

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

TERRY WILLIAM LINT,

Defendant-Appellee.

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UNPUBLISHED  
September 8, 2000

No. 220313  
Isabella Circuit Court  
LC No. 99-008777 FH

Before: Doctoroff, P.J., and O’Connell and Wilder, JJ.

PER CURIAM.

The prosecutor appeals by right from two trial court orders granting defendant’s motion to quash charges of fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e(1)(c); MSA 28.788(5)(1)(c) (mentally incapacitated victim), and gross indecency between males, MCL 750.338; MSA 28.570. We reverse and remand.

Following a preliminary examination, the district court bound defendant over on one count of CSC IV and one count of gross indecency between males. The trial court subsequently granted defendant’s motion to quash the CSC IV charge on the basis that the victim was neither mentally incapable nor mentally incapacitated at the time of the alleged offense, and that he in fact knew that the act was wrong. However, the trial court refused to quash the gross indecency charge stating that whether the victim consented to the conduct was an issue for the trier of fact.

Defendant sought reconsideration of the trial court’s denial of his motion to quash the gross indecency charge. On reconsideration, the trial court quashed the bound over charge as an abuse of discretion, finding that the alleged act did not fall within any conduct covered by CJI2d 20.31, and that the prosecutor failed to present testimony to establish that the independent living arrangement qualified as a public place.

On appeal, the prosecutor argues that the trial court erred in quashing the CSC IV charge against defendant because there was a factual question regarding the victim’s mental capacity at the time of the alleged offense. We agree.

We review a trial court's decision to quash an information on legal grounds de novo. *People v Motor City Hosp & Surgical Supply, Inc*, 227 Mich App 209, 212; 575 NW2d 95 (1997). This Court reviews the circuit court's decision to determine whether the district court abused its discretion in ruling that there was probable cause to believe that defendant committed the charged offense. *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997); *People v Flowers*, 191 Mich App 169, 174; 477 NW2d 473 (1991). An abuse of discretion occurs if the result was so violative of fact and logic that it evidences a perversity of will or an exercise of passion or bias. *Orzame, supra*.

The primary function of a preliminary examination is to determine whether a crime was committed and whether there was probable cause to believe that the defendant committed the offense. If the district court concludes that probable cause supports these propositions, then the district court must bind over the defendant for trial. MCL 766.13; MSA 28.931; MCR 6.110(E); *People v Goecke*, 457 Mich 442, 469; 579 NW2d 868 (1998); *Orzame, supra*. Probable cause is established by evidence sufficient to cause a person of ordinary prudence and caution to entertain a reasonable belief of the defendant's guilt. *People v Justice (After Remand)*, 454 Mich 334, 344; 562 NW2d 652 (1997), *Orzame, supra*. The prosecutor must present some evidence of each element of the charged offense. *People v Reigle*, 223 Mich App 34, 37; 566 NW2d 21 (1997). Although the district court may weigh credibility of witnesses, if the evidence conflicts or raises a reasonable doubt, the defendant should be bound over for resolution of the factual questions by the trier of fact. *Goecke, supra* at 469-470.

Defendant was charged under MCL 750.520e(1)(c); MSA 28.788(5)(1)(c), which states in relevant part:

A person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and

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(c) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

MCL 750.520a; MSA 28.788(1) defines the terms "mentally incapable" and "mentally incapacitated" as follows:

(f) "Mentally incapable" means that a person suffers from a mental disease or defect which renders that person temporarily or permanently incapable of appraising the nature of his or her conduct . . .

(g) "Mentally incapacitated" means that a person is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or other substance administered to that person without his or her consent, or due to any other act committed upon that person without his or her consent.

The question of whether a person is “mentally incapable” for purposes of the criminal sexual conduct statute encompasses both an understanding of the physical act, and an appreciation for the nonphysical factors of the act, including its moral quality. *People v Breck*, 230 Mich App 450, 455; 584 NW2d 602 (1998). An individual’s capacity to consent to a sexual act depends on the person’s ability to understand the act, including how the act “will be regarded in the framework of the social environment and [the] taboos to which a person will be exposed.” *Id.* at 454-455. A mentally incapable person is presumed to be incapable of truly consenting to the sexual act. *Id.* at 455.

