

STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner/Appellee,

Case No. 139586

COA 284905

Lower Court Case No. 07-465255 DL

vs.

RASHID ABDULLAH

Respondent/Appellant.

_____ /

139586

RESPONDENT/APPELLANT, RASHID ABDULLAH'S
ANSWER IN OPPOSITION TO PETITIONER/APPELLEE'S
APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF QUESTION PRESENTED

I. WHETHER THE MICHIGAN COURT OF APPEALS CORRECTLY FOUND THAT THE TRIAL COURT ERRED IN FINDING THE DEFENDANT/RESPONDENT GUILTY OF CRIMINAL SEXUAL CONDUCT IN THE THIRD DEGREE PURSUANT TO MCL 750.d(1)(b) WHEN IT HAS BEEN ESTABLISHED THAT CRIMINAL SEXUAL CONDUCT IN THE THIRD DEGREE PURSUANT TO MCL 750d(1)(b) IS NOT A LESSER INCLUDED OFFENSE OF THE ORIGINAL CHARGE OF CRIMINAL SEXUAL CONDUCT 750.b(1)(g)

Plaintiff/Petitioner would answer	"NO"
Defendant/Respondent would answer	"YES"

STATEMENT OF FACTS

Respondent/Appellant, RASHID ABDULLAH, a juvenile, was originally charged in the Wayne County Juvenile Court with one count of criminal sexual conduct in the first degree pursuant to MCL 750.520(b)(1)(g) not MCL 750.520d)(1)(b).

Prior to trial, the appellant waived his right to a jury trial and elected to have the court hear the case.¹ Furthermore, prior to trial, the prosecutor moved to dismiss the adult designation and proceed against the respondent as a juvenile.² (Bench Trial/Pre-Trial, Tr. 11/5/07, p. 5).

Trial commenced on February 19, 2008 and all witnesses and potential witnesses were sequestered including the appellant's mother, RANI JAN, who was acknowledged as a witness by both the prosecutor and defense counsel. Indeed, a translator was present for the sole purpose of assisting Rani Jan (Tr. 2/19/08, p. 3-5).

The prosecutor's theory was that on February 4, 2007 the complainant, Brittany McCarthy, just shy of her twenty-first birthday, arranged to meet a friend name "Araldi" who was accompanied by Rashid Abdullah. Araldi and Rashid went to her home where she was living with her parents and picked her up. Prior to meeting her, she had consumed several beers. They then went to Rashid

¹ The Respondent/appellant waived his right to a jury trial at an August 27, 2007 pretrial.

² On November 5, 2007, the date originally set for trial, the prosecutor sought an adjournment to procure DNA evidence. However, the defense agreed to the adjournment with the stipulation that the respondent be tried as a juvenile. (Bench Trial/Pre-Trial, Tr. 11/5/07, p. 5).

Abdullah's parents home and into the basement level. Ms. McCarthy consumed more beer and vodka at the house and then allegedly blacked-out.

According to the prosecutor, when she "wakes up the next morning she finds herself in essentially the clutches of the respondent, that, in fact, he is having intercourse with her." The prosecutor argued that she was upset and bruised on her neck and rug burns on her arms. She is driven home by the respondent, Rashid Abdullah and later makes a police report.

(Tr. 2/19/08, p. 6-9)

In contrast, it was the defense position that there would not be sufficient evidence to show that the sexual contact between the sixteen-year-old Rashid Abdullah and the almost twenty-one year old complainant was anything but consensual. The complainant did not tell the police she had been drinking that night, that she went to the respondent's home and into his basement voluntarily, she continued to drink voluntarily and danced provocatively at Rashid's home all in good spirits. Indeed, she did not report any incident until she was later confronted by her parents regarding her absence from their home. (Tr. 2/19/08, p. 10-13)

Brittany McCarthy was the first witness and she testified that on February 4, 2007 she was six days short of her twenty-first birthday and that on that particular day around 11 p.m. she was "sitting at my house drinking (beer) by myself." (Tr. 2/19/08, p. 15-16) Sometime later, Ms. McCarthy recalled speaking with an individual she identified only as "Araldi," an acquaintance and friend. She

could not recall whether she called him or he called her. (Tr. 2/19/08, p. 16).

