STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 4, 2011
v	No. 295404 Macomb Circuit Court
RITESH MANOJKUMAR VAIDYA, Defendant-Appellant.	LC No. 2009-001475-FH

Before: SHAPIRO, P.J., and SAAD and K.F. KELLY, JJ.

PER CURIAM.

Defendant appeals by right his jury trial conviction for fourth-degree criminal sexual conduct, MCL 750.520e(1)(b), force or coercion. Defendant was sentenced to five years' probation with the first thirty days in jail. We find that the trial court did not err in its jury instructions, and that the evidence was sufficient to support the conviction. While the trial court erred in its decision concerning defendant's cross-examination of the complainant, this evidence was harmless under the circumstances. We thus affirm.

Defendant is a licensed physical therapist. The complainant testified that she was working for defendant as his office manager on September 30, 2008, when the alleged assault occurred. She maintained that the two were alone at defendant's office located in his home, talking about a "small error" she had made in some paperwork, when defendant jokingly stated that she "deserved some form of punishment." The two also began speaking of defendant's occupation. Defendant then began to give the complainant a neck massage. According to the complainant, she started to feel awkward, and brought up her mother's neck and upper back pain. She asked defendant if a massage would help, and defendant replied that he would show her. After ruling out other areas of the home, defendant decided to perform the massage on his bed. As the complainant lay on the bed, defendant began to massage her upper neck and back under her shirt. While defendant straddled her legs, he continued the massage of the complainant's back, eventually unhooked her bra, and massaged the sides of her chest. He began to massage the complainant's lower back. Stating that he did not want to get lotion on her pants, defendant then pulled them down to expose the complainant's underwear. He ignored her repeated instructions not to do so, and her attempts to rearrange her clothing, and told her to "calm down." The complainant testified that defendant then began to massage the complainant's buttocks and inner thighs while she fidgeted, uncomfortable and scared. She also testified that she made it clear to defendant that the touching was unwanted and inappropriate. However, defendant

continued massaging her legs until he went all the way up her legs and touched her vagina. The complainant testified that, at that point, she "freaked out," moved to get defendant off of her and stated, "This is done." Defendant then lay next to her on the bed. She told him that his behavior was inappropriate, and he then leaned in and kissed her. She told him not to do so. She continued to tell him that he was acting inappropriately, and he tried to kiss her again. Eventually, defendant left the room and the complainant rearranged her clothes. She testified that she remained at the home in the office until defendant's wife arrived, because she was expecting her paycheck from her previous week's work. She left at 5:30 p.m. and subsequently reported the incident to the police.

On appeal, defendant first maintains that the trial court erred when it provided a jury instruction on force or coercion that included the example included in MCL 750.520e(1)(b)(iv), and argues that the instruction was not supported by the evidence. "Claims of instructional error are generally reviewed de novo by this Court, but the trial court's determination that a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion." *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). An abuse of discretion occurs when the trial court chooses an outcome falling outside the "principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

This Court reviews jury instructions as a whole, rather than piecemeal. *People v Henry*, 239 Mich App 140, 151; 607 NW2d 767 (1999). Although an instruction may be somewhat imperfect, "there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Id*. "Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses and theories that are supported by the evidence." *People v Crawford*, 232 Mich App 608, 619; 591 NW2d 669 (1998).

MCL 750.520e 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. 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.
>
> (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 that threat.
>
> (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 that threat. As used in this subparagraph, "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 achieves the sexual contact through concealment or by the element of surprise.

Here, the trial court provided the following instruction:

> The Defendant is charged with the crime of fourth degree criminal sexual conduct. To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> First, that the Defendant intentionally touched [the complainant's] genital area, groin, inner thigh, buttock or breast or the clothing covering them.
>
> Second, that this touching was done for sexual purposes or could reasonably be construed as having been done for sexual purposes.
>
> Third, that the Defendant used force or coercion to commit the sexual act. Force or coercion means that the Defendant either used physical force or did something to make [the complainant] reasonably afraid of present or future damage – danger.
>
> It is enough force if the Defendant overcame [the complainant] by physical force. It is enough force if the Defendant was giving [the complainant] a medical exam or treatment and did so in a way or for a reason that is not recognized as medically acceptable.
>
> You must decide whether the Defendant did the exam or treatment as an excuse for sexual purposes and in a way that is not recognized as medically acceptable.
>
> It is enough force if the Defendant by the element of surprise was able to overcome or achieve sexual contact with [the complainant].
>
> ***
>
> To prove this charge the prosecutor does not have to show that [the complainant] resisted the defendant.

We conclude that, under the facts presented by the prosecution, the trial court did not abuse its discretion when presenting the jury with the "medical treatment or examination" instruction above.

First, contrary to defendant's assertion on appeal, the jury was not instructed, even implicitly, that it must find that the touching occurred during the course of a medical treatment or examination. The jury instruction, when read as a whole, is designed to present possible alternative forms of force or coercion that could fit the complainant's testimony were the jury to believe it. The phrase "[y]ou must decided whether the Defendant did the exam or treatment" in the instruction is a limiting instruction on the phrase before it. It is in effect a requirement that, if the jury found that the touching occurred during a medical exam or treatment, it must also find that the touching occurred for a sexual purpose and in a way not recognized as medically acceptable, in order to find defendant guilty. It was not an instruction that the jury was required to find that the touching occurred during a medical exam or treatment. When coupled with the fact that the trial court also provided other examples that could be found applicable, such as physical force or surprise, and the fact that defendant did not request either a special verdict form or a unanimity instruction, defendant has not shown that form of the trial court's instructions were improper.

As to the question of whether the evidence presented supported the giving of this instruction, we find that it did. Defendant objects on the ground that the complainant was not defendant's patient. However, MCL 750.520e(1)(b)(iv) does not use the term patient, but "victim" to describe the subject of the improper touching. This Court has noted in the past that the purpose of this portion of the statute is to "[preclude] a medical professional from abusing the setting or status of the medical relationship by using it as a pretext to have sexual contact with a patient." *People v Bayer*, 279 Mich App 49, 63; 756 NW2d 242 (2008), vacated in part on other grounds, 482 Mich 1000 (2008). See also *People v Regts*, 219 Mich App 294, 297; 555 NW2d 896 (1996) ("The clear purpose of the statute is to protect patients from abuse by professionals who, under the guise of treatment, take advantage of the patient's vulnerabilities to achieve a sexual purpose.") However, our Supreme Court, discussing cases from this Court that limited the application of the statute to situations in which the medical examination or treatment is "used as a pretext to secure a patient's consent to sexual conduct," found this to be too narrow of an interpretation of the statute. *People v Baisden*, 482 Mich 1000; 756 NW2d 73 (2008). The Court held that "[t]he statute also applies to situations where nonconsensual sexual conduct is perpetrated during or in the context of medical treatment or examination."

Our Supreme Court's holding that the example listed in MCL 750.520e(1)(b)(iv) applies to situations concerning nonconsensual touching as well as the more "traditional" consensual touching recognizes that this subsection of the statute is designed to prevent the ability of the defendant to use the medical setting to the defendant's advantage to get the recipient of the examination or treatment into a position where the medical professional can take advantage of his position to gain either consensual or nonconsensual access to the victim's body. Defendant improperly tries to shoehorn the situation here into an academic "demonstration" of massage techniques. Instead, if the jury believed the complainant's testimony, it could reasonably conclude that defendant subjected the complainant to his actions under the auspices of his status as a health professional in the same way as if she had she formally been his patient. He "treated" her by performing a massage on her, even if it was in this case under the guise of demonstrating the benefits of massage so that she could help her mother who had back and neck problems. He then used this situation to perpetrate a nonconsensual touching of the complainant's buttocks and vagina.

We note that the statute specifically states that the listed examples of force or coercion are not exhaustive. MCL 750.520e(1)(b). Arguably, the trial court could have worded the jury instruction more specifically to fit what complainant testified happened during the assault. However, even under the specific language used in MCL 750.520e(1)(b)(iv), the trial court chose a reasonable outcome in deciding to instruct the jury on an "example" that could fit the complainant's testimony. We thus find that the trial court did not err in providing the challenged jury instruction.

Defendant next argues that the trial court erred when it refused to allow defense counsel to specifically cross-examine the complainant about whether defendant used force during the massage. We agree, but find the error harmless under the circumstances.

