

X PWS

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

vs

No.

RASHID ABDULLAH
Defendant-Appellee.

In re Rashid Abdullah, Minor

L.C. No. 07-465255-DL
COA 284905

Wayne Juvenile S. Manning

Ofc 7-21-09
Rec 8-19-09

139586

APPL

9/22

35521

APPLICATION FOR LEAVE TO APPEAL

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

Timothy A. Baughman
Chief, Research, Training,
and Appeals
1441 St. Antoine
Detroit, MI 48226
313 224-5792

FILED

SEP - 1 2009

CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

Table of Contents

Index of Authorities -ii-

Statement of the Question -1-

Statement of Facts -2-

Argument

I. Sexual penetration upon an individual who was at the time mentally incapable, mentally incapacitated, or physically helpless is 1st-degree criminal sexual conduct when injury is also inflicted. Sexual penetration upon an individual who was at the time mentally incapable, mentally incapacitated, or physically helpless is 3rd-degree criminal sexual conduct where no injury is proven beyond a reasonable doubt. 3rd-degree criminal sexual conduct is an inferior degree of 1st-degree criminal sexual conduct in this circumstance. -5-

Relief -10-

TABLE OF AUTHORITIES

Cases

People v Fox,
482 Mich 1011 (2007).....9

People v Nyx,
471 Mich 112 (2007)7

Statutes

MCL 750.520d(1)(b)6

MCL 750.520b(1)(g)6

MCL 750.520d(1)(c)6

Statement of the Question

I.

Sexual penetration upon an individual who was at the time mentally incapable, mentally incapacitated, or physically helpless is 1st-degree criminal sexual conduct when injury is also inflicted. Sexual penetration upon an individual who was at the time mentally incapable, mentally incapacitated, or physically helpless is 3rd-degree criminal sexual conduct where no injury is proven beyond a reasonable doubt. Is 3rd-degree criminal sexual conduct an inferior degree of 1st-degree criminal sexual conduct in this circumstance?

The People answer: "YES"

Statement of Facts

Respondent was charged with criminal sexual conduct in the first degree under MCL 750.520b(1)(b). The gravamen of the offense is that the perpetrator engaged in a sexual penetration with an individual who was at the time mentally incapable, mentally incapacitated, or physically helpless, and caused personal injury. The trial judge made the following findings of fact:

Just because you're in the room with somebody doesn't give you the license to steal and in my mind that's what happened. There was a license to steal taking place that night.

The girls was drunk. It's plain and simply she was drunk.

There was no way, shape, for or fashion, stretch of the imagination that she could remotely give any consent at that time. None whatsoever. That's my opinion.

But under all the circumstances that transpired, I don't see Brittany giving any consent, any way, shape, form or fashion.

The fact of the matter remains that she has to knowingly and voluntarily. If you're drunk, you cannot knowingly and voluntarily do anything. You're drunk. You're intoxicated. You're inebriated. You're not in control of your faculties.

That's what we have here, a situation where she was not in control of her faculties.

However, the young men were and the young men took advantage of her with her not being in control of her faculties and that's the way I see it.

And we know that she was sleeping as it was indicated during the early hours of the morning.

So I don't know how you can remotely get consent from her while she was sleeping even she was coming out of her drunken stupor.

And the fact of the matter remains, you know, there have been situations when individuals have had complete control of their faculties. When they said, No, no means no.

But here we have a young lady who was not and it's been evidenced by all of the testimony.

And like I said, this was a situation where this young lady was unfortunately taken advantage of... *we don't have any medical testimony to support that there was an injury that occurred, but the Court does note that Brittany was incapacitated.*

However, because of the fact that the court has not conclusively found any injury beyond a reasonable doubt, the court finds that the respondent is guilty of CSC in the third degree using force or coercion to penetrate her which occurred without her consent. (T, 47-51, emphasis added).

The Court of Appeals, raising the issue on its own, and without calling for supplemental briefs, slip opinion at 3, held that defendant had been convicted under MCL 750.520(1)(b) (apparently because of the trial judge's reference to "force or coercion," and that this form of 3rd-degree criminal sexual conduct is not an inferior degree of the charged

form of 1st-degree criminal sexual conduct. The People's motion for rehearing (the first opportunity to brief the issue) was denied, over the dissent of Judge Talbot. The people seek leave.

