

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals

Judges: Donofrio, P.J., and O'Connell and Servitto, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TRUMON DONTAE CANNON,

Defendant-Appellant.

Supreme Court No. 131994

Court of Appeals No. 259532

10th Judicial Circuit;
File No. 04-024226-FC;
Hon. Lynda L. Heathscott

BRIEF ON APPEAL-APPELLANT

ORAL ARGUMENT REQUESTED

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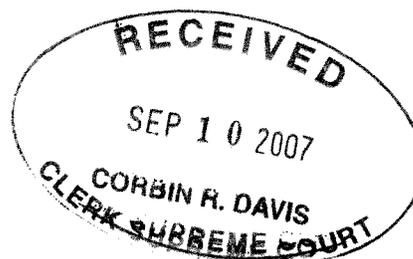


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STATEMENT OF JURISDICTION

Defendant-Appellant filed a delayed application for leave to appeal from a decision of the Michigan Court of Appeals issued on July 25, 2006 and fully deciding the appeal to that Court. This Court granted leave to appeal in an order dated May 23, 2007.

This Court's appellate jurisdiction is granted by the Michigan Constitution, Const 1963, Art 6, §4, and is as provided by this Court's rules. MCR 7.301(A)(2) provides that this Court has jurisdiction to "review by appeal" a case "after decision by the Court of Appeals".

STATEMENT OF QUESTIONS PRESENTED

I. WHAT IS THE PROPER SCOPE OF PREDATORY CONDUCT DEFINED IN MCL 777.40(3)(A) USED IN SCORING OFFENSE VARIABLE 10?

The sentencing court did not answer this question

II. DID THE SENTENCING COURT PROPERLY ASSESS 15 POINTS FOR "PREDATORY CONDUCT" IN SCORING OV 10 IN THIS CASE?

The sentencing court said "yes".

Defendant-Appellant says "no".

III. IS "PREDATORY CONDUCT" LIMITED TO THE EXPLOITATION OF A "VULNERABLE VICTIM"?

The sentencing court did not answer this question.

Defendant-Appellant says "no".

IV. WHAT FACTORS MAY BE CONSIDERED IN DETERMINING IF A VICTIM IS "VULNERABLE"?

The sentencing court did not answer this question.

STATEMENT OF FACTS

In a jury trial, Defendant was convicted of conspiring to commit armed robbery (MCL 750.529), MCL 750.157a. He was sentenced to a prison term of 210-500 months.

At trial, Plaintiff claimed that Defendant conspired with Maurice Mayes and Larry Hibler to rob the employees of a Burger King at 1420 North Michigan Avenue in the city of Saginaw on January 12, 2004. He was tried with his alleged coconspirators, and acquitted of additional charges of armed robbery and felony-firearm (both submitted on an aiding and abetting theory).

The "Agent's Description of the Offense" (Appx 23a-25a) in the presentence report states:

The following information was taken from documentation within the Saginaw County Prosecuting Attorney's file, as well as information given by APA Paul Fehrman, transcripts of witness testimony, and other various sources.

On 1-12-04 at the Burger King located at 1420 N. Michigan Avenue, Saginaw, Michigan, on or about 7:39 p.m., Central Dispatch received a 911 call from Burger King employee Marcus Harrison. Harrison was working when he contacted 911. He reported he was locked in the restaurant freezer and that the restaurant was being robbed at gunpoint. Harrison indicated there were three individuals inside the store involved in the robbery. While the 911 conversation was taking place, screaming by the other employees in the restaurant could be heard in the background. Officers were immediately dispatched. Upon arrival, it was discovered that surveillance cameras had taped the entire incident. Officers dispatched were Officer Hildebrant, Officer Oberle, Officer Zak, Officer Fong, Officer Newberry, Officer Fresorger, Officer Williams, Officer Llewellyn, Officer Mata, Officer Wenzell, Officer Guerrero, Officer Nelson, and Officer Richmond. Additionally, Officer Sharkey, Officer Revard, Officer Stacer, Officer Vanderhaar, and Officer Parker assisted.

Upon arrival, employees/witnesses Harrison, Betty Tappen, Maudena Scott, and Tamika Brown were visibly shaken and upset. They were interviewed immediately by officers.

Meanwhile, officers were attempting to apprehend the three individuals who had been fleeing the restaurant upon their arrival. Larry Hibler was apprehended lying down in a playhouse located in the backyard of 522 N. Fayette by Officer Terry Williams. Williams pointed his weapon at him and ordered him to put his hands up where they could be seen. He failed to comply. Williams was then assisted by Officer Zak while he held the suspect at gunpoint. Hibler attempted to jump from the playhouse and run. He was taken to the ground by Officer Williams and was handcuffed by Officer Zak. Money from the armed robbery and a do-rag, identified by Burger King employees as being from one of the robbers, was lying in the snow in close proximity from Hibler's person. Officer Fong also located a chrome handgun nearby. Hibler was placed under arrest.

