STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

REYNALD BOILY,

Defendant-Appellant.

UNPUBLISHED
May 14, 1996

No.166619
LC Nos. 91-112162
91-112155
91-112156

Before: Doctoroff, C.J., and McDonald and J.B. Sullivan,* J.J.

PER CURIAM.

Following a jury trial in Oakland Circuit Court, defendant was convicted of three counts of fourth degree criminal sexual conduct, MCL 750.520e; MSA 28.788(5). He was sentenced to twenty-four months' probation. He appeals as of right, and we affirm.

Defendant claims there was insufficient evidence to support the statutory element of force or coercion beyond a reasonable doubt. When reviewing a claim of insufficient evidence following a jury trial, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found the essential elements of the crime were proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354 (1979); 258 NW2d 284 (1979).

At the time of the instant offense, MCL 750.520e; MSA 28.788(5) provided:

> (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 exists:
>
> (a) Force or coercion is used to accomplish the sexual contact. Force or coercion includes but is not limited to any of the circumstances listed in section 520b(1)(f)(i) to (iv).

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*Former Court of Appeals Judge, sitting on the Court of Appeals by assignment pursuant to Administrative Rule 1995-6.

MCL 520b(1)(f)(i) to (iv); MSA 28.788(2)(f)(i) to (iv) provides:

> (f) * * * Force or coercion includes but is not limited to any of the following circumstances:
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> (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.

In *People v Premo*, 213 Mich App 406; 540 NW2d 715 (1995), this Court discussed the force and coercion elements of the fourth-degree criminal conduct statute. The defendant in *Premo* was a high school teacher who allegedly pinched the buttocks of three female students while they were on the premises of Ferndale High School. In affirming the trial court's denial of the defendant's motion to quash, this Court determined that the defendant's conduct constituted force because the act of pinching required the exertion of strength or power over another. *Id.*, 409.

As an alternative basis for affirming the trial court, this Court also concluded that the defendant's conduct constituted coercion because he was in a position of authority. *Id.*, 410. This Court noted that the defendant's conduct was not included in the enumerated examples of coercion in MCL 750.520b(1)(f)(i)-(iv); MSA 28.788(2)(1)(f)(i)-(iv), but noted further that the Legislature did not limit the definition of force or coercion to the enumerated examples in the statute. MCL 750.520e(1)(a); MSA 28.788(5)(1)(a). This Court added:

> Furthermore, the existence of force or coercion is to be determined in light of all the circumstances and is not limited to acts of physical violence. *People v Malkowski*, 198 Mich App 610, 613; 499 NW2d 450 (1993). Coercion
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> "may be actual, direct, or positive, as where physical force is used to compel act [sic] against one's will, or implied, legal, or constructive, as where one party is constrained

by subjugation to other [sic] to do what his free will would refuse. (Black's Law Dictionary [5th ed], 234.)" [*Premo, supra,* 410-411.]

In this case, the element of sexual contact is not in dispute. Indeed, there was ample evidence of repeated anal-digital penetration of the then 14 year-old seventh grade complainant by the 44 year-old defendant. Defendant claims that the element of coercion was not proven because the victim voluntarily went to defendant's house and "was at all times able to terminate any contact with the Defendant, or remove himself from the Defendants [sic] presence without suffering any repercussions."

At trial, complainant testified that he met defendant when he caddied for him and that a friendship developed. Complainant received a letter from the police informing him that a complaint had been filed against him for breaking into defendant's townhouse. Complainant admitted his and his sister's involvement to defendant who told complainant that, if complainant kept out of trouble, defendant would talk to his roommate and make sure that complainant's name was not brought up in the report.

Prior to the break-in, complainant had massaged defendant's back in return for money. After the break-in, defendant told complainant that he "could have gotten in a lot of trouble" for his part in the break-in, reminded complainant how nice defendant was to have kept complainant's name out of the matter, and told complainant to massage the front of his body. A few days later, defendant told complainant to massage his penis. When complainant told him that he was not going to, defendant again brought up the break-in, and complainant cooperated. When defendant talked about the break-in, complainant was worried that defendant was going to press charges and get him into trouble. Complainant had been in trouble before and "was scared of getting in trouble . . . again." Complainant testified, "There was a threat of [defendant] revealing evidence that could get [complainant] in trouble . . . [b]ut not a threat of [defendant] physically harming [complainant]."

Plaintiff correctly argues that coercion is not limited to the enumerated examples in MCL 750.520b(1)(f)(i)-(iv); MSA 28.788(2)(1)(f)(i)-(iv). *Premo, supra.* However, even if it were, we would conclude that defendant's action in reminding complainant of the fact that he had kept complainant's involvement out of the break-in investigation in order to get complainant to submit to sex acts constituted the very threat of retaliation which is proscribed in MCL 750.520b(1)(f)(iii); MSA 28.1788(2)(1)(f)(iii). The statute does not require the use of any particular language in communicating a threat to retaliate, nor will we add any such requirement. The fact that complainant was able to remove himself from defendant's physical presence does not remove the threat of retaliation. Viewing the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found that the element of coercion was proven beyond a reasonable doubt.

Defendant also claims, that as to counts one and two, there was insufficient evidence that the sexual assaults occurred on the date alleged by the prosecutor. However, time is not an element of a

sexual assault offense. *People v Naugle*, 152 Mich App 227, 235; 393 NW2d 592 (1986); MCL 767.51; MSA 28.991.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Gary R. McDonald
/s/ Joseph B. Sullivan