Argument

I.

Sexual penetration upon an individual who was at the time mentally incapable, mentally incapacitated, or physically helpless is 1st-degree criminal sexual conduct when injury is also inflicted. Sexual penetration upon an individual who was at the time mentally incapable, mentally incapacitated, or physically helpless is 3rd-degree criminal sexual conduct where no injury is proven beyond a reasonable doubt. 3rd-degree criminal sexual conduct is an inferior degree of 1st-degree criminal sexual conduct in this circumstance.

The decision of the Court of Appeals—which raised the issue on which it reversed on its own motion, and without calling for supplemental briefs to address the issue it was raising on respondent’s behalf—is somewhat mystifying; more importantly, the result reached by the Court of Appeals is a miscarriage of justice.

Respondent was charged with criminal sexual conduct in the first degree under MCL 750.520b(1)(b). The gravamen of the offense is that the perpetrator engaged in a sexual penetration with an individual who was at the time mentally incapable, mentally incapacitated, or physically helpless, and caused personal injury. Here the trial court had a reasonable doubt as to personal injury, and found the respondent guilty of criminal sexual conduct in the third degree. The Court of Appeals has found this improper, finding that offense to be a “cognate” offense, which may not be considered by a factfinder. See *People v Nyx*, 471 Mich 112 (2007). The People think that this is not the law, and that the trial judge

here was quite plainly *not* finding that the victim was not incapacitated, but had a doubt as to personal injury. If the trial judge *also* found force or coercion, in addition to incapacity, defendant cannot possibly be harmed.

While it is true that criminal sexual conduct in the third degree is committed by use of force or coercion under MCL 750.520d(1)(b), an element not contained in first-degree criminal sexual conduct when charged under MCL 750.520b(1)(g), third-degree criminal sexual conduct under MCL 750.520d(1)(c) is *precisely* penetration with a person who was at the time mentally incapable, mentally incapacitated, or physically helpless, and is quite clearly an included offense under *Cornell* and *Nyx*—in short it is an offense all elements of which are subsumed in the greater offense. Though the judge may have said the words “force or coercion” in her factfinding, a conviction on the basis of penetration with an incapacitated person, but with no finding of personal injury so as to make the offense first-degree criminal sexual conduct, is clearly what was intended:

Just because you're in the room with somebody doesn't give you the license to steal and in my mind that's what happened. There was a license to steal taking place that night.

The girls was drunk. It's plain and simply she was drunk.

There was no way, shape, for or fashion, stretch of the imagination that she could remotely give any consent at that time. None whatsoever. That's my opinion.

But under all the circumstances that transpired, I don't see Brittany giving any consent, any way, shape, form or fashion.

The fact of the matter remains that she has to knowingly and voluntarily. If you're drunk, you cannot knowingly and voluntarily do anything. You're drunk. You're intoxicated. You're inebriated. You're not in control of your faculties.

That's what we have here, a situation where she was not in control of her faculties.

However, the young men were and the young men took advantage of her with her not being in control of her faculties and that's the way I see it.

And we know that she was sleeping as it was indicated during the early hours of the morning.

So I don't know how you can remotely get consent from her while she was sleeping even she was coming out of her drunken stupor.

And the fact of the matter remains, you know, there have been situations when individuals have had complete control of their faculties. When they said, No, no means no.

But here we have a young lady who was not and it's been evidenced by all of the testimony.

And like I said, this was a situation where this young lady was unfortunately taken advantage of... *we don't have any medical testimony to support that there was an injury that*

occurred, but the Court does note that Brittany was incapacitated.

However, because of the fact that the court has not conclusively found any injury beyond a reasonable doubt, the court finds that the respondent is guilty of CSC in the third degree using force or coercion to penetrate her which occurred without her consent. (T, 47-51, emphasis added).

On this factfinding, it simply cannot reasonably be said that the trial judge was *not* concluding that the penetration had occurred on an individual who was at the time mentally incapacitated—the trial judge said so *repeatedly*. That because there was not consent (for that reason) the trial judge *also* used the term “force and coercion” does not detract from the (repeated) finding that the defendant penetrated a mentally incapacitated person; this “extra” finding does not undermine the trial judge’s repeated conclusion that the defendant had committed the included offense of penetration on an mentally incapacitated person, but with a reasonable doubt as to injury, leaving the offense at criminal sexual conduct in the third degree.

The People cannot help but note the irony here. The Court of Appeals has held that the respondent was denied notice to defend against the charge of which he was ultimately convicted (with which the People, for the reasons stated,¹ strenuously disagree), and in an opinion in which the court raised the issue on respondent’s behalf sua sponte, giving the

¹ And for other reasons not necessary to press here (i.e. that 3rd-degree criminal sexual conduct is by definition an inferior degree of criminal sexual conduct to 1st-degree criminal sexual conduct).

People no notice or opportunity to brief the question.² Had supplemental briefing been directed on the issue noticed by the court but not raised by respondent, the People would have made the above argument, and also pointed out that when the prosecutor requested consideration of third-degree criminal sexual conduct by the trial judge, no objection was heard by respondent's counsel, counsel thereby acquiescing to consideration of the offense. See *People v Fox*, 482 Mich 1011 (2007)(Corrigan, J., dissenting from the denial of leave).

Because it clear beyond peradventure from the findings of the trial court here that the court was finding simply that it had a reasonable doubt as to one element of the charged offense (personal injury), but was convinced of the remaining elements (penetration, mental incapacity of the victim), and those remaining elements *constitute* the offense of criminal sexual conduct in the third degree, of which the court convicted defendant, that conviction should be reinstated.

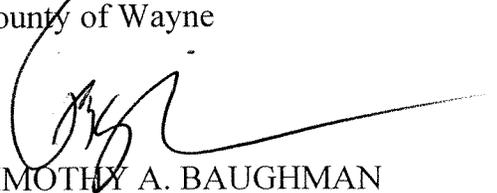
² The People appreciate—in all senses of the word—that the Court of Appeals several weeks before the case was submitted on call invited the parties to appear at argument. But as the People regretfully noted at the time in a letter to the court, the prosecutor who handled the appeal was retiring shortly before argument, there was no time to get someone else “up to speed” on the case, and it now appears that this would have been unavailing in any event, as the issue on which the court reversed was not then even part of the case, and the invitation to appear at oral argument did *not* note that the court was considering an issue neither raised nor briefed by respondent. Respectfully, even an appearance by the prosecutor who handled the appeal at that time would not have been an adequate substitute for notice of the issue under consideration and an opportunity to file a supplemental brief, which the People respectfully submit should be the regular practice if an appellate court notices an issue not raised and briefed that it nonetheless intends to consider, something on which *this* court ought to remark.

Relief

WHEREFORE, the People respectfully requests this Honorable Court to grant leave to appeal and reverse the Court of Appeals.

Respectfully submitted,

KYM L. WORTHY
Prosecuting Attorney
County of Wayne



TIMOTHY A. BAUGHMAN
Chief of Research
Training and Appeals
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5792

TAB/js

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of RASHID ABDULLAH, Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

RASHID ABDULLAH,

Respondent-Appellant.

UNPUBLISHED
July 21, 2009

No. 284905
Wayne Circuit Court
Juvenile Division
LC No. 07-465255-DL

Before: Fitzgerald, P.J., and Talbot and Shapiro, JJ.

PER CURIAM.

Respondent, a 16-year-old juvenile at the time of the charged offense, was adjudicated responsible for third-degree criminal sexual conduct, MCL 750.520d(1)(b) (CSC III), by the trial court and was sentenced to a juvenile facility. Respondent appeals as of right. We reverse. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Respondent's conviction arises out of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(g) (CSC I). The complainant, who was six days shy of her twenty-first birthday on the date of the incident, testified that she passed out in the basement of respondent's family's apartment following a night of heavy drinking, and awoke in the morning to find respondent sexually penetrating her. She had no recollection of any events between approximately 3:00 a.m. and 10:00 a.m. Photographs admitted into evidence revealed slight abrasions to the victim's elbows, some slight bruising on her arm, and bruising on her neck. The victim testified that she suffered vaginal pain for which she received medical treatment. No medical testimony regarding the victim's injuries was presented.

Respondent gave a statement to the police. He stated that the complainant was drunk when he and a mutual friend picked the complainant up at her house at her request and brought her to respondent's house. The three drank and, while dancing, took off their shirts. He and the complainant started kissing and then had sex twice under a blanket on the floor. They fell asleep, woke up a few hours later, and had sex again. He then drove her home.

Although defendant was charged with CSC I, during the closing arguments the prosecutor urged the trial court to consider, in the alternative, the offense of CSC III. Respondent did not object. The trial court, after finding that the complainant was drunk and

unable to give consent, rejected the original charge of CSC I for injury to an incapacitated victim because no medical testimony was presented to support a finding that an injury occurred. MCL 750.520(1)(g). However, the court found respondent guilty of CSC III for engaging in sexual penetration accomplished by force or coercion.

This brings us to a problem not raised by respondent. Generally we do not address issues not raised by the parties on appeal. But our function is to dispense justice, and we are given the limited power to raise questions on our own. *Vermeulen v Knight Investment Corp*, 73 Mich App 632, 642-643; 252 NW2d 574 (1977); *People v Noel*, 88 Mich App 752, 754; 279 NW2d 305 (1979). We deem this issue to be of sufficient merit to warrant raising it on our own motion as defendant's due process rights are implicated.¹

In the present case, the prosecutor chose to charge respondent with a violation of MCL 750.520b(1)(g). The essential elements of that charge are that the defendant (1) engages in sexual penetration with the victim, (2) causes personal injury to the victim, and (3) that the victim was mentally incapable, mentally incapacitated, or physically helpless at the time of the alleged act. Under Michigan law "physically helpless means that a person is unconscious, asleep, or for any other reason is physically unable to communicate unwillingness to act." MCL 750.520a(k).

The essential elements of CSC III under MCL 750.520d(1)(b) are that the defendant (1) engages in sexual penetration with the victim and (2) uses force or coercion. "Force or coercion" means the defendant either used physical force to accomplish the penetration or did something to make the victim "reasonably afraid of present or future danger." CJI2d 20.15.

Under the facts of this case it was possible for respondent to be convicted of CSC I under MCL 520b(1)(g) without having committed CSC III under MCL 750.520d(1)(b) because of the additional element of force or coercion required under CSC III. Thus, CSC III in this case is a cognate lesser offense, rather than a necessarily included lesser offense, because it was not necessarily committed.²

In *People v Nyx*, 479 Mich 112; 734 NW2d 548 (2007), the defendant was charged with CSC I, but following a bench trial the trial court sua sponte convicted the defendant of two counts of CSC II. The defendant appealed, arguing that the trial court was without authority to

¹ "A defendant's right to adequate notice of the charges against the defendant stems from the Sixth Amendment, as applied to the states through the Due Process Clause of the Fourteenth Amendment." *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998).

² In certain factual scenarios CSC III may be a necessarily included lesser offense, but this case is not one of them. Had respondent been charged with CSC I under MCL 750.520b(1)(f), which requires proof that the defendant (1) caused personal injury to the victim, (2) engaged in sexual penetration with the victim, and (3) used force or coercion to accomplish the sexual penetration, the offense of CSC III under MCL 750.520d(1)(b) would be a necessarily included lesser offense because it is not possible to commit CSC I without first having committed CSC III.

consider the cognate lesser offense of CSC II. *Id.* at 116. The lead opinion in *Nyx* agreed, concluding:

[E]ven if the crime is divided by the Legislature into degrees, the offense of a lesser degree cannot be considered under MCL 768.32(1) unless it is inferior, i.e., it is within a subset of the elements of the charged greater offense. Given that all the elements of CSC II are not included within CSC I, the trial court was without authority to convict defendant of CSC II after it acquitted him of CSC I. [*Id.* at 121 (Taylor , C.J.), 137 (Markman, J).]