Deputy Newberry pursued Maurice Mayes eastbound on Catherine near the train tracks. As Newberry pursued, he also observed Trumon Cannon walking southbound on the tracks. He was taken into custody with assistance from Deputy Fresorger. Cannon was placed into Fresorger's patrol unit. As Fresorger and Newberry stood by, Officer Hildebrant arrived in his patrol vehicle with Maurice Mayes in custody. He was then also placed in the same patrol unit as defendant Trumon Cannon. The three were then taken to the police department at 612 Federal where they were interviewed.

Officers interviewed Maudena Scott, Burger King manager, at the time of the armed robbery. She advised she'd been working the drive-thru and she had given a customer change. She then turned around to observe a subject standing at the counter with a \$5 bill. The person was identified as defendant Trumon Cannon. A short time later, the companions Cannon had walked into the restaurant with returned from the restroom. The individuals apprehended matched the employee's/victim's descriptions of the armed robbers including the clothing they were wearing.

At the trial, evidence was given that Larry Hibler was the assailant in possession of the weapon. Maurice Mayes had initially stated that he had not been involved at all in the robbery, that he had actually driven a car when he needed to urinate. He claimed he pulled into the Burger King parking lot. Mayes indicated that he went behind the building to relieve himself and an unknown white

female with blonde hair came up behind him and began to administer oral sex. He stated as he pushed her away, the police came along and tackled him to the ground, spraying him with pepper spray. Officers in speaking with Mayes, indicated they knew he was lying as this was not believable. Further there was no white blonde female at the scene when he was apprehended. Mayes then admitted that he, Larry Hibler, and Trumon Cannon had driven to the Burger King in a pickup truck on the spur of the moment, deciding to rob the business. He admitted Trumon Cannon was the lookout while he and Hibler did the actual robbery, taking the store's money and locking the employees in the freezer at gunpoint.

Additionally, it was further revealed that the vehicle which the three had driven to the Burger King in was, in fact, stolen from the owner Milton Nelson. Nelson identified Larry Hibler as the person who was present with his girlfriend, Ayana, known to Nelson as "T-T". T-T, present with boyfriend Larry Hibler had asked to borrow the vehicle to go to the mall. Mr. Nelson agreed, however, the vehicle then was not returned. That had taken place on 1-10-04. *Defendant denies knowledge of stolen vehicle.*

On 1-12-04 in the afternoon, Larry Hibler identified as T-T's boyfriend, phoned Nelson. He told Milton Nelson he intended to keep his truck for 30 days unless Nelson paid him \$700.00 for a drug debt owed to him by Ayana Abdul-Shalteed.

A jury reviewed video tapes of the robbery as well as heard testimony from 9-15-04 until the verdict was returned on 9-24-04. Cannon was found guilty of Conspiracy Robbery Armed. Larry Hibler was found guilty of Ct. I: Conspiracy Robbery Armed, Ct. II: Robbery Armed, Ct. III: Weapons - Felony Firearms, Ct. VI: Felon in Possession of a Firearm, Ct. VII: Weapons: Felony Firearms with sentencing also 11-2-04. Codefendant Maurice Mayes was found guilty of Ct. I: Conspiracy Robbery Armed, Ct. II: Robbery Armed, Ct. III: Weapons - Felony Firearms, Ct. IV: Police Officer - Assaulting/Resisting/Obstructing, Ct. VIII Felon Possession of a Firearm, Ct. IX: Weapons - Felony Firearms. His sentence also is 11-2-04.

(Emphasis in original)

At Defendant's sentencing, both parties were afforded the opportunity to contest the proposed scoring of the guidelines. The Court and parties discussed the scoring of OV 10:

MR. FEHRMAN: Offense Variable 10 should be scored 10 points for predatory conduct. Actually, I'm sorry, that's 15 points for predatory conduct.

MR. PIAZZA [defense counsel]: We object to that. Predatory conduct is where an offender's pre-offense conduct directed at a victim for the primary purpose of victimization. I don't see any -- where that is in this particular case whatsoever, in lieu of the fact my client was found guilty of conspiracy due to the fact that this was -- according to what the jury said, two other individuals came in just to rob the restaurant. There's no predatory conduct.

MR. FEHRMAN: Your honor, we agree with Mr. Piazza that predatory conduct means pre-offense conduct directed at a victim for the primary purpose of victimization pursuant to MCL 777.40.

And we'd also cite the Court to People versus Witherspoon at 257 Mich Ap (*sic*) 329, a 2003 case, in which the Court made a finding that there was pre-offense predatory conduct where the victim's mother's boyfriend waited until the victim -- the young victim went into the basement, then followed her downstairs and sexually assaulted her.

Here the evidence is, is that the defendants, in a -- what appears to be a stolen vehicle, parked it alongside of the restaurant in a separate parking lot, not the parking lot of the restaurant itself, but actually parked at the rear next to a doctor's office, and that they would have waited until the store -- the restaurant was in a position where the employees were basically there by themselves, that there were no customers there -- as the Court saw on the videotape, there were no customers inside of the restaurant, and outside there was only one car that was in the drive-thru.

Therefore, they were specifically picking on that particular victim, the Burger King restaurant, and taking actions and planning their strategy in order to victimize those people that were inside of that restaurant and steal from them, which is exactly the same thing that this boyfriend did in waiting for an opportunity to get the victim alone. That's pre-offense conduct, and that's exactly what the defendants did in this particular case, and it should be scored.

