STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 17, 2006
v	No. 252561 Van Buren Circuit Court
MICHAEL FRANCIS WELSH, Defendant-Appellant.	LC No. 03-013348-FH ON REMAND

Before: Hoekstra, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

This case is before us on remand from our Supreme Court "for reconsideration of the issue whether defendant's third-degree criminal sexual conduct convictions are supported by sufficient evidence in light of *People v Carlson*, 466 Mich 130, 140 (2002), and the applicable statutory text that requires 'force or coercion.' MCL 750.520d(1)(b) and MCL 750.520f(1)(i)-(v)[1]." 474 Mich ___ (2005). We again affirm.

Defendant argues, in regard to his two convictions of third-degree criminal sexual conduct, MCL 750.520d(1)(b), the prosecution failed to present any evidence that defendant used force or coercion. We disagree. This Court views the evidence in a 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 Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). This review is undertaken de novo. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001).

MCL 750.520d(1)(b) provides that "A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person . . . and force or coercion is used to accomplish the sexual penetration. Force or coercion includes but is not limited to any of the circumstances listed in section 520b(1)(f)(i) to (v)." Pursuant to MCL 750.520b(1)(f), force or coercion includes, but is not limited to, any of the following circumstances:

[1] It appears that the Court meant to cite MCL 750.520b(1)(f)(i) to (v) because that is the statute cited in MCL 750.520d(1)(b). Further, MCL 750.520f(1) does not contain any subdivisions.

(i) When the actor overcomes the victim through the actual application of physical force or physical violence.

(ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats.

(iii) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute this threat. As used in this subdivision, "to retaliate" includes threats of physical punishment, kidnapping, or extortion.

(iv) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable.

(v) When the actor, through concealment or by the element of surprise, is able to overcome the victim.

In *People v Carlson*, 466 Mich 130, 140; 644 NW2d 704 (2002), our Supreme Court held:

> To be sure, the "force" contemplated in MCL 750.520d(1)(b) does not mean "force" as a matter of mere physics, i.e., the physical interaction that would be inherent in an act of sexual penetration, nor, as we have observed, does it follow that the force must be so great as to overcome the complainant. It must be force to allow the accomplishment of sexual penetration when absent that force the penetration would not have occurred. In other words, the requisite "force" for a violation of MCL 750.520d(1)(b) does not encompass nonviolent physical interaction in a mechanical sense that is merely incidental to an act of sexual penetration. Rather, the prohibited "force" encompasses the use of force against a victim to either induce the victim to submit to sexual penetration or to seize control of the victim in a manner to facilitate the accomplishment of sexual penetration without regard to the victim's wishes.

In other words, force cannot be found simply because sexual penetration occurred despite the fact that some amount of force, generally speaking, is inherent in that act. On the other hand, the force need not be so great as to overcome the victim. The force must either "induce the victim to submit to sexual penetration" or allow the defendant to "seize control of the victim in a manner to facilitate the accomplishment of sexual penetration without regard to the victim's wishes." *Id.* Nothing in *Carlson* indicates that the force used must be physically violent. Indeed, this Court has previously held that force or coercion is not limited to physical violence but is instead determined in light of all the circumstances. *People v Premo*, 213 Mich App 406, 410; 540 NW2d 715 (1995); *People v Brown*, 197 Mich App 448, 450; 495 NW2d 812 (1992).

With regard to the August 2002 incident, the victim and his brother were staying overnight at defendant's house. While the victim was sleeping on his stomach, he was awakened with defendant on top of him. Defendant pulled off the victim's clothes and anally penetrated

him. The victim testified that he tried to move away but was "kind of pinned down." This, at first blush, appears similar to the facts in *Carlson,* in which two teenagers kissed and masturbated in a car precipitating the defendant's suggestion that they have sexual intercourse. *Carlson, supra* at 132. Even after the victim indicated that she did not want to, the defendant got on top of her and achieved sexual penetration. *Id.* The victim, however, testified that she did not resist. *Id.* When asked how the defendant "got it in," she stated, "'He got on top of me and put it in.'" *Id.* at 132-133. In *Carlson,* there was no evidence of any force by which the defendant came to achieve penetration. This case is distinguishable from *Carlson*. In this case, defendant got on top of the victim's back while he was asleep on his stomach, tore off his clothes, and penetrated his anus. The victim testified, "I would try to move away. I was kind of pinned down so I couldn't really move." When asked "Did you attempt to get away from [defendant] when he was doing this to you?", the victim responded "I tried to." On the basis of this evidence, we distinguish this case from *Carlson,* and conclude that a rational trier of fact could have found sufficient evidence that defendant used force to achieve anal penetration of the victim.

With regard to the March 2001 incident, we conclude that there was sufficient evidence of coercion under MCL 750.520d(1)(b). We note that MCL 750.520d(1)(b) uses the disjunctive term "or" indicating that either force or coercion satisfies the statute. Further, even if defendant's conduct did not fall within the purview of the examples enumerated in MCL 750.520b(1)(f)(i) to (v), "the Legislature did not limit the definition of force or coercion to the enumerated examples in the statute." *Premo, supra* at 410. In *Premo,* the defendant was convicted of fourth-degree criminal sexual conduct (force or coercion) for pinching three students' buttocks. In affirming the conviction on the basis of coercion, this Court held that coercion

> "may be actual, direct, or positive, as where physical force is used to compel act against one's will, or implied, legal or constructive, as where one party is constrained by subjugation to other to do what his free will would refuse." [*Id.* at 410-411, quoting Blacks Law Dictionary (5th ed), 234.]

This Court held:

> [D]efendant's actions constituted implied, legal, or constructive coercion because, as a teacher, defendant was in a position of authority over the student victims and the incidents occurred on school property. Defendant's conduct was unprofessional, irresponsible, and an abuse of his authority as a teacher. Accordingly, we conclude that defendant's conduct in this case is sufficient to constitute coercion . . . .

Similarly, in this case, the victim was 16 years old at the time of the incident. Defendant, an adult, was in a position of authority. Defendant himself testified, "I considered myself to be an uncle" to the victim; he was, in fact, the victim's cousin's uncle. Defendant testified that he knew the victim since he was a "little kid[]." The victim testified that he trusted defendant. The victim went to defendant's house "Just about every weekend" and did "a lot of work there" for which defendant paid him. The victim and his brother occasionally stayed overnight at defendant's house. Sometimes, when the boys were at his house, defendant provided them with alcohol. The victim's father testified that defendant was considered a member of the family and, after learning of the incidents, he felt that defendant had abused his family's sense of trust. The

victim testified that the charged offense occurred one evening at defendant's house the day after the victim's birthday when defendant had taken a group of boys to a Kid Rock concert and furnished them with alcohol. The victim testified that, while he was at defendant's house, defendant put his mouth on the victim's penis. The victim did not say anything to defendant at the time because he was "Just too embarrassed." As in *Premo*, defendant was in a position of authority and the incident occurred at defendant's home. Defendant's alleged conduct was irresponsible and an abuse of his position of authority and trust. Therefore, we conclude that there was sufficient evidence to support a finding that defendant achieved oral sex with the victim through coercion.

In arguing that there was insufficient evidence to support his convictions, defendant points to other evidence that contradicts the victim's testimony. However, we do not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992). Viewing the evidence in a light most favorable to the prosecution, we conclude that there was sufficient evidence to allow a rational trier of fact to find that, for both charged offenses, force or coercion was proved beyond a reasonable doubt.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly