

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JOHN FRANCIS LECHNER,

Defendant-Appellee.

UNPUBLISHED

November 19, 2009

No. 288569

Mackinac Circuit Court

LC No. 08-003145-FH

Before: Talbot, P.J., and O’Connell and Davis, JJ.

PER CURIAM.

Defendant was charged with and bound over for trial on one count of fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e(1)(b) (force or coercion). The circuit court granted defendant’s motion to dismiss and quashed the felony information, finding insufficient facts to satisfy the element of force or coercion. The prosecution appeals by leave granted. We reverse and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On the morning of April 27, 2008, the victim was working as the manager of a Subway restaurant. She and defendant, her boss, were the only employees present. The victim testified to the following events:

I was there doing my prep work in the morning, and he arrived and proceeded to be touching my back up and down my spine, and I arched against it and said, “Please don’t do that.” We continued to be doing our stuff, and he made comments about my breasts, and I said, you know, “I don’t like that” or “please don’t do that”. And then at one point the oven and the poofer [sic], which makes the bread rise is up in front, and he was kind of trying to grab at my breasts while I was putting cheese on the bread to put it into the, into the oven.

The prosecutor then asked, “Did he actually touch your breasts?” The victim replied, “He grabbed at them, yes.” Subsequently, the court rephrased one of defendant’s questions and stated, “Defendant asked, ‘Did I or didn’t I grab your breasts?’” The victim answered, “Yes. My breasts were touched.” The prosecutor also asked the victim, “did you give him permission to grab your breasts?” and the victim replied, “No. I did not.”

We review the circuit court's analysis of the bindover de novo to determine whether the district court abused its discretion in finding probable cause that the defendant committed the offense charged. *People v Reigle*, 223 Mich App 34, 36-37; 566 NW2d 21 (1997). To bind over a defendant for trial, the district court is required to find "some evidence from which each element of the crime may be inferred." *Id.* at 37. Accordingly, the issue is whether there was some evidence before the district court from which the element of force or coercion could have been inferred.

The felony information charged "defendant effected sexual contact through force or coercion." MCL 750.520e(1)(b)(i). The element of force or coercion is satisfied "[w]hen the actor overcomes the victim through the actual application of physical force or physical violence," MCL 750.520e(1)(b)(i).

There was some evidence that defendant exerted "strength or power" on the victim. *People v Premo*, 213 Mich App 406, 409; 540 NW2d 715 (1995). Like the act of pinching at issue in *Premo*, defendant's act of grabbing the victim's breasts was "an act of physical force because it require[d] a person to exert strength or power on another person." *Id.* See also *People v Carlson*, 466 Mich 130, 140; 644 NW2d 704 (2002) (holding that, for a charge of third-degree criminal sexual conduct involving penetration, "[the requisite force] must be force to allow the accomplishment of sexual penetration when absent that force the penetration would not have occurred").

Although defendant claims a "touch" does not constitute force sufficient for a CSC IV charge, we find that the victim's testimony established that defendant grabbed her breasts (i.e., she answered in the affirmative to defendant's question, "Did I or didn't I grab your breasts?"), with further clarification that contact (i.e., "touch) was actually made. Such an interpretation is consistent with the context of defendant's questioning. Specifically, defendant's questions clearly tried to establish that he might have grabbed *at* the victim's breasts but he never actually made *contact*. The victim further testified that, after defendant began touching her back along her spine, she arched her back away from him and said, "Please don't do that." Then, while she was preparing bread for placement in the oven, defendant grabbed her breasts. The above testimony provided some evidence of forceful contact to support defendant's bindover on the charge of CSC IV. Contrary to what the circuit court apparently believed, the "force" required by the CSC IV statute does not have to "be so great as to overcome" the victim. *Carlson, supra* at 140. The circuit court erred in quashing the felony information against defendant.

Reversed and remanded for further proceedings on the charge of CSC IV against defendant. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Peter D. O'Connell
/s/ Alton T. Davis