MR. PIAZZA: That's pure supposition on the prosecutor's point of view. You know, even the Court looked at the videotape. There was hardly any customers at all for a

period of time.

THE COURT: You know, I would say that Mr. Cannon's actions were predatory more than the other two defendants, because but for Mr. Cannon, if he would have signalled those other two go away, go away, this isn't a good time, or, you know, they're -- they're locking the doors or they're calling the police or whatever, the robbery would have been foiled.

So I think Mr. Cannon is guilty of predatory conduct.

MR. PIAZZA: Your Honor, for the record, the Court is assuming my client acted as an aider and abettor in an armed robbery where the jury found him not guilty. The jury found my client not guilty of the armed robbery.

THE COURT: I understand. But they also found him guilty of conspiracy.

MR. PIAZZA: The conspiracy only.

THE COURT: Okay. Your objection is noted. OV10 is 15.
(Sent Tr 12-15; Appx 12a-15a)

The Court of Appeals affirmed Defendant's conviction and sentence in an opinion dated July 25, 2006. Regarding the scoring of OV 10, the Court stated:

Also, according to defendant, the trial court should not have assessed fifteen points for OV 10 because OV 10 is designed to punish offenders who had the "primary purpose of victimization." OV 10 concerns the exploitation of a vulnerable victim and provides that fifteen points are to be assessed if "predatory conduct" was involved in committing the offense. MCL 777.40(1)(a). "Predatory conduct" is defined as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). Defendant argues that the "primary purpose" of the offending conduct in this case was obtaining money, not the victimization of employees. Defendant reasons that where the "primary purpose" of a crime is financial, "predatory conduct" as defined in the statute could not have occurred.

"In *People v Kimble*, 252 Mich App 269, 274-275; 651 NW2d 798 (2002), *aff'd* 470 Mich 305 (2004), this Court addressed the statutory definition of "predatory conduct" and held that the following factual situation warranted a score of fifteen points:

Under MCL 777.40(1)(a), the trial court must assign fifteen points to this variable if "predatory conduct was involved." The statute defines predatory conduct as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). Here, the record reflects that defendant and his accomplices drove around for an hour, looking for a car to steal so they could remove and sell the wheel rims. The record further indicates that, when defendant and his cohorts saw the victim driving a car with valuable rims, they followed the victim home, watched the victim pull into the driveway, and shot the victim in order to steal the car. Defendant's preoffense behavior in seeking out a victim and following the victim home for the specific purpose of committing a crime against her was clearly predatory within the meaning of the statute. Accordingly, the trial court did not err in assigning fifteen points for OV 10."

The evidence suggests that defendant and his coconspirators selected a time, place and manner in which to commit this robbery to maximize the vulnerability of the victims and minimize their chances of getting caught. The trial court heard evidence that the offenders planned the crime in advance, parked their car alongside the restaurant in a separate parking lot where they would not be seen, selected defendant to act as the lookout, and waited until the restaurant was devoid of customers so that the employees were alone, in order to facilitate the commission of the offense. Accordingly, defendant's acts satisfied the criteria for predatory conduct within the meaning of the statute. Defendant thus fails to show that the trial court committ (sic) clear error in scoring fifteen points against defendant on OV 10. (Slip op, pp 4-5; Appx 21a-22a)

The Court also held that OV 4 was misscored at 10 points and should have been scored at 0 points, but that resentencing was not required because that scoring error alone did not alter the appropriate guidelines range (Appx 21a-22a). This Court granted Defendant's application for leave to appeal, limited to those issues stated in this brief's Statement of Questions Presented.

ARGUMENT

I. WHAT IS THE PROPER SCOPE OF PREDATORY CONDUCT DEFINED IN MCL 777.40(3)(A) USED IN SCORING OFFENSE VARIABLE 10?

This Court reviews a lower court's interpretation of a statute *de novo*, *People v Schaefer*, 473 Mich 418, 427; 703 NW2d 774 (2005). This Court has specifically held that this standard applies to its review of the interpretation of terms used in the statutory sentencing guidelines, *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

Defendant clearly objected to the scoring of OV 10 at 15 points at his sentencing (Appx 12a-13a).

MCL 777.40(1)(a) provides for a score of 15 points on OV 10 where "[p]redatory conduct was involved". MCL 777.40(3)(a) defines "predatory conduct" as "preoffense conduct directed at a victim for the primary purpose of victimization". This Court has not issued any opinions interpreting this statutory provision.

MCL 8.3 provides that "[i]n the construction of the statutes of this state, the rules stated in sections 3a to 3w [MCL 8.3a to MCL 8.3w] shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature". None of the rules stated in MCL 8.3b to MCL 8.3w can even arguably be applied here. MCL 8.3a, however, states that "[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and

phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning".