According to Ms. McCarthy, Araldi and her discussed going to AJ's home who she had previously met. Ms. McCarthy identified the respondent, Rashid Abdullah as the individual she knew as "AJ." (Tr. 2/19/08, p. 19)

By the time Araldi and Rashid came to pick her up at her home, Ms. McCarthy testified she had already consumed "about three or four" twelve ounce beers. (Tr. 2/19/08, p. 20, 53). Ms. McCarthy indicated that she walked out to Araldi's car and went to Rashid's house voluntarily, even taking her beer with her. (Tr. 2/19/08, p. 21, 53). When they arrived, they go directly to the basement portion of Rashid's parent's home. There was no indication they did not go voluntarily. (Tr. 2/19/08, p. 23-24, 56).

Ms. McCarthy continued to drink while at Rashid's basement and drank at least her fifth beer before she started drinking Vodka, according to her testimony, at the request of Araldi. (Tr. 2/19/08, p. 26, 56-57). She then drank at least her sixth beer immediately thereafter and started to dance with both Araldi and Rashid. (Tr. 2/19/08, p. 28-29, 58) Ms McCarthy would then sit down and opened and drank yet another beer, at least her seventh before she claims she stood-up and was danced again and eventually passed out. Ms. McCarthy has no recollection what occurred between two in the morning and ten in the morning. (Tr. 2/19/08, p. 29-31).

Ms. McCarthy testified that at 10 in the morning she 'started feeling really weird and then I woke-up and AJ was on top of me with his penis inside me and I kicked him off me and just started saying, what the fuck is going on, and I just

freaked out.” (Tr. 2/19/08, p. 32). Ms. McCarthy and Rashid Abdullah then began looking for her pants and her socks and, according to Ms. McCarthy, Rashid Abdullah’s brother, later identified as Abid Abdullah, came downstairs and finds her pants in the window area. (Tr. 2/19/08, p. 33, 35, 75).

Soon thereafter Rashid’s mother Rani Jan, came into the basement and Ms. McCarthy indicated that she was having a conversation with Araldi about what purportedly occurred that evening. (Tr. 2/19/08, p. 37-38). Ms. McCarthy maintained that she saw a condom on the floor near where he head was when she was laying down. (Tr. 2/19/08, p. 39). Ms. McCarthy was then asked by the prosecutor if she told Araldi what had happened to which she answered: “No.” (Tr. 2/19/08, p. 40).

Later that day, Ms. McCarthy would go to the police and make a report. Several photographs were admitted showing, according to Ms. McCarthy, marks on her neck that she did not know how they got there and a scrape and bruise on her elbow. Ms. McCarthy also maintained that she felt pain in her vaginal area. (Tr. 2/19/08, p. 42-44). There were no medical records admitted.

When Ms. McCarthy returned home she did not tell her parents what occurred because she was embarrassed but she admitted that it was not unusual for her to spend the night away from home. (Tr. 2/19/08, p. 47-48).

On cross-examination, Ms. McCarthy stated that she made a full, complete and accurate statement to the police, even correcting the spelling to her statement when she made it the next day. Ms. McCarthy, acknowledged,

however, that she had failed to mention that she was drinking alone at her parent's home prior to going to Rashid's house. (Tr. 2/19/08, p. 51).

Ms. McCarthy acknowledged she drank approximately seven beers and several shots of vodka and was dancing in the basement and either Araldi or Rashid took off their shirt. Ms. McCarthy could not recall which one but she did recall telling Rashid to "loosen up" and showed him how to dance. (Tr. 2/19/08, p. 59-60).

Ms. McCarthy did acknowledge that she had, on a previous occasion, drank a lot of beer and alcohol together and in fact had previously passed out. (Tr. 2/19/08, p. 61). In contrast, however she testified at the preliminary examination that this was the first time she had passed out. (Tr. 2/19/08, p. 67). Ms. McCarthy acknowledged that she was unaware of what she might have been doing after she passed out. (Tr. 2/19/08, p. 84-85). Further, Ms. McCarthy was asked about her previous statement to the police in which she indicated that she had become upset with Rashid after he told her that he had used protection "most of the time." (Tr. 2/19/08, p. 70).

The defense then attempted to inquire about Ms. McCarthy's statement in which she admittedly told Rashid that she had been positive for herpes and didn't experience any symptoms and he should care. (Tr. 2/19/08, p. 70). The prosecutor objected and the court barred any further inquiry. The defense argued that the line of questioning went to the issues of state of mind; injuries and whether the complainant was upset only after discovering that protection had been partially used by the respondent. (Tr. 2/19/08, p. 71-72).

Ms. McCarthy, now twenty-two years old, acknowledge that Rashid was at the time sixteen years old and that he lived at the residence with his parents and that she met both his brother, Abid Abdullah and his mother Rani Jan but did not mention to either of them that she had been assaulted or was in any type of discomfort or had suffered any injuries. (Tr. 2/19/08, p. 75,). Moreover, Ms. McCarthy indicated she had spoken with Araldi and did not mention to him “that AJ had sex with [her] against her will” only that she was upset that he left without her. (Tr. 2/19/08, p. 76).

Finally, Ms. McCarthy acknowledged that she really does not know what happened between the time she blacked out and the time she woke up and further that the respondent, Rashid Abdullah, the person she claims assaulted her, drove her home. (Tr. 2/19/08, p. 76-77, 79).

The final witness to testify was Araldi Arkaxhiu, a friend of Rashid Abdullah who he met at high school. (Tr. 2/19/08, p. 90, 128). Mr. Arkaxhiu stated that he had met the complainant, Brittany McCarthy, at a grocery store about a week prior and had dated one time. According to Mr. Arkaxhiu, Ms. McCarthy called him that evening around 12 and they agreed Mr. Arkaxhiu and Rashid would pick her up at her house (Tr. 2/19/08, p. 93).

Araldi Arkaxhiu testified that they pick up Ms. McCarthy at her house and I go to Rashid’s parents home. (Tr. 2/19/08, p. 97). Araldi assumed that Rashid’s parents were home because they are always home and the three of them went into the basement, drank beer and alcohol and danced. (Tr. 2/19/08, p. 99-100,

104). Soon thereafter, Araldi took off his shirt and, according to Araldi, Ms.

McCarthy took off her shirt and “took his off.” (Tr. 2/19/08, p. 104).

At some point Araldi recalled being on the floor with Brittany McCarthy “making out on the floor” and he was “trying to get a move on” but did not have sex with her although he was touching her. (Tr. 2/19/08, p. 106, 127). According to Mr. Arkaxhiu, Ms. McCarthy then gets up and has a cigarette and then continues to drink. (Tr. 2/19/08, p. 107-108). Araldi Arkaxhiu specifically recalls seeing Brittany McCarthy and Rashid Abdullah dancing and kissing followed by “touching and then they got on the floor” and then go “under the blanket.” (Tr. 2/19/08, p. 111, 113 116). At some point, Araldi recalls Ms. McCarthy standing up with just a bra and no pants, had a cigarette before going back under the blankets just prior to Araldi leaving. It appeared to Araldi that “Brittany is all into this” and Araldi is sitting in close proximity and sees all of this clearly for approximately an hour. (Tr. 2/19/08, p.117-118, 122).

Araldi recalled seeing Rashid’s brother, Abid, come “downstairs for a second” while the three of them were in the basement and Brittany was without her pants. (Tr. 2/19/08, p.126).

On cross-examination, Mr. Arkaxhiu indicated that while he is older than Rashid, he is younger than Ms. McCarthy. He stated that he recalled noticing Brittany appeared intoxicated while they were in Rashid’s basement and that he had told the police that there came a point that Ms. McCarthy and Rashid Abdullah were kissing and that he further told police that Ms. McCarthy had told

him that she was interested in Rashid and was more interested in Rashid than him. (Tr. 2/19/08, p.128-130). Testimony concluded for the day.

The next day, the prosecutor noted for the record that the sworn interpreter was interpreting in "bits and spurts" and that he wanted to make sure that Ms. Jan was able to understand what was occurring. (Tr. 2/20/08, p. 4). The parties, through counsel, stipulated to the testimony of Detective Kenneth Robinson. That if he had testified he would have stated that he is an officer with the Canton Police Department, the officer-in-charge of the case, that he had spoken with the respondent Rashid Abdullah on March 1, 2007, accompanied by his mother and brother, advised of his Miranda rights, signed advise of rights form and stated as follows: They drove back to his house, picked the complainant up, she was already drunk, they went into his basement at his parents' home, the complainant brought approximately eight beers, they were drinking and dancing, he took off his shirt and he and Ms. McCarthy started kissing and had sex on the floor two times under a blanket, fell asleep, woke up a few hours later and had sex again before waking up around noon. They got up and he drove her home. There was no admission to non-consensual sex. (Tr. 2/20/08, p. 5-7).

At the conclusion of the stipulation, the prosecutor rested. The defense called no witnesses. Neither the respondent, his mother Rani Jan nor his brother Abid Abdullah testified. (Tr. 2/20/08, p. 7). Counsel proceeded to closing arguments. (Tr. 2/20/08, p. 8-43).

The Court immediately made the following findings of fact: that Araldi and Ms. McCarthy appeared to like each other, they had gone out before and she called him, she put some more beers in her purse and got in the car with Araldi and his friend who she had seen once before. When they get to Rashid's house, she continues to drink and dances with both young men before she passes out. The court noted "there was no way, shape, form or fashion, stretch of the imagination that she could remotely give any consent at that point in time. None whatsoever. That's my opinion." (Tr. 2/20/08, p. 47). The Court found Rashid Abdullah guilty of criminal sexual conduct in the third degree. (Tr. 2/20/08, p. 48-49, 51). The Court made no findings of fact, however, that there was any evidence of injury a required element .

The Respondent was sentenced on March 17, 2008 and thereafter filed this timely appeal as of right. The Michigan Court of Appeals reversed and vacated the verdict on the basis that since the respondent was charged originally with Criminal Sexual Conduct in the First Degree MCL 750.520(b)(1)(g) and given the findings of fact by the trial court it was improper for the trial court judge to have found the defendant/respondent guilty of third-degree criminal sexual conduct in the third degree pursuant to MCL 750.d(1)(b)

The plaintiff/respondent seeks application for leave to appeal.

ARGUMENT

I. THE MICHIGAN COURT OF APPEALS CORRECTLY FOUND THAT THE TRIAL COURT ERRED IN FINDING THE DEFENDANT/RESPONDENT GUILTY OF CRIMINAL SEXUAL CONDUCT IN THE THIRD DEGREE PURSUANT TO MCL 750.d(1)(b) WHEN IT HAS BEEN ESTABLISHED THAT CRIMINAL SEXUAL CONDUCT IN THE THIRD DEGREE PURSUANT TO MCL 750d(1)(b) IS NOT A LESSER INCLUDED OFFENSE OF THE ORIGINAL CHARGE OF CRIMINAL SEXUAL CONDUCT 750.b(1)(g)

MCL 750.520(b)(1)(g) requires evidence as follows: A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:

(g) The actor causes personal injury to the victim, and the actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

In contrast, MCL 750.750(b)(1)(f) (1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists: (f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration. Force or coercion includes, but is not limited to, any of the following circumstances: (i) When the actor overcomes the victim through the actual application of physical force or physical violence. (ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats. (iii) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim

believes that the actor has the ability to execute this threat. As used in this subdivision, "to retaliate" includes threats of physical punishment, kidnapping, or extortion. (iv) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes that are medically recognized as unethical or unacceptable. (v) When the actor, through concealment or by the element of surprise, is able to overcome the victim.

The plaintiff/petitioner is attempting to argue that the defendant/respondent is guilty of third degree criminal sexual conduct. What the plaintiff/petitioner misunderstands is that the issue is whether the statute the court cited and employed in finding the defendant/petitioner guilty is a lesser included offense of the original charge. Because criminal sexual conduct in the third degree pursuant to MCL 750.520d(1)(b) is not a lesser included offense of the criminal sexual conduct offense that the defendant/appellant was charged it is simply inappropriate for a trier of fact to have found him guilty.

Criminal Sexual Conduct in the Third Degree pursuant to MCL 750.520d(1)(b) requires that a person engage in sexual penetration with another person and if any of the following circumstances exist: (a) That other person is at least 13 years of age and under 16 of age.(b) Force or coercion is used to accomplish the sexual penetration. [MCL 750.520d(1)(a) and (b); MCL 28.788(4)(1)(a) and (b).

