

STATE OF MICHIGAN

IN THE SUPREME COURT

On Oral Argument on Application for Leave to
Appeal from the Michigan Court of Appeals,
Beckerling, P.J. and O'Connell and Shapiro, J.J.

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff-Appellee,

vs

RANDALL SCOTT OVERTON,

Defendant-Appellant.

Supreme Court
No. 148347

Court of Appeals
No. 308999

Wayne County Circuit Court
No. 11-002103-FC

**BRIEF OF PROSECUTING ATTORNEYS ASSOCIATION
OF MICHIGAN AS AMICUS CURIAE**

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STATEMENT OF QUESTION PRESENTED

DOES FORCING A VICTIM TO SEXUALLY PENETRATE HERSELF WITH HER OWN FINGER CONSTITUTE SEXUAL PENETRATION; AND WHERE A CHILD VICTIM PENETRATES HERSELF BECAUSE ORDERED TO DO SO BY A PERSON WITH AUTHORITY OVER HER, IS THE RESULTANT CRIME FIRST DEGREE CRIMINAL SEXUAL CONDUCT?

The Trial Court answered Yes.

The Court of Appeals answered Yes.

Defendant-Appellant answers No.

Plaintiff-Appellee answers Yes.

Amicus Curiae answers Yes.

STATEMENT OF FACTS

The Prosecuting Attorneys Association of Michigan relies on the parties to provide the Court with the pertinent facts of the case. For purposes of this amicus brief, the critical fact is that the defendant was convicted of criminal sexual conduct first degree, MCL 750.520b, and that the basis of the conviction was the child victim inserting her finger inside her vagina because the defendant instructed her to do so.

ARGUMENT

FORCING A VICTIM TO SEXUALLY PENETRATE HERSELF WITH HER OWN FINGER CONSTITUTES SEXUAL PENETRATION. WHERE A CHILD VICTIM PENETRATES HERSELF BECAUSE ORDERED TO DO SO BY A PERSON WITH AUTHORITY OVER HER, THE RESULTANT CRIME IS FIRST DEGREE CRIMINAL SEXUAL CONDUCT.

Standard of Review. The issue in this case is the meaning of the term “sexual penetration” in the criminal sexual conduct statutes. This is an issue of law, reviewed de novo. *People v Holley*, 480 Mich 222, 226; 747 NW2d 856 (2008).

Discussion. The facts of this case, as shown by the Court of Appeals opinion, are that the defendant instructed the victim to insert her finger inside her vagina, under the pretext of teaching her how to use a tampon (see Court of Appeals opinion, slip opinion, p 2).¹ That the victim sexually penetrated herself is beyond dispute. The question is properly whether the victim’s sexual penetration of herself – done at the instruction of the defendant, the boyfriend of the victim’s mother – was sufficient to warrant a conviction of criminal sexual conduct first degree. Amicus curiae submits that the answer is yes.

The starting point for interpreting a statute is, of course, the statute itself. MCL 750.520b(1) sets forth the various ways in which a person may commit the crime of criminal sexual conduct first degree, all of which contain as an element that sexual penetration occurred. “Sexual penetration” is defined by MCL 750.520a(r):

¹ The defendant was also convicted of criminal sexual conduct second degree, based on his act of shaving the victim’s pubic hair and applying ointment to the area (Court of Appeals opinion, slip opinion, p 2). The defendant was also convicted of three counts of gross indecency. It does not appear that the propriety of those convictions is at issue; in any event, amicus curiae will not address those issues. This brief will be solely directed to the issue of whether, on the facts as related, what occurred here constitutes “sexual penetration.”

“Sexual penetration” means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body, but emission of semen is not required.

In *People v Flick*, 487 Mich 1, 10-11; 790 NW2d 295 (2010), this Court summarized the rules of statutory interpretation:

The overriding goal of statutory interpretation is to ascertain and give effect to the Legislature's intent. *People v Lowe*, 484 Mich 718, 721; 773 NW2d 1 (2009). “The touchstone of legislative intent is the statute's language.” *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008). The words of a statute provide the most reliable indicator of the Legislature's intent and should be interpreted on the basis of their ordinary meaning and the overall context in which they are used. *Lowe*, 484 Mich at 721–722, 773 NW2d 1. An undefined statutory word or phrase must be accorded its plain and ordinary meaning, unless the undefined word or phrase is a “term of art” with a unique legal meaning. *People v Thompson*, 477 Mich 146, 151–152; 730 NW2d 708 (2007); MCL 8.3a. When we interpret the Michigan Penal Code, we do so “according to the fair import of [the] terms, to promote justice and to effect the objects of the law.” MCL 750.2.

“Where [a legislature] borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.” *People v Couch*, 436 Mich 414, 419; 461 NW2d 683 (1990), quoting *Morrisette v United Sates*, 342 US 246, 263; 72 S Ct 240; 96 L Ed 288 (1952). “The criminal law, as defined at common law and codified by legislation, ‘should not be tampered with except by legislation,’ and this rule applies with equal force to common-law terms encompassed in the

defenses to common-law crimes.” *Couch, supra*, citing and quoting from *In re Lamphere*, 61 Mich 105, 109; 27 NW 882 (1886).

The statute covers the insertion of “any part of a person’s body or of any object into the genital or anal openings of another person’s body.” By its terms, it does not require that the insertion be of a part of the actor’s body. Nor does it require that the object inserted be specifically wielded by the actor.

The statute also includes the insertion of any part of a person’s body into “another” person’s body. Standing alone, that phrase might be read to require that the part of a person’s body inserted into the victim cannot be of the victim herself, since it is not an insertion of “another” person’s body. Such a construction would lead to the conclusion that if a defendant forced one victim to penetrate another victim, the resultant crime would be criminal sexual conduct, but if the defendant forced a victim to penetrate herself, it would not be. Granting that this Court has rejected the “absurd results” theory of statutory construction, it still makes little sense to hold that forcing someone into self-penetration is not penetration under MCL 750.520a. The defendant who forces a victim to self-penetrate has in essence forced the victim to use herself as an object to engage in a forced and unwanted sexual penetration. And a limited construction of the term “sexual penetration” would in any event overlook the other part of the statute: the insertion of “any object” into the genital or anal opening of another person’s body.

No Michigan case has directly addressed whether forcing a victim to penetrate herself constitutes sexual penetration. Several cases from other states, however, do provide guidance on this issue.

In *Kirby v State*, 625 So2d 51 (Ct App Fla, 1993), the defendant was convicted of multiple counts of what was labeled under Florida law as “sexual battery.” Florida Statutes

Section 794.011(1)(h) defined “sexual battery” as “oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object.” One of the defendant’s convictions was based on the defendant forcing the victim to insert her fingers into her own vagina while he watched and took pictures. While the defendant was convicted of a lesser offense on that count, the Florida Court of Appeals found that the charge of sexual battery was proper, that “the coerced insertion of a woman’s own fingers in her intimate body orifice, against her will and at the command of a person that is intimidating her, is prohibited by the sexual battery statute.” *Id.*, 625 So2d at 55.

In *People v Keeney*, 24 Cal App 4th 886; 29 Cal Rptr 451 (1994), the defendant was convicted of a number of sexual offenses, one of which involved the defendant forcing the victim at gunpoint to insert two fingers from one hand in her vagina and a finger from her other hand in her anus. Under Cal Pen Code § 289, subd (a), sexual penetration included the insertion against the victim’s will “by any foreign object.” The defendant argued that the statute did not contemplate a person who forced a victim to penetrate herself, that “a person’s finger cannot be foreign to that person.” The California Court of Appeals, disagreeing with what they described as the defendant’s “novel assertion,” held that the defendant had caused the penetration to occur, forced the victim to use her own fingers as an object, and that the defendant therefore was properly convicted. *Id.*, pp 888-889.