This Court has held that a legislatively-provided definition of a word or phrase in a statute supersedes a commonly accepted, dictionary, or judicial definition, and is binding on the courts, *Erlandson v Genesee County Employees' Retirement Commission*, 337 Mich 195, 204; 59 NW2d 389 (1953). Any other construction would almost certainly be "inconsistent with the manifest intent of the legislature", MCL 8.3. It is the statutory definition of "predatory conduct" contained in MCL 777.40(3)(a) to which this Court must apply the general rules of statutory construction prescribed by the Legislature.

A. Does the legislative definition contain technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law?

This is the first question which must be answered, consistent with the Legislature's directives in MCL 8.3 and MCL 8.3a regarding the interpretation of the statutes it enacts. Different rules clearly apply to the interpretation of certain "technical" words and phrases than to words and phrases which are not "technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law".

Neither the term "predatory conduct" nor any part of its statutory definition ("preoffense conduct directed at a victim for the primary purpose of victimization") in MCL 777.40(3)(a) is derived from earlier Michigan law (either statutory or judicial).

Both versions of the judicial sentencing guidelines (Michigan Sentencing Guidelines, Second Edition (1988) and State of Michigan, Sentencing Guidelines Manual (1982)) used the concept of "offender exploitation of victim vulnerability" (now scored 10 points under OV 10) as an aggravating offense variable, but did not use "predatory conduct" as an (even more) aggravating offense variable under OV 10 (or anywhere else).

Prior to the adoption of the legislative guidelines, Michigan adopted the "sex offender registration act" (SORA), MCL 28.721 et seq. In an amendment to that act, the Legislature required any person required to register as a "sex or child offender or predator" in another state to register in this state, MCL 28.723(1)(d), but that provision's adoption came shortly after the adoption of the term "predatory conduct" in MCL 777.40(1)(a).

The term "sexual predator" had been used to refer to persons required to register under Michigan's act in an opinion upholding that act against constitutional challenges in 1997, *Doe v Kelley*, 961 F Supp 1105 (WD Mi, 1997). The term was also used in two SORA cases in the Court of Appeals, *People v Pennington*, 240 Mich App 188, 193; 610 NW2d 608 (2000) and *In re Ayres*, 239 Mich App 8, 15; 608 NW2d 132 (1999), but the publication of both postdated the enactment of MCL 777.40(3)(a).

Nothing in Michigan law previous to the enactment of the legislative sentencing guidelines in 1999 PA 317 in any way established "predatory conduct" or its statutory definition as ones having "acquired a peculiar and appropriate meaning in the law".

Part of the Legislature's definition of "predatory conduct" almost certainly comes from laws in other jurisdictions. In 1994 (PL 103-322, 108 Stat 2038, enacted 9/13/94), the United States adopted a law appropriating money for states which adopted registration programs for sex offenders. It targeted, among others, those convicted of "predatory" offenses. As part of the Crimes Against Children and Sexually Violent Offender Registration Program Act, Congress enacted 42 USC 14071(a)(3)(E) stating that "the term 'predatory' means an act directed at a stranger, or a person with whom a relationship has been established or promoted for the primary purpose of victimization". The appearance of the word "predatory" and the phrase "for the primary purpose of victimization" in the same definitional section is a compelling indication that the federal statute's formulation is a likely source of part of the Michigan definition.

Other states have enacted statutes (requiring sex offender registration) using the same combination of words and phrases. In North Dakota's statute, a "predatory" act is defined as "an act directed at a stranger, or at an individual with whom a relationship has been established or promoted for the primary purpose of victimization", N Dak CC 12.1-32-15 1-d. Precisely the same definition appears in Pa 42 CSA §9792, a Pennsylvania statute involving the same subject-matter.

Several states have enacted statutes providing for the civil commitment of violent sex offenders (rather than sex offender registration), which use the same phrase to define "predatory". A

California statute defines "predatory" to mean that an act "is directed toward a stranger, a person of casual acquaintance, or an individual with whom a relationship has been established or promoted for the primary purpose of victimization", California Welf & Inst Code, §6600(e). In Washington, a statute provides that "predatory" means acts directed towards: "strangers; (b) individuals with whom a relationship has been established or promoted for the primary purpose of victimization; or (c) persons of casual acquaintance with whom no substantial personal relationship exists", RC Wash 71.09.020(5). The Washington act was adopted in 1990 and appears to predate all of the other acts cited here. Missouri uses a nearly identical definition in RS Mo 2000 632.480(3). Iowa statutes define "predatory" acts as "acts directed toward a person with whom a relationship has been established for the primary purpose of victimization", Iowa CA §229.A2(6).

It appears very likely that the phrase "for the primary purpose of victimization" is one which "may have acquired a peculiar and appropriate meaning in the law". The Court should, therefore, consider the sources of the phrase in interpreting it. At the same time, the Court must consider the significant differences between the content of the Michigan statute and that of the statutes from which the phrase was derived. For example, all of the other statutes in which the phrase appears are concerned explicitly only with sex offenders. There can be little doubt that this limitation was intentionally dropped and that "predatory

conduct" can be found in any case in which "preoffense conduct [is] directed at a victim for the primary purpose of victimization". The second major difference is that the source statutes require that a relationship be "established or promoted" for "the primary purpose of victimization". In the Michigan statute, the pre-offense conduct must be directed at a victim for that purpose; the relationship between victim and offender need not have been established "for the primary purpose of victimization".

