STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID RAY HARTEGAN,

Defendant-Appellant.

UNPUBLISHED
November 25, 1997

No. 196572
Ingham Circuit Court
LC No. 96-070033-FH

Before: Smolenski, P.J., and MacKenzie and Neff, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of two counts of fourth-degree criminal sexual conduct pursuant to MCL 750.520e(1)(a) and (b); MSA 28.788(5)(1)(a) and (b). Defendant was sentenced to two concurrent terms of two years' probation, with the first 120 days to be served in jail. Defendant argues that there was insufficient evidence to support his convictions. We affirm.

I

Defendant's first conviction stemmed from a violation of subsection (1)(a), which provides:

> (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:
>
> (a) That other person is at least 13 years of age and under 16 years of age, and the actor is 5 or more years older than that other person.

Specifically, defendant claims that any touching of the complainant was accidental and unintentional. We disagree.

The evidence presented at trial showed that at the time of the incident defendant was twenty-nine years old and the complainant was thirteen years old. The complainant's testimony established that defendant, without permission, started giving her a back rub, caressing her shoulders, and then began fondling her breasts. There was no evidence suggesting that defendant's intent was anything other than

prurient, and it could be inferred from the context of his actions that they were intentionally done for the purpose of sexual gratification. Evidence of the unwanted massage administered by defendant, coupled with his fondling of the victim's breasts, provided sufficient evidence to support the jury's finding that defendant's actions were not accidental and were for the purpose of sexual arousal or gratification. *People v Duenaz*, 148 Mich App 60, 65; 384 NW2d 79 (1985).

II

With regard to the second conviction, defendant was charged under subsection (1)(b), which differed from subsection (1)(a) in that the age element is replaced with the requirement that the sexual contact be accomplished through the use of force or coercion.[1]

Defendant first alleges that there was conflicting testimony regarding whether he and the complainant were alone in the house at the time the sexual assault was alleged to have occurred. We will not revisit the jury's assessment of defendant's alibi defense. *People v Taylor*, 185 Mich App 1, 8; 460 NW2d 582 (1990).

Defendant also argues that even if he did touch the complainant, his children's baby-sitter, she often visited his house and was in an area with which she was familiar. Thus, posits defendant, because circumstances did not exist to create reasonable fear of dangerous consequences there was no evidence of force or coercion. In support of this argument defendant cites *People v McGill*, 131 Mich App 465, 474; 346 NW2d 572 (1984) (stating that force or coercion can be inferred where circumstances exist to create an atmosphere of reasonable fear and dangerous consequences).

Defendant's reliance on *McGill* is misplaced. As expressly stated in subsection (1)(b), force includes "the actual application of physical force or physical violence." This Court has stated that an act of pinching a victim's buttocks is enough to meet the force requirement outlined in the statute. *People v Premo*, 213 Mich App 406, 409; 540 NW2d 715 (1995). There was testimony at trial that defendant straddled the victim's lap, effectively pinning her in the chair in which she was sitting, and that victim clutched her pants while defendant tried to pull them down, and that defendant forcibly kissed the victim on her neck and breasts. The victim's vivid trial testimony describing the actual physical force defendant used to accomplish his sexual assault provides sufficient evidence to sustain defendant's conviction of fourth-degree criminal sexual conduct.

Affirmed.

/s/ Michael R. Smolenski
/s/ Barbara B. MacKenzie
/s/ Janet T. Neff

[1] (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:

(a) That other person is at least 13 years of age and under 16 years of age, and the actor is 5 or more years older than that other person.

(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 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 achieves the sexual contact through concealment or by the element of surprise.