In *State v Green*, 746 SE2d 457 (Ct App N Car, 2013), the defendant was convicted of multiple offenses, including a crime designated as “first degree sexual offense.” The defendant was one of two men who entered the victim’s residence. The defendant ordered the victim at gunpoint to undress, and then to insert her own fingers into her vagina and “play with herself.” The crime of first degree sexual offense requires that a person engage in a “sexual act,” defined

by NC Gen Stat § 14-27.1(4) as “the penetration, however slight, of any object into the genital or anal opening of another person’s body.” The defendant argued that since the victim penetrated herself, he could not be charged with having “engaged” in a sexual act. The Court found that the defendant, who participated in the act by directing the victim to penetrate herself, did indeed engage in a sexual act, and was properly convicted for that act. *Id.*, 746 SE2d at 463.

These cases recognize that there is no material difference between an actor inserting a foreign object into a victim’s vaginal or anal openings and forcing a victim to penetrate herself. And there is no difference between the self-penetration of the victim with some outside object and forcing the victim to use her own fingers to penetrate herself.

Amicus curiae therefore joints Plaintiff-Appellee in requesting that this Court affirm the defendant’s convictions. We wish to make one final point.

The word “object” has many meanings, but in the context of MCL 750.520a(r) it is used as a noun. Among its meanings are “a thing that can be seen or touched; material thing that occupies space,” or “a person or thing to which action, thought, or feeling is directed.” *Webster’s New World Dictionary* (2nd Coll Ed, 1976). “Object” may be defined as “anything perceptible by one or more of the senses, especially something that can be seen and felt; a material thing,” or “a person or thing serving as a focus of attention, curiosity, discussion, feeling, thought, or action.” *The American Heritage Dictionary of the English Language* (New College Ed, 1979). When a defendant forces a victim to engage in self-penetration, what has the defendant done? He has used the victim as an object, and forced the victim to insert an object – her own hand and fingers, which he is treating as an object – into herself. He has, to his own mind, dehumanized his victim.

Ultimately, when an actor selfishly uses a victim for his or her own sexual purposes against the will of the victim, what is that actor doing? He is treating the victim as an object.² Indeed, is that not one of the factors that makes sexual assault such a terrible crime, the treatment of a victim as if she were not really a human being with her own rights, but an object for the defendant to use as he wishes, regardless of her feelings and the resultant humiliation that results from being used as an object? The denial of that basic humanity, the denial of the right of a person to have control of one's own body, the reduction of a victim to the status of a thing, is a large part of what makes sexual assaults such horrific crimes.

Sexual assaults are not just attacks on a victim's body. They are an attack on a person's bodily integrity. They are an attack on the psyche; or perhaps better put, an attack on a person's soul.

All of us deserve to be treated with dignity and respect. We do not deserve to be treated as objects to be used to satisfy the concupiscence of others. And yet that is exactly what the defendant was convicted of doing in this case. Amicus curiae submits that when a defendant forces a victim to engage in self-penetration, the defendant has in fact used the victim as an object, sufficient to satisfy the element of sexual penetration for the crime of criminal sexual conduct first degree. Such a conclusion comports with the statutory language of MCL

² See *How Perpetrators View Child Sexual Abuse* (Gilgun & Connor), (<http://connection.ebscohost.com/c/articles/5281450/how-perpetrators-view-child-sexual-abuse>), concluding that during a sexual act against a child the perpetrator views the child as an object; See also article, *Listening to Jerry*, America Magazine, July 16, 2012 (<http://americamagazine.org/issue/5146/100/listening-jerry>) ("The abuser uses his victim as an object, without rights, feelings and needs of his own, to fulfill his sick and compulsive needs"). A google search of "victim as an object" reveals about 225,000 results, many of which discuss this very point, that the victim of an assault becomes an object to the person who engages in the assault.

750.520a(r), and has the incidental benefit of comports with the strong public policy of protecting victims from attacks on their bodily integrity.

Amicus curiae thus joins Plaintiff-Appellee in urging this Court to find that forced self-penetration constitutes sexual penetration, sufficient to support a finding of guilt to a conviction of criminal sexual conduct.

RELIEF REQUESTED

WHEREFORE, amicus curiae, the Prosecuting Attorneys Association of Michigan, joins Plaintiff-Appellee in respectfully praying that the decision of the Court of Appeals, affirming the convictions and sentences in this matter by the Circuit Court for the County of Wayne, be affirmed.

Respectfully submitted,

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Dated: September 25, 2014

By: _____
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