The Legislature's use of the phrase "preoffense conduct directed at a victim" with "for the primary purpose of victimization" results in a poor fit, rendering the provision somewhat ambiguous. It is easy to understand the meaning of entering into a relationship "for the primary purpose of victimization", i.e., of making the other person in the relationship a victim. It is far more difficult to understand the meaning of (any type of) preoffense conduct being "directed at a victim for the primary purpose of victimization".

Part of the statutory definition ("for the primary purpose of victimization") is a phrase which "may have acquired a peculiar and appropriate meaning in the law". It has been used specifically in statutes to describe a situation in which an offender develops a relationship with a potential sexual abuse victim to advance the offender's plan to abuse that victim. Since the Michigan statute is not limited to sexual abuse and does not require the development or promotion of a relationship, the phrase's genesis and use is significant only if the statutory language is ambiguous.

B. Construed and understood according to the common and approved usage of the language, what does "preoffense conduct directed at a victim for the primary purpose of victimization" mean?

"Preoffense conduct" initially appears to be generally unambiguous. It clearly refers to conduct prior to the commission of the offense (although it does not specify if only the offender's conduct may be considered). Neither "preoffense" nor "conduct" has "acquired a peculiar and appropriate meaning in the law", MCL 8.3a, in this context.

"Preoffense" should be held to refer to conduct occurring before the offense in its common sense. In a technical sense, it could be held that any action occurs "preoffense" if it occurs before the essential elements of the offense occur. It is unlikely that the Legislature intended such a highly technical meaning; such a construction would not be consistent with its manifest intent that the offense scores be aggravating factors or with the Legislature's placement of predatory conduct in a section concerning "exploitation of a vulnerable victim". "Preoffense conduct" should be considered to be conduct occurring before the transaction in which the offense occurs. If such a technical construction is used with regard to Defendant's conspiracy conviction here, it is doubtful that any "preoffense conduct" occurred.

"Conduct" has acquired special meanings in the law, but only in contexts starkly different from that considered here. In First Amendment jurisprudence, "conduct" is deemed to not include "mere speech"; in criminal law, "conduct" normally includes speech, such

as verbal threats; see *People v Davis*, 151 Ill App 3d 435, 445-446; 104 Ill App Dec 283; 502 NE2d 780 (1986). Assuming the Legislature's "core" concern here was to punish activity an offender directs at a victim to make the victim more vulnerable, "conduct" should receive a broad construction.

Deciding what "directed at a victim" means is far more difficult. The most common meaning of "direct" (as a verb) is to "aim, turn, or point", *Webster's New School and Office Dictionary* (Fawcett, 1974 ed). "Conduct" is not something that is aimed, turned, or pointed. While a comment may be directed at a person, conduct is not "directed at" a person, in any broad sense in which "direct" may be used. It is far more likely to be directed at a goal (such as establishing or promoting a relationship). "Direct" is used here in the sense of "he directed the spitball at the teacher" rather than as "his act of throwing the spitball at the teacher was directed toward humiliating her".

This alternative definition of "direct" (as a verb) which specifically is noted to be used with "at" (as in "directed at") appears in *Webster's Third New International Dictionary* (Merriam-Webster, Inc, 1986), p 640. "Direct" can mean "to engage in or launch hostilely" when used with "against" or "at". This meaning accommodates the notion of directing conduct at a victim; it fits well with the Legislature's placement of the consideration of "predatory conduct" in a provision stating "[o]ffense variable 10 is exploitation of a vulnerable victim", MCL 777.40(1). This definition would include conduct affecting or intending to affect

the victim by directing actions at him or her to increase his or her vulnerability or sense of vulnerability.

"Victimization" is defined as "to make a victim of" (or "to slaughter" or "to subject to deception or fraud"), *Webster's Third New International Dictionary* (Merriam-Webster, Inc, 1986), p 2550. It is not a word that is commonly used. It is hard to conclude that it has a "common and approved usage in the language". Where used in statutes, it has almost always been used in connection with a vulnerable or potentially vulnerable victim of sexual abuse.

Defendant submits that the language of the statute should be given its common meaning, but that the words cannot be separated from the phrases in which they are used. One cannot speak or write understandable English by stringing together the definitions of words in a sentence without regard to the words which proceed and follow them. The Legislature's definition of "predatory conduct" means conduct of any kind separate from and prior to an offense which is in any way intended to affect the intended victim and enable the offense to take place, where both the conduct and its effect are to take place before the offense. The conduct must be launched at the victim, and not merely planned, before the offense.

C. Would such a construction be "inconsistent with the manifest intent of the legislature"?

The intent of the Legislature must be determined by considering "all the provisions of the act and the purpose sought to be accomplished by it", *Binkley v Asire*, 335 Mich 89, 96-97; 55 NW2d 742 (1952).

The Legislature's definition of "predatory conduct", construed

reasonably, will almost certainly exclude a substantial number of instances of predatory conduct (in that term's most common understanding) and include a substantial number of instances of non-predatory conduct.