Upon review of the record, we agree with the district court’s conclusion that there was sufficient evidence that the victim was mentally incapable of consenting to the sexual contact because of his developmental deficit. Ronald Meadors, a licensed psychologist who performed a psychological examination on the victim, testified that the victim was mildly retarded, he functioned at the mental age of an eight- to ten- or twelve-year-old in terms of his cognitive ability, and at the mental age of a twelve-year, nine-month to fourteen-year, nine-month-old child in adaptive skills, and that the victim had an overall IQ score of 71. Meadors further testified that the victim was clearly not functioning as a normal thirty-year-old man and that he was the type who could be easily manipulated by another. In addition, although the victim testified that he did not think it was okay for defendant to touch him in this manner, he explained that he did not know the meaning of the word “consent.”

The district court was in the best position to evaluate the victim’s demeanor and credibility in determining whether there was sufficient evidence that the victim was mentally incapable under § 520a(f) at the time of the alleged offense. On the existing record, we are not convinced that the district court’s finding in this regard was an abuse of discretion or that the bindover was improper. Accordingly, we reverse the trial court’s order granting defendant’s motion to quash and reinstate the district court’s order binding defendant over for trial on CSC IV.

The prosecution also argues that the trial court erred by quashing the gross indecency between males charge against defendant. We agree.

The specific issue we must decide is whether, under the circumstances of this case, the district court erred by finding probable cause to believe that sexual contact between two males in the living room of an assisted living residence is grossly indecent under MCL 750.338; MSA 28.570. Whether the alleged conduct falls within the scope of a criminal statute is a question of law that is reviewed de novo on appeal. *People v Williams*, 237 Mich App 413, 415; 603 NW2d 300 (1999), modified in part 462 Mich 861; \_\_\_ NW2d \_\_\_ (2000); *Orzame, supra* at 557.

The statute proscribing gross indecency between males under which defendant was charged states in relevant part:

Any male person who, in public or in private, commits or is a party to the commission of or procures or attempts to procure the commission by any male person of any act of gross indecency with another male person shall be guilty of a felony . . . .  
[MCL 750.338; MSA 28.570.]

There is no statutory definition of “an act of gross indecency,” and Michigan case law is less than clear on what specific acts fall within the statute’s prohibition, whether the statute only reaches public acts, and what test should be applied to determine whether conduct is “grossly indecent.” For many years, the test for gross indecency was whether a defendant acted in a way that the common sense of society would regard as indecent and improper. *People v Carey*, 217 Mich 601, 603; 187 NW 261 (1922), citing *People v Hicks*, 98 Mich 86, 90; 56 NW 1102 (1893); *People v Dexter*, 6 Mich App 247, 253; 148 NW2d 915 (1967).

In *People v Howell*, 396 Mich 16, 23-24; 238 NW2d 148 (1976), three of the six participating Justices rejected the *Hicks-Carey-Dexter* “common sense of society” test concluding that there was no common sense of society regarding sexual behavior between consenting adults in private. Instead, Justice Levin advocated a construction of the gross indecency statute that prohibited the following acts: “oral and manual sexual acts committed without consent or with a person under the age of consent or any ultimate sexual act committed in public.” *Id.* at 24. Although Justice Levin’s construction of the gross indecency statute was not binding,<sup>1</sup> subsequent panels of this Court nonetheless followed the *Howell* definition of gross indecency, see e.g., *People v Lino*, 190 Mich App 715, 719; 476 NW2d 654 (1991), rev’d 447 Mich 567; 527 NW2d 434 (1994); *People v Lynch*, 179 Mich App 63; 445 NW2d 803 (1989); *People v Emmerich*, 175 Mich App 283; 437 NW2d 30 (1989), while other panels of this Court continued to follow the “common sense of society” standard. See e.g., *People v Austin*, 185 Mich App 334; 460 NW2d 607 (1990); *People v Gunnett*, 158 Mich App 420; 404 NW2d 627 (1987).

The split of authority in this Court led to the convening of a conflict panel to resolve the conflict over the prevailing test for gross indecency. *People v Brashier*, 197 Mich App 672, 678-680; 496 NW2d 385 (1992), modified 447 Mich 567; 527 NW2d 434 (1994). The *Brashier* conflict panel held that the definition of gross indecency advocated in Justice Levin’s opinion in *Howell* was not binding and panels of this Court were not free to adopt that definition. *Id.* at 679. Rather, the conflict panel held that “*Carey* established an authoritative interpretation of the meaning of ‘gross indecency’” and should be applied forthwith. *Id.* Thus, this Court’s opinion in *Brashier* made clear that what constituted an act of gross indecency was left to the trier of fact, applying the “common sense of society” standard.