At trial, the prosecutor's argument concerning the proposed question was based on the prosecution's assertion that the question of whether defendant "forc[ed] or coerce[d] you in any way during the massage" was a conclusion that only the trier of fact could resolve. However, pursuant to MRE 701, a lay witness may testify regarding an opinion or inference if it is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness'[s] testimony or the determination of a fact in issue." Here, the complainant's lay opinion regarding whether defendant forced her or coerced her into undergoing the sexual contact was rationally based on her perceptions of defendant's actions, demeanor and statements to her during the encounter. Her lay opinion would certainly have been helpful in the determination of facts in issue, specifically, whether she felt forced or coerced to submit to the massage against her will, at least at some point, which in turn would have provided evidence concerning whether he in fact forced or coerced her. See *People v Brown*, 197 Mich App 448, 450; 495 NW2d 812 (1992); *People v Vaughn*, 186 Mich App 376, 379-381; 465 NW2d 365 (1990). Furthermore, even if the complainant's testimony did embrace the ultimate issue to be determined by the factfinder, whether defendant did use force or coercion to accomplish the contact, such testimony is acceptable under MRE 704. Thus, the trial court erred in its refusal to allow defendant to cross-examine the complainant as to whether defendant used force or coercion during the massage. While certain examples as to when this occurs are set out in MCL 750.520e(1)(b), it is not limited to those examples. Force or coercion is not, as plaintiff suggested at trial, a term of art.

However, we find that this error was harmless, particularly in light of the fact that defendant challenges on appeal only the disallowance of the question with respect to whether defendant used "force." A preserved nonconstitutional error is harmless unless it is more probable than not that the error in question was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Here, counsel cross-examined the complainant extensively, concerning the reason why defendant began the massage, at what point during the massage she decided to object to defendant's conduct, and her decision to remain at defendant's home after the alleged attack. In addition, defense counsel specifically elicited from the complainant that defendant did not verbally threaten her, did not hit her, and that she did not feel that she would lose her job if she refused to submit to the massage. Moreover, while the trial court decided that it would not allow defense counsel to ask the complainant whether defendant forced or coerced her, it decided that it would allow defense counsel to ask whether defendant "used physical force" or whether he "did something to make [her] reasonab[ly] afraid of present or future danger." However, defense counsel declined to ask that of the complainant. Given this

arguable contribution to any prejudice, the fact that counsel was permitted to cross-examine the complainant about all other facets of the encounter, and the fact that her answer may well have been less favorable to defendant than he surmises on appeal, we find that defendant cannot show that it was more probable than not that any error was outcome determinative.

Defendant next argues that the evidence was insufficient to support his conviction. We disagree. This Court reviews a defendant's allegations regarding insufficiency of the evidence de novo, in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). Satisfactory proof of the elements of the crime can be shown by circumstantial evidence and the reasonable inferences arising therefrom. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

First, as discussed above, viewing the evidence in the light most favorable to the prosecution, the jury could reasonably have found that defendant used his situation as a medical professional and the complainant's desire to see if massage could assist her mother's neck and back pain to "treat" the complainant with a massage and to use that as a means to accomplish inappropriate sexual touching.

In addition, as to the use of physical force, defendant argues in his brief that "[t]he prohibited 'force' under the 'force or coercion' element is such force that either induces the victim to submit to sexual contact or seizes control of the victim in a manner to facilitate the accomplishment of sexual contact without regard to the victim's wishes." We concur. See *People v Carlson*, 466 Mich 130, 140; 644 NW2d 704 (2002) (finding that the prohibited "force" under MCL 750.520d(1)(b) "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.") However, if the jury believed the complainant's testimony, that is exactly what it could have concluded occurred when defendant repeatedly pulled down the complainant's pants to expose her buttocks and then massaged them when she told him not to do so. Pursuant to MCL 750.520i, a victim of a sexual assault is not required to resist the defendant in any way. *People v Jansson*, 116 Mich App 674, 683; 323 NW2d 508 (1982). Here, while defendant told the complainant to "calm down" while he continued to disregard her wishes, the element of force was still met.

Likewise, even if the majority of the touching could be said to be consensual, even to the extent that the complainant allowed defendant to massage her buttocks, a reasonable jury could find that his subsequent unwanted touching of her vagina was achieved "by the element of surprise." Thus, the evidence was sufficient to support defendant's conviction.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Henry William Saad
/s/ Kirsten Frank Kelly