Example A If an offender cruises the streets looking for a vulnerable victim (due, e.g., to the victim's age), finds the apparently vulnerable victim (without previously interacting with her in any way), and approaches the victim and takes her purse by force, this is predatory conduct. The offender has sought a particularly vulnerable victim and taken advantage of that vulnerability. Nonetheless, there was no preoffense conduct directed at the victim. This is not "predatory conduct" using the statutory definition.

Example 2 If the offender slaps his wife, tears out the phone and tells her he will kill her if she seeks help, leaves, then later returns and shoots her, there is nothing particularly predatory about the conduct. It does, however, involve preoffense conduct directed at the victim and intended to make her more vulnerable (thus victimizing her). This is "predatory conduct" using the statutory definition.

Although the statutory definition is inconsistent with any reasonable common definition of predatory conduct, the Legislature (by using the form of a definition) manifestly intended that its special definition be used exclusively, and that no other definition of "predatory conduct" be used.

"Predatory conduct" is used in scoring offense variable 10.

"Offense variable 10 is exploitation of a vulnerable victim", MCL 777.40(1). To the extent that all or part of the statutory definition of "predatory conduct" is ambiguous, this Court's construction should honor the manifest intent of the Legislature. Ambiguities should be resolved in favor of finding "predatory conduct" where a victim is rendered vulnerable by an offender's preoffense conduct directed at him or her and of not finding "predatory conduct" where there has been no preoffense attempt to make the victim vulnerable.

~~Offense variable 10 may be scored either for predatory conduct~~ or for the exploitation of a victim who is vulnerable due to the existence of several named conditions or statuses. 10 points is scored where the "offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status", MCL 777.40(1)(b). Five points is scored where the "offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious", MCL 777.40(1)(c). Any construction which results in eliminating all scores of five and ten points is not consistent with the Legislature's manifest intent.

Choosing a victim at a relatively vulnerable point (in place or time) is not "predatory conduct". Try to distinguish this conduct from that involved in choosing a victim who is among those specified in MCL 777.40(1)(b) or (c) (e.g., with a physical

disability). The choice of the latter victim for his vulnerability is "preoffense conduct" of the same sort involved in the instant case. Construing the statute to include selecting the (not relatively vulnerable) victim at a relatively vulnerable point would mean either never using the 10-point and 5-point scores on OV 10 or scoring the selecting of a non-vulnerable victim at a relatively vulnerable point (in time or place) as a more egregious act than choosing a victim with one of the legislatively-identified vulnerabilities. Either would indicate that the construction of the statute was inconsistent with the manifest intent of the Legislature.

D. Summary

"Preoffense" should be interpreted in a common sense manner; conduct which is a part of the transaction or encounter in which the offense is completed is not "preoffense". Conduct engaged in after an intent is formed (or an agreement to offend is made) but before an encounter is "preoffense".

"Conduct" should be interpreted broadly to include, e.g., verbal threats. Words can be as effective as actions in rendering a victim vulnerable; a narrower construction would not be consistent with the Legislature's intent.

"Directed at" should be construed to mean "to engage in or launch hostilely", "to aim and fire", rather than "to aim". This should require that the conduct be intended by the offender to affect the victim (most particularly, his or her vulnerability or sense of vulnerability) prior to the offense. It does not mean

preoffense conduct intended to affect the victim only at the time of the offense. It does not mean conduct directed at committing a crime against the victim, but not yet directed at the victim.

Conduct "for the primary purpose of victimization" should not be confused with conduct intended to prevent detection of the crime or escape the scene of the crime, or any other purpose. The intended focus of the conduct must be on making the target of it a victim (or a more vulnerable victim).

E. Published Opinions of the Court of Appeals

Although the scoring of OV10 has been addressed by the appellate courts, none have had an occasion to define any of its terms or decide what it (generally) is or is not. The Court of Appeals has affirmed scores for "predatory conduct", frequently in CSC cases; see *People v Drohan*, 264 Mich App 77; 698 NW2d 750 (2004), *aff'd* 475 Mich 140; 715 NW2d 778 (2006); *People v Apgar*, 264 Mich App 321; 690 NW2d 312 (2004), *lv gtd* 474 Mich 1099 (2006), *lv vac* ___ Mich ___ (7/20/07); *People v Witherspoon (After Remand)*, 257 Mich App 329, 336; 670 NW2d 434 (2003), and *People v Cox*, 268 Mich App 440; 709 NW2d 152 (2005) (Note that this Court did not address this issue in *Drohan* or *Apgar*).

In *Apgar* (involving a CSC conviction), the assailants asked the victim to go to a store, drove around and used drugs with her for two hours, then took her to an unfamiliar place where she was given more drugs; then, they attacked her. The Court stated:

Both the timing and the location of an assault are factors of predatory conduct before the offense, which conduct includes watching a victim and waiting for any chance to be alone with her at a separate location.

People v Witherspoon, 257 Mich App 329, 336; 670 NW2d 434 (2003). The victim testified that, although defendant and his two friends invited the victim to accompany them to the store, they drove around for at least two hours, forcing the victim to smoke marijuana. Moreover, the victim claimed that defendant led her to an unfurnished bedroom in the Hamtramck house, shut the door, and forced her to smoke more marijuana before engaging in sexual contact.

