

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JOHN IRVIN BAUMAN,

Defendant-Appellee.

UNPUBLISHED

December 16, 1997

No. 193185

Oakland Circuit

LC No. 95-DA6341 AR

Before: Michael J. Kelly, P.J., and Wahls and Gage, JJ.

PER CURIAM.

Plaintiff appeals, by leave granted, the February 20, 1996, order of the Oakland Circuit Court affirming the order of the 50th District Court dismissing the criminal sexual conduct and indecent exposure charges brought against defendant. We affirm.

On December 22, 1995, numerous employees of the Oakland County Prosecutor's Office gathered at the Mill Street Bar in the City of Pontiac for an informal Christmas party. Defendant, an investigator at the Oakland County Prosecutor's Office, and complainant, a typist in the Warrants Division of the Oakland County Prosecutor's Office, were both present at the party. At some point in the evening, defendant and complainant left the Mill Street Bar together in defendant's car to go to another bar nearby. Defendant and complainant stayed only briefly at the other bar, and then decided to return to the Mill Street Bar. On their return to the Mill Street Bar, defendant parked the car in a parking lot of a small office building so that they could drink a six-pack of beer which he had stopped to purchase along the way. Complainant alleges that, while she and defendant were sitting in the car in the parking lot, defendant exposed his penis, forced her to touch it, and attempted to force her to perform oral sex on him, but that she refused. Defendant and complainant then returned to the Mill Street Bar.

Complainant reported the incident to her supervisor on December 27, 1995. Defendant was subsequently charged with one count of attempted third-degree criminal sexual conduct, MCL 750.520d(1)(b); MSA 28.788(4)(1)(b),¹ one count of fourth-degree criminal sexual conduct, MCL 750.520e(1)(a); MSA 28.788(5)(1)(b),² and one count of indecent exposure, MCL 750.335a; MSA 28.567(1).³ After a preliminary examination, the district court judge dismissed the charges against

defendant based on its finding that complainant was not a credible witness. The dismissal was affirmed on appeal to the circuit court. On appeal to this Court, the prosecution argues that the circuit court erred in affirming the district court's dismissal of the charges.

A defendant must be bound over for trial if the evidence presented at the preliminary examination establishes that a crime was committed and probable cause exists to believe that the defendant committed it. MCL 766.13; MSA 28.913; *People v Pitts*, 216 Mich App 229, 232; 548 NW2d 688 (1996). The prosecutor is not required to prove each element of the crime beyond a reasonable doubt, and where credible evidence is presented both to support and to negate the existence of an element of a crime, a factual question exists which should be left to the jury. *People v Kieronski*, 214 Mich App 222, 228-229; 542 NW2d 339 (1995). The magistrate has not only the right, but the duty, to pass judgment on the credibility of the witnesses testifying at the preliminary examination. *People v Paille #2*, 383 Mich 621, 627; 178 NW2d 465 (1970). However, if the evidence conflicts or raises a reasonable doubt, the defendant should be bound over for resolution of the questions by the trier of fact. *People v Laws*, 218 Mich App 447, 452; 554 NW2d 586 (1996). Furthermore, in most criminal sexual conduct cases there are no nonparticipant witnesses, and therefore the principle issue usually becomes the credibility of the parties. *People v Beckley*, 434 Mich 691, 717; 456 NW2d 391 (1990).

This Court reviews de novo a circuit court decision to reverse or affirm a district court's decision not to bind over a defendant for trial. *People v Flowers*, 191 Mich App 169, 174; 477 NW2d 473 (1991). Therefore, this Court must determine whether the district court abused its discretion in concluding that there was not probable cause to believe that the defendant committed the crime charged. *People v Neal*, 201 Mich App 650, 654; 506 NW2d 618 (1993). An abuse of discretion exists only where an unprejudiced person, considering the facts on which the court acted, would say there was no justification or excuse for the ruling made. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921(1995).

We find no abuse of discretion in the instant case. If complainant's testimony is accepted, her description of the attempted sexual assault appears to satisfy the elements of the charged crimes. However, several inconsistencies in the record regarding complainant's actions before and after the alleged assault support the district court's finding that complainant was not a credible witness. First, although complainant testified that she was not intoxicated by the end of the evening, several defense witnesses testified that she was unsteady on her feet, that she was slurring her words, and that she appeared to be intoxicated. Next, although complainant testified that the only physical contact she had with defendant at the Mill Street Bar was that "[m]aybe his leg was touching mine," two witnesses testified that defendant and complainant were involved in further physical contact before they left the Mill Street Bar together. Finally, although complainant testified that she was upset and was not smiling when she returned to the Mill Street Bar after the alleged assault, every defense witness who observed complainant upon her return testified that she appeared happy and did not appear to have been victimized.

The district court judge, who had the opportunity to observe the demeanor of the witnesses, felt very strongly that complainant was not a credible witness. Furthermore, the nature of complainant's testimony on the record regarding her actions at the Mill Street Bar before and after the alleged assault casts doubt on her credibility regarding the events that took place while she and defendant were together in defendant's car. Under these circumstances, we cannot conclude that the district court's decision not to bind defendant over for trial was an abuse of discretion. Accordingly, we find that the circuit court properly affirmed the district court's decision to dismiss the charges against defendant.

Affirmed.

/s/ Michael J. Kelly

/s/ Myron H. Wahls

/s/ Hilda R. Gage

¹ According to MCL 750.520d(1)(b); MSA 28.788(4)(1)(b), a person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if force or coercion is used to accomplish the sexual penetration.

² According to MCL 750.520e(1)(b); MSA 28.788(5)(1)(b), a person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and force or coercion is used to accomplish the sexual contact.

³ According to MCL 750.335a; MSA 28.567(1), "[a]ny person who shall knowingly make any open or indecent exposure of his or her person or of the person of another," shall be guilty of indecent exposure.