The respondent/appellant was charged with Criminal Sexual Conduct in the First Degree in violation of MCL § 750.520b(1)(g) (not MCL 750.520b(1)(b) as was stated in paragraph one of the Plaintiff/Appellee's Motion for Rehearing).

MCL § 750.520b(1)(g) provides that: A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists: (g) The actor causes personal injury to the victim and the actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

MCL Sec. 520d. (1) states that a person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exist: (a) That other person is at least 13 years of age and under 16 years of age. (b) Force or coercion is used to accomplish the sexual penetration. Force or coercion includes but is not limited to any of the circumstances listed in section 520b(1)(f)(i) to (v). (c) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

Criminal Sexual Conduct in the Third Degree is a cognate lesser offense but is not a necessarily included lesser offense as charged in this case. The appellee is correct if the appellant had been charged with Criminal Sexual Conduct in the First Degree pursuant to MCL 750.520b(1)(f). However, he was not charged under that statute.

A jury instruction is not permitted for a cognate lesser offense. People v Nyx, 479 Mich 112, 121; 734 NW2d 548 (2007). "A cognate lesser offense is one that shares elements with the charged offense but contains at least one element not found in the higher offense." Id. at 118 n 14

In the case of People v Secreto, 81 Mich App 1, 264 NW2d 99 (1978) the Michigan Court of Appeals held that where defendant was charged with first-degree criminal sexual conduct under statutory provision involving facts similar to the case at bar, third- and fourth-degree criminal sexual conduct were not lesser-included offenses. People v Secreto (1978) 81 Mich App 1, 264 NW2d 99.

More recently in the case of People v Cron, 480 Mich 999, 999; 742 NW2d 126 (2007) defendant was convicted of one count of CSC II and one count of criminal sexual conduct in the fourth degree (CSC IV), MCL 750.520e(1)(a) (victim between 13 and 16 years of age and actor is more than five years older than victim) following a jury verdict. Defendant was sentenced to two to 15 years in prison for CSC II, and to 16 to 24 months in prison for CSC IV. This Court affirmed defendant's convictions. People v Cron, unpublished per curiam opinion of the Court of Appeals, issued March 22, 2007 (Docket No. 265576).

However, the Michigan Supreme Court reversed in part and vacated defendant's conviction and sentence for CSC IV, holding that, "In this case, the jury should not have been instructed on fourth-degree criminal sexual conduct, because that offense is not a necessarily included lesser offense of second-degree criminal sexual conduct." People v Cron, 480 Mich 999, 999; 742 NW2d 126 (2007), citing People v Nyx, 479 Mich 112; 734 NW2d 548 (2007).

In reviewing findings of fact in a bench trial, the Michigan Court of Appeals reviews the trial court's factual findings for clear error and its conclusions of law de novo. People v Lanzo Constr Co, 272 Mich App 470, 473; 726 NW2d 746 (2006). A judge need not provide a particularized or detailed elaboration of the

facts; rather, a judge's findings are sufficient as long as it is obvious that the judge was aware of the legal and factual issues and correctly applied the law. MCR 2.517(A)(2); Lanzo Constr, supra at 479; People v Lewis, 168 Mich App 255, 268-269; 423 NW2d 637 (1988).

In the case at bar, the trial court judge found that there was any medical testimony to support that there was an injury that occurred and therefore the requisite element in criminal sexual conduct in the First Degree could not be proven. (Trial Transcripts, pp 47-51).

The fact that the trial court found the defendant/appellant of each of the elements of criminal sexual conduct in the third degree is irrelevant because MCL Sec. 520d. (1)(b) is not necessarily an included lesser offense of MCL 750.520b(1)(g) and that is the issue at bar. The fact that the appellee did not appear for oral argument or send someone from their office is irrelevant. The fact that the court made some findings as to CSC Third Degree is not relevant. What is relevant is that the court found there was no evidence presented of injury and yet still found him guilty of Criminal Sexual Conduct in the Third Degree when that is not a necessarily included lesser offense of the OFFENSE CHARGED.

RELIEF

WHEREFORE, the Respondent/Appellant, RASHID ABDULLAH, by and through his attorney, SANFORD A. SCHULMAN, respectfully requests this Honorable Court deny the Petitioner/Appellee's Application for Leave to Appeal for the reasons so stated herein..

Respectfully submitted,



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