Apgar, 330

While "watching a victim and waiting for any chance to be alone with her" might be predatory conduct, it is not "predatory conduct" because no conduct has been directed at the victim. The factors cited after the reference to *Witherspoon* in the above passage make this "predatory conduct"; watching a victim and waiting for a chance to be alone with her are not.

In *Drohan*, the attacker worked with the victim and had made lewd comments to her and touched her offensively many times before attacking her. The Court of Appeals stated:

The victim testified that defendant fondled her and grabbed her wrist around July 17, 2002, before the instance of penetration supporting the CSC III conviction. Defendant told the victim that she had "made him hard" and that he wanted her to "make him come". Two days later, he stated that she should have sexual intercourse with him. He then approached the victim in a parking structure, grabbed her arm, and forced her to enter his car before the act of penetration occurred.

Drohan, p 91

The acts of approaching the victim, grabbing her arm and forcing her into his car are not "preoffense". The other acts discussed make this "predatory conduct".

In *Cox*, the Court of Appeals upheld the scoring of 15 points where the defendant was convicted of sexual conduct with a mentally incapable person. The Court stated:

The victim testified that he had been to defendant's house five or ten times, and that defendant had visited him at his foster home. The investigating officer testified that defendant admitted harboring the victim as a runaway from a foster home. In addition, defendant's presentence investigation report indicates that the victim viewed pornographic material at defendant's home and that a large amount of pornographic material was found in defendant's home, including a videotape of a 16-year-old boy dancing and drinking alcohol in defendant's bedroom, and sleeping nude. Cox, 455

Except for the last two factors mentioned (the large amount of pornography in defendant's house and the videotape), the factors mentioned (involving the victim) constituted "predatory conduct".

Defendant submits that much of the conduct involved in *Drohan*, *Apgar*, and *Cox* fits within an appropriate interpretation of the statutory definition of "predatory conduct". In each case, preoffense conduct over an extended period of time was directed at the victim to, essentially, make him or her a better, more compliant, or more trusting, victim. In each case, the sentencing court could have found that was the offender's primary purpose.

In *People v Kimble*, 252 Mich App 269; 651 NW2d 798 (2002), affirmed 470 Mich 305; 684 NW2d 669 (2004), the Court of Appeals upheld the scoring of "predatory conduct" in a murder case. There, the killers wanted to steal a car with certain valuable rims on the wheels. They saw the victim in her car (with the requisite rims), followed her for quite some time, then killed her and stole the car when she got home. The Court of Appeals upheld the scoring for "predatory conduct" because the killers followed the victim for a lengthy period of time.

Kimble involves "predatory conduct" as the term is commonly

understood, but does not involve "predatory conduct" as the term was defined by the Legislature in the statute. The behavior of the offenders (searching for a potential victim and following the victim until her car stopped) was not directed at her, but at stealing her car. No conduct was directed at her until her car stopped and the offense began. Note also that the conduct did nothing to affect her vulnerability. It is also doubtful if any of the preoffense conduct was primarily for the purpose of victimization; it appeared to be primarily for the purpose of stealing.

In *Witherspoon, supra*, evidence showed that Defendant, the boyfriend of the victim's mother, sexually assaulted the 9-year old victim in the basement of her home while the mother was away. The Court stated a number of reasons why the issues of the scoring for "predatory conduct" should not be reviewed, then upheld the scoring, stating:

We conclude that the *timing* of the assault (when no other persons were present) and its *location* (in the isolation and seclusion of the basement) are evidence of preoffense predatory conduct. Like *Kimble, supra*, it may be inferred from the evidence that defendant *watched* his victim and *waited* for any opportunity to be alone with her in an isolated location. (Emphasis in original)

To watch and wait is not enough because no preoffense conduct is directed at the victim. If the defendant had somehow inveigled the victim into the isolated location, this would be different (even though a close question might be presented concerning the primary purpose of the conduct). As in *Kimble*, the conduct fits within a common definition of predatory conduct, but does not fit within the

statutory definition.

II. DID THE SENTENCING COURT PROPERLY ASSESS 15 POINTS FOR "PREDATORY CONDUCT" IN SCORING OV 10 IN THIS CASE?

The sentencing court and the Court of Appeals clearly misinterpreted the statute by relying on entirely irrelevant considerations regardless of this Court's interpretation.

The sentencing court stated that "Mr. Cannon's actions were predatory more than the other two defendants, because but for Mr. Cannon, if he would have signalled those other two go away, go away, this isn't a good time, or, you know, they're -- they're locking the doors or they're calling the police or whatever, the robbery would have been foiled" (Sent Tr 14; Appx 14a). This was not "preoffense conduct". It was not "directed at" the victims. It was not for "the primary purpose of victimization".

The Court of Appeals shifted ground, ignoring the sentencing court's reasoning and finding facts on its own, and held that "defendant and his coconspirators selected a time, place and manner in which to commit this robbery to maximize the vulnerability of the victims and minimize their chances of getting caught" and "that the offenders planned the crime in advance, parked their car alongside the restaurant in a separate parking lot where they would not be seen, selected defendant to act as the lookout, and waited until the restaurant was devoid of customers so that the employees were alone, in order to facilitate the commission of the offense" (Slip op, p 5; Appx 22a).