Thereafter, the Supreme Court consolidated the appeals from this Court’s decisions in *Lino* and *Brashier*, and held that “[t]o the extent the Court of Appeals in *Brashier* interpreted *People v Carey* to leave to the jury’s assessment of [sic] the common sense of the community the definition of gross indecency, the Court of Appeals is reversed.” *People v Lino*, 447 Mich 567, 571; 527 NW2d 434 (1994). However, a majority of the Court could not agree on an appropriate standard for determining if an act constitutes gross indecency. Instead, the Court simply held that the statute was not

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<sup>1</sup> Section II of Justice Levin’s opinion, rejecting the common sense of the community test and proposing an alternative construction of the statute, was joined by only two other justices, and therefore, was not binding precedent. *Howell, supra* at 29. See *People v Anderson*, 389 Mich 155, 170-171; 205 NW2d 461 (1973).

unconstitutionally vague as applied to the conduct alleged in *Lino* and *Brashier*, *id.* at 570, and that the specific conduct in those cases was prohibited by the statute. *Id.* at 571. Thus, all that is derived from the Court’s opinion is that gross indecency includes oral sex in public, *Lino*, *supra* at 716-717, and procuring underage males to beat a third male while he masturbates. *Brashier*, *supra* at 676-677.

Thereafter, in *People v Warren*, 449 Mich 341, 345; 535 NW2d 173 (1995), the Supreme Court provided some guidance on how to resolve these cases by stating, “[o]ne of the lessens of the *Lino* inquiry is that it is prudent to decide only the case before us, and not attempt to catalog what is permitted and prohibited . . . .” Thus, we are constrained to consider only the facts and circumstances before us in deciding the issue. *Id.*; *Jones*, *supra* at 602.

Turning to the facts of the instant case, we conclude that defendant’s alleged actions were within the realm of conduct proscribed by the gross indecency statute. The prosecution presented testimony at the preliminary examination that defendant touched and stroked the victim’s covered penis in the living room of the assisted living residence, continued these actions on the victim’s unclothed penis in the bathroom, told the victim that “he liked doing this to guys,” and showed his penis to the victim and asked the victim if he would commit an act of fellatio. While the evidence established that the victim’s roommate was not present at the time of the alleged offense, the record is unclear as to whether the doors to the residence were open so that other individuals were able to enter, or whether the area in which the alleged conduct occurred qualified as a public place, that is, whether there was a possibility that the unsuspecting public could have been exposed to or viewed the sexual conduct. *Williams*, *supra*, 237 Mich App at 417; *People v Brown (After Remand)*, 222 Mich App 586, 591-593; 564 NW2d 919 (1997).<sup>2</sup> We note, however, that while there may be sufficient evidence to establish that the room was a public place, whether the prosecution established that the act occurred in public is an element of the crime that the trier of fact must resolve at trial. *Williams*, *supra*, 462 Mich at 861. Thus, to the extent that the trial court concluded that the area in which the act occurred did not qualify as a public place as a matter of law, this was error. We further note that the conduct alleged to be grossly indecent cannot be looked at in a vacuum or separated from the factual situation in which it took place. *Lino*, *supra*; *Jones*, *supra* at 604. The circumstances surrounding the alleged act were necessary to the district court’s determination that defendant’s conduct violated the gross indecency statute and, on the existing record, we decline to disturb that ruling. The trial court’s order granting defendant’s motion to quash the gross indecency charge is reversed and the district court’s order binding defendant over for trial on that charge is reinstated.

Reversed and remanded for action consistent with this opinion. We do not retain jurisdiction.

/s/ Martin M. Doctoroff

/s/ Kurtis T. Wilder

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<sup>2</sup> In *People v Brown (After Remand)*, 222 Mich App 586, 591; 564 NW2d 919 (1997), this Court stated that the key issue in determining whether an act . . . was performed in a “public place” is not so much the exact location of the act, but whether there is the possibility that the unsuspecting public could be exposed to or view the act.