficient to create probable cause to believe that defendant had assaulted the boy. The circuit court affirmed.

This Court's review of the circuit court's analysis of the bindover process is de novo. We must redetermine if the magistrate abused his discretion by not finding probable cause to believe that the defendant committed the offenses charged. This Court decides whether the evidence presented to the magistrate was sufficient to establish as a matter of law that the defendant probably committed the offense charged. There must be evidence of each element of the crime charged or evidence from which the elements can be inferred, although the evidence need not establish guilt beyond a reasonable doubt. *People v McBride*, 204 Mich App 678, 681; 516 NW2d 148 (1994). If the evidence conflicts or otherwise creates a reasonable doubt

concerning defendant's guilt, the defendant should be bound over for resolution of the issue by the trier of fact. *People v Selwa,* 214 Mich App 451, 457; 543 NW2d 321 (1995).

MCL 750.520g(1) makes it a felony to commit an assault with intent to commit criminal sexual conduct involving penetration. The elements of the offense are (1) the defendant assaulted the victim, (2) the defendant intended to commit an act involving a sexually improper intent or purpose, (3) the intended sexual act constituted penetration as defined by statute, and (4) the existence of an aggravating circumstance. *People v Snell,* 118 Mich App 750, 754-755; 325 NW2d 563 (1982). Proof that defendant touched the victim or that the intended sexual act was started or completed is not required. *Id*., at 755.

Elements two, three, and four are not in dispute. Defendant offered to perform fellatio, which is an act constituting sexual penetration, MCL 750.520a(o), and the penetration, if consummated, would constitute criminal sexual conduct because the boy was under the age of sixteen. MCL 750d(1)(a). The only issue is whether defendant committed an assault.

"At early common law, 'a criminal assault was an attempt to commit a battery and that only.'" *People v Jones,* 443 Mich 88, 91; 504 NW2d 158 (1993), quoting Perkins, *An analysis of assault and attempts to assault*, 47 Minn L R 71, 72 (1962). The definition has since expanded to include not only an attempt to commit a battery but also an unlawful act which places another person in reasonable apprehension of receiving an immediate battery. *People v Joseype Johnson*, 407 Mich 196, 210; 284 NW2d 718 (1979). Both forms of assault have been described accurately in *People v Carlson,* 160 Mich 426, 429; 125 NW 361 (1910), cited with approval in *People v Worrell,* 417 Mich 617, 622; 340 NW2d 612 (1983):

> There are numerous definitions of what constitutes an assault given by courts and text-writers. We cite two, which, taken together, may be said to include all necessary elements:
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> "An assault is any attempt or offer, with force or violence, to do a corporal hurt to another, whether from malice or wantonness, with such circumstances as denote, at the time, an intention to do it, coupled with a present ability to carry such intention into effect." 3 Cyc. p 1020.
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> "An assault is any unlawful physical force, partly or fully put into motion, creating reasonable apprehension of immediate injury to a human being." 2 Bishop on Criminal Law (7th Ed), § 23.

Also relevant is whether the victim of the offense consented to the contact as an assault is an attempt or offer to commit a battery and a battery is "an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected to the person," *People v Reeves,* 458 Mich 236, 240 n 4; 580 NW2d 433 (1998). As noted by the *Worrell* Court, "[i]f the other person is a willing partner to the physical act, there can be no assault because there is no reasonable apprehension of immediate injury," and "[t]here can be no assault without proof of force or threat thereof." *Worrell, supra* at 622.

The evidence showed that after arranging to be alone with a thirteen-year-old boy, defendant offered to perform fellatio on him and told him to pull down his pants, which he

started to do. Defendant did not expressly threaten to harm the boy; there is no evidence that she made any threatening gestures; the boy gave no indication that he was apprehensive of being injured or harmed in any way or that he was complying with defendant's plan against his will. Although this evidence may have established probable cause to believe defendant attempted[1] to commit criminal sexual conduct, MCL 750.92; *Worrell, supra,* that was not the charge the prosecutor sought to bind over to circuit court for trial. The evidence presented at the preliminary examination failed to establish probable cause to believe that defendant committed an assault. Therefore, the district court did not err in dismissing that charge, and the circuit court properly affirmed that ruling.

But despite our decision here we urge the Supreme Court to reexamine and overrule *Worrell.* We believe that Justice Boyle's dissent in *Worrell*, in which Chief Justice Williams joined, is the better analysis.

The facts in *Worrell* are analogous to those here. Indeed, *Worrell* states that a conviction of assault with intent to commit criminal sexual conduct involving penetration is inappropriate if, as here, there was no evidence introduced that the complainant was threatened or placed in apprehension of injury or harm or was complying with the defendant's directives unwillingly. See, generally, *id.* at 622-623.

But, the *Worrell* majority adopted the *minority* view that a person who attempts sexual penetration with a child under the age of consent may not be found guilty of assault if the child consented to the act. *Id.* at 627 (Boyle, J. dissenting). As Justice Boyle noted in her dissent, both the majority view and earlier Michigan law did not require that the child did not consent in order to convict. *Id.* at 626-628.

Justice Boyle forcefully stated that the advent in 1975 of new statutory provisions regarding sex crimes only continued the policy of prior statutory provisions establishing conclusive presumptions with regard to certain underage sex offenses. *Id.* at 628, 631. She stated:

> From this statutory scheme we find that, while the Legislature intended to give persons between 13 and 16 some sexual freedom, it intended to continue the absolute prohibition of sexual penetration which existed under prior law. . . . Thus, we hold that the Legislature did not intend to change the prior law concerning assault with intent to rape a consenting underage person. [*Id* at 632.]

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[1] An attempt "consists of (1) an attempt to commit an offense prohibited by law, and (2) any act towards the commission of the intended offense." *People v Thousand,* 465 Mich 149, 164; 631 NW2d 694 (2001). The defendant must specifically intend to commit the crime attempted and must take steps toward its commission that go beyond mere preparation. *Id.* "Mere preparation is distinguished from an attempt in that the former consists of making arrangements or taking steps necessary for the commission of the crime, while the attempt itself consists of some direct movement toward commission of the crime that would lead immediately to the completion of the crime." *People v Jones,* 443 Mich 88, 100; 504 NW2d 158 (1993).

Justice Boyle then concluded:

> Thus, we hold that in the case of a victim under 16 years of age and over 13 years of age the elements of assault with intent to commit third-degree criminal sexual conduct may be made out by evidence sufficient to permit the factfinder to conclude that the defendant had the specific intent to commit sexual penetration, and that a showing of force or coercion is not required in the case of an underage victim. If force or coercion were necessary elements of the offense in the case of an underage victim, then the young victim would have no greater protection from sexual assaults than an adult victim. We believe this result to be inconsistent with the criminal sexual conduct act's provisions which provide greater protection from sexual conduct for persons under 16 years of age. [*Id* at 633.]

We agree that Justice Boyle's dissent accurately restates the longstanding policy of this state that the complainant's consent, or lack of consent, is not germane in a prosecution for assault with intent to commit criminal sexual conduct involving penetration with a child under the age of sixteen. Thus, we respectfully urge our Supreme Court to revisit the issue and overrule *Worrell.*

We affirm.

/s/ Jane E. Markey
/s/ Kurtis T. Wilder
/s/ Patrick M. Meter