To "minimize their chances of getting caught" is not "for the primary purpose of victimization". Unless Defendant's primary

purpose in directing his preoffense conduct at the victims was victimization, the decision fails on this point.

Of equal importance, no "preoffense conduct" was "directed at" the victims. "Watching" and "waiting" is not conduct directed at the victim and is not enough. The offender must direct some "victimizing" action toward the victim prior to the offense. That simply did not happen here.

Attacking a person when or because he or she is vulnerable is not "predatory conduct" under the statutory definition (although it might be in one of "predatory's" common usages). First, the offender has not necessarily directed any actions at the victim at that point. Second, such a construction would virtually eliminate the use of the remaining scores under OV 10 (for exploitation of a vulnerable victim). If this Court construes the statute's ambiguities to eliminate the utility of the other provisions of this section, it is expressing its own disapproval of the Legislature's intent, not attempting to advance it.

Here, the evidence strongly indicates that the offenders' preoffense conduct was directed primarily at not getting caught. The four victims were working in a well-lit restaurant which was open to the public. One had a cell phone which he used to contact police. 18 (named) police officers responded to the victim's call (a fairly short distance from the courthouse and the sheriff's department). Any interpretation that would conclude that targeting these relatively non-vulnerable victims is more blameworthy than exploiting a victim's physical disability (or any of the other

vulnerabilities identified by the Legislature as warranting special protection) should be suspect. Absent very clear and entirely unambiguous language compelling such a result, this Court should conclude that this was not the Legislature's intent.

III. IS "PREDATORY CONDUCT" LIMITED TO THE EXPLOITATION OF A "VULNERABLE VICTIM"?

No. Generally, predatory conduct will involve a victim made more vulnerable by the effect of the offender's pre-offense conduct.

If, however, the offender directs preoffense conduct at the victim in an effort to make him or her more vulnerable, the offender has engaged in "predatory conduct" whether or not the intended victim becomes vulnerable or increasingly vulnerable, and whether or not that vulnerability or increased vulnerability is ultimately exploited or not.

Although the Legislature may have intended any scoring under OV 10 to involve the victimization of a vulnerable person, this intent is not so manifest that the language it chose can be disregarded. Where an offender has directed preoffense actions at an intended victim with the primary purpose of making that victim more vulnerable than otherwise, "predatory conduct" has occurred (even if the victim is not rendered particularly vulnerable by those actions).

IV. WHAT FACTORS MAY BE CONSIDERED IN DETERMINING IF A VICTIM IS "VULNERABLE"?

"Vulnerability" is defined as "the readily apparent susceptibility of a victim to injury, physical restraint,

persuasion, or temptation", MCL 777.40(3)(c). This provision limits the factors to be considered in determining if a victim can be considered "vulnerable".

"Injury, physical restraint, persuasion, or temptation" are not things to which only certain people or classes of people are susceptible. Particularly, those factors used by the Legislature to designate persons (presumably most) susceptible to vulnerability (i.e., physical disability, mental disability, youth or agedness, etc. in MCL 777.40(1)(b) and (c)) do not limit the application of "predatory conduct". It does not appear likely that the Legislature intended "predatory conduct" to apply only in cases where the victim has developed a readily apparent susceptibility (due to the offender's actions directed toward him or her) to "injury, physical restraint, persuasion, or temptation".

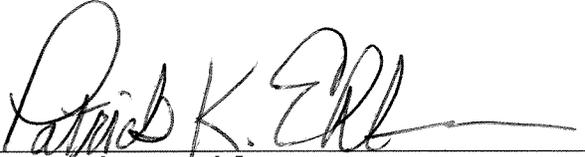
RELIEF REQUESTED

Defendant-Appellant prays that this Honorable Court reverse the decision of the Court of Appeals, hold that the sentencing court erred by scoring OV 10 at 15 points, and remand to that Court for resentencing. The sentencing court used a guidelines range of 126-210 months, based on a PRV score of 25 points (PRV Level D) and an OV score of 75 points (OV Level IV). The Court of Appeals previously held (slip op, p 4; Appx 21a-22a) that OV 4 was misscored at 10 points, and should have been scored at 0 points. If OV 10 was misscored at 15 points and should have been scored at 0 points (nothing in the record would support a score of 5 or 10

points), the OV level would change to III. The resulting recommended range would be 108-180 months. Defendant's minimum sentence of 210 months is outside the proper guidelines range. He is entitled to resentencing. MCL 769.34(2)(10); *People v Kimble*, 470 Mich 305; 684 NW2d 669 (2004); *People v Francisco*, 474 Mich 82, 89, n 8; 711 NW2d 44 (2006).

(Note: counsel was unable to obtain a signed copy of the Sentencing Information Report, filed in Circuit Court on 11/29/04; the unsigned copy (Appx 17a) includes all of the corrections made at sentencing, but mistakenly states that 10, rather than 15, points were scored on OV 10.)

Date: 9/4/07


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