Justices Cavanagh and Kelly concurred with the result reached by Justices Taylor and Markman, reasoning that “[d]efendant did not have adequate notice that he faced the charge of CSC II, so convicting him of that offense would violate his right to due process.” *Id.* at 142-143.

Like in *Nyx*, respondent in the present case was charged with CSC I, and the trial court erred by considering the lesser cognate offense of CSC III, thereby violating respondent’s substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999). The appropriate remedy under *Nyx*, *supra* at 136, is that respondent must be discharged. Accordingly, in light of our resolution, it is unnecessary to address respondent’s remaining issues.

Vacated and remanded for the entry of an order of discharge. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald

/s/ Michael J. Talbot

/s/ Douglas B. Shapiro

Court of Appeals, State of Michigan

ORDER

In re Rashid Abdullah

Docket No. 284905

LC No. 07-465255-DL

E. Thomas Fitzgerald
Presiding Judge

Michael J. Talbot

Douglas B. Shapiro
Judges

The Court orders that the motion for reconsideration ~~is~~ DENIED.

Talbot, J., would grant the motion for reconsideration.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

APR 24 2014

Date

Sandra Schultz Mengel
Chief Clerk

**STATE OF MICHIGAN
IN THE SUPREME COURT**

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff - Appellant,

vs

Supreme Court
No.

RASHID ABDULLAH
Defendant - Appellee.

Lower Court No. 07-465255-DL
COA No. 284905

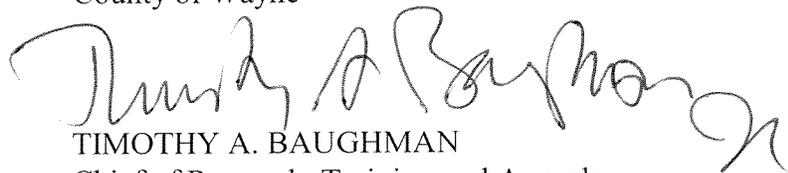
NOTICE OF HEARING

TO: SANFORD A. SCHULMAN
Attorney for Appellee
500 Griswold, Ste 2340
Detroit, Michigan 48226

PLEASE TAKE NOTICE that the attached APPLICATION FOR LEAVE TO APPEAL will be brought on for hearing in the Michigan Supreme Court at Lansing, Michigan on Tuesday, SEPTEMBER 22, 2009.

Respectfully submitted,

KYM L. WORTHY
Prosecuting Attorney
County of Wayne



TIMOTHY A. BAUGHMAN
Chief of Research, Training and Appeals
1441 St. Antoine Street
Detroit, Michigan 48226
313/224-5792

**STATE OF MICHIGAN
IN THE SUPREME COURT**

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant,

vs.

No.

RASHID ABDULLAH

Defendant-Appellee.

L.C. No. 07-465255-DL

COA 284905

PROOF OF SERVICE

STATE OF MICHIGAN)

ss

COUNTY OF WAYNE)

The undersigned deponent, being duly sworn, deposes and says that she served a true copy of **APPLICATION FOR LEAVE TO APPEAL** on:

SANFORD A. SCHULMAN

The within named attorney for defendant, by **DEPOSITING SAID PLEADING IN THE U.S. MAIL IN THE CITY OF DETROIT**, enclosed in an envelope bearing postage fully prepaid on AUGUST 27, 2009, plainly addressed as follows:

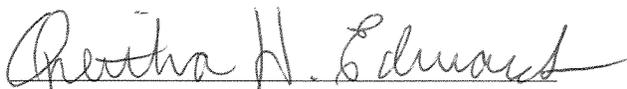
SANFORD A. SCHULMAN
Attorney for Defendant-Appellee
500 Griswold, Ste. 2340
Detroit, Michigan 48226


Olymphina Montgomery

Said pleading was filed in **THE MICHIGAN SUPREME COURT**, by U.S. Mail at the following address:

CORBIN R. DAVIS
Michigan Supreme Court
Post Office Box 30052
Lansing, Michigan 48902

Subscribed and sworn to before me
this 27th date of AUGUST - 2009



Oneitha H. Edwards
Notary Public, Wayne County, Michigan
My commission expires on 01/23/2016