STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRUCE ARTHUR WITKOWSKI,

Defendant-Appellant.

UNPUBLISHED
November 4, 1997

No. 193315
Recorder's Court
LC No. 94-012156

Before: Holbrook, Jr., P.J., and Michael J. Kelly and Gribbs, JJ.

PER CURIAM.

Defendant appeals by right from his convictions by nolo contendere pleas of two counts of engaging in child sexually abusive activity, MCL 750.145c(2); MSA 28.342a, and one count of assault with intent to commit second degree criminal sexual conduct, MCL 750.520g(2); MSA 28.788(7)(2). Although defendant also originally pled nolo contendere to one count of second degree criminal sexual conduct, the trial court subsequently permitted defendant to withdraw his plea to that count, which is therefore outside the scope of the present opinion.

On appeal, defendant contends, first, that the trial court failed to establish a proper factual basis for the nolo contendere pleas to any one of the three counts, as required by MCR 6.302(D)(2), and, second, that the magistrate at the preliminary examination abused his discretion in binding defendant over for trial on all three counts. Inasmuch as defendant's nolo contendere pleas were entered unconditionally, he has waived review of any defects in the preliminary examination. *People v New*, 427 Mich 482, 495; 398 NW2d 358 (1986). The second issue is therefore without merit on an independent basis.

However, in this instance the preliminary examination transcript, by stipulation of the parties, was utilized by the trial court to furnish the factual basis prerequisite to acceptance of defendant's nolo contendere pleas to each count. On appellate review, a factual basis for acceptance of a plea is sufficient if an inculpatory inference can reasonably be drawn by the trier of fact from the facts admitted or otherwise established, even if an exculpatory inference could also be drawn and defendant asserts the latter is the correct inference. *Guilty Plea Cases*, 395 Mich 96, 130; 235 NW2d 132 (1975). Here, with respect to the first victim, defendant contends that the factual basis for the plea of engaging in child sexually abusive activity derives from the fact that defendant photographed the child's unclothed

buttocks. Defendant contends that prerequisite proof is lacking that the actual photograph constituted "child sexually abusive activity," as defined in MCL 750.145c(h), because the only "listed sexual act" that could apply would be "erotic nudity," which the statute defines as "the lascivious exhibition of the … rectal area of any person. As used in this subdivision, 'lascivious' means wanton, lewd, and lustful and tending to produce voluptuous or lewd emotions."

This Court rejects defendant's argument. The statutory definition of "erotic nudity" resulted from an amendment effectuated by 1994 PA 444, effective April 1, 1995. The acts charged in the information, however, occurred on October 8, 1994, at which time the statutory definition of "erotic nudity" encompassed any display of the male or female genital or pubic area lacking primary literary, artistic, educational, political, or scientific value and which the average person applying contemporary statewide community standards would find appeals to prurient interests. Clearly, there was no need for the trial court, as a prerequisite to accepting defendant's plea, to examine any actual photograph, since MCL 750.145c(1)(i) defines "child sexually abusive material" to include both developed and *undeveloped* photographs, films, slides, and other visual image forms. From the victim's description of his posture when the photograph was taken and, given the complete lack of indication of primary literary, artistic, educational, political, or scientific value, a trier of fact might well find that the display would appeal to prurient interest applying a statewide community standard.

With respect to the second victim, as to the charge of assault with intent to commit second-degree criminal sexual conduct, the victim's testimony indicated that defendant perpetrated an unwanted touching, without the victim's consent. The unwanted touching willfully accomplished by defendant was a battery, which inherently includes an assault. *People v Bryant*, 80 Mich App 428; 264 NW2d 13 (1978); see also *People v Worrell*, 417 Mich 617; 340 NW2d 612 (1983). Although there was no actual touching of the victim's genital area, groin, inner thigh, buttock, or clothing covering those areas, the trier of fact might have inferred from all the circumstances that this was defendant's intent and that it was for the purpose of sexual arousal or gratification. *People v Evans*, 173 Mich App 631; 434 NW2d 452 (1988). Accordingly, the factual basis as to this charge was also sufficient.

Finally, with respect to the charge of child sexually abusive activity involving the second victim, the preliminary examination evidence indicated that defendant attempted to photograph the child's naked buttocks, but the child refused to cooperate. The factual basis is adequate to establish that defendant perpetrated attempted child sexually abusive activity, MCL 750.92; MSA 28.287, but that felony is punishable only by a maximum incarceration of five years, not twenty years. Accordingly, defendant's conviction on that count of the information must be reduced either to one of attempt, followed by resentencing, or at the option of the prosecutor, the plea as to that count is vacated in its entirety and the case may proceed to trial. See *People v Jenkins*, 395 Mich 440, 443; 236 NW2d 503 (1975).

Defendant's conviction of child sexually abusive activity as to victim one and of assault with intent to commit criminal sexual conduct in the second degree as to victim two is affirmed; defendant's conviction of child sexually abusive activity as to victim two is remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Kelly
/s/ Roman S. Gribbs