

**STATE OF MICHIGAN
IN THE SUPREME COURT**

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee

Michigan Supreme Court No. 148347

Court of Appeals No. 308999

vs.

Third Circuit Court No. 11-002103-FC

RANDALL SCOTT OVERTON,

Defendant/Appellant.

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DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF

ORAL ARGUMENT REQUESTED



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STATEMENT OF JURISDICTION

The Defendant-Appellant agrees this Court has jurisdiction.

STATEMENT OF QUESTION PRESENTED

WAS THE EVIDENCE SUFFICIENT TO SHOW THAT MR. OVERTON ENGAGED IN SEXUAL PENETRATION PURSUANT TO MCL 750.520a(r), SUCH THAT HIS CONVICTION OF FIRST-DEGREE CRIMINAL SEXUAL CONDUCT CAN BE SUSTAINED?

The trial court answered, "Yes".

Court of Appeals answered, "Yes".

The People answer, "Yes".

Defendant-Appellant answers, "No".

STATEMENT OF RELEVANT FACTS

Defendant-Appellant Randall Scott Overton was convicted of first-degree criminal sexual conduct, MCL 750.520b; second-degree criminal sexual conduct, MCL 750.520c; and three counts of gross indecency, MCL 750.338b. He was acquitted of child sexually abusive activity, MCL 750.145c(2), and accosting a child for an immoral purpose, MCL 750.145a. On June 13, 2014, this Court ordered supplemental briefing regarding the sufficiency of the evidence to support Mr. Overton's first-degree criminal sexual conduct conviction. The facts relevant to this the first-degree criminal sexual conduct conviction only, are as follows:

The complainant, ██████████ testified that Mr. Overton did a "virginity check" on her and told her that her vaginal opening appeared bigger when she was twelve years old. (TT II, 64) ██████████ claimed she informed him that it appeared bigger because she began using tampons. *Id.* ██████████ testified that she "told him that [she] put it in the wrong place," specifically her "pee hole." (TT II, 66). ██████████ said that Mr. Overton held a full-length mirror in front of her legs while she was lying on a bed. (TT II, 65) She testified that she inserted her own index finger in her vagina at Mr. Overton's request and that he then said, "That is where a tampon goes." (TT II, 65-66) ██████████ confirmed that Mr. Overton did not touch her or penetrate her with his finger or any object. (TT II, 115)

ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO SHOW THAT MR. OVERTON ENGAGED IN SEXUAL PENETRATION PURSUANT TO MCL 750.520a(r), SUCH THAT HIS CONVICTION OF FIRST-DEGREE CRIMINAL SEXUAL CONDUCT CANNOT BE SUSTAINED.

Standard of Review:

This case involves interpreting the plain language of MCL 750.520b. This Court reviews issues of statutory interpretation *de novo*. *In re MCI Telecom Complaint*, 460 Mich 396, 413; 596 NW2d 164 (1999). In determining whether sufficient evidence exists to sustain a conviction, this Court reviews the evidence in the light most favorable to the prosecution, and considers whether there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt. *People v Sherman-Huffman*, 466 Mich 39, 41; 642 NW2d 339 (2002).

Argument:

The goal of statutory interpretation "is to ascertain and give effect to the intent of the Legislature. The touchstone of legislative intent is the statute's language. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning and we enforce the statute as written." *People v Hardy*, 494 Mich 430, 439; 835 NW2d 340 (2013), quoting *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008). We must give the words of a statute their plain and ordinary meaning, and only where the statutory language is ambiguous may we look outside the statute to ascertain the Legislature's intent. *Turner v. Auto Club Ins. Ass'n*, 448 Mich 22, 27; 528 NW2d 681 (1995); *Luttrell v. Dep't of Corrections*, 421 Mich 93; 365 NW2d 74 (1984).

In giving meaning to any statute, we examine the provision within the overall context of the statute "so as to produce, if possible, a harmonious and consistent enactment as a whole."

Grand Rapids v Crocker, 219 Mich 178, 182-183; 189 NW 221 (1922). This Court "must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory." *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002). We also consider the statute's "placement and purpose in the statutory scheme," *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999) (citation omitted), and in interpreting related statutes, those *in pari materia*, we construe the statutes together "so as to give the fullest effect to each provision." *Glover v Parole Bd.* 460 Mich 511; 596 NW2d 598 (1999).

The plain language of the first-degree criminal sexual conduct statute, MCL 750.520b(1)(a), in pertinent part, reads 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...That other person is under 13 years of age.

To secure a conviction of first-degree criminal sexual conduct, the prosecution must prove each of following elements beyond a reasonable doubt: (1) that the defendant engaged in sexual penetration with another person (2) who was under 13 years of age. Each element must be proved beyond a reasonable doubt. A conviction should be overturned when the prosecutor "did not satisfy even her minimal burden of presenting *some* evidence at trial that would allow a rational trier of fact to find the essential elements of the crime proven beyond a reasonable doubt." *People v Tennyson*, 487 Mich 730; 790 NW2d 354 (2010); *Jackson v Virginia*, 443 US 307, 312; 99 S Ct 2781; 61 L Ed 2d 560 (1979). In Mr. Overton's case, the evidence does not satisfy the element of "sexual penetration with another person."

MCL 750.520a(r) defines "sexual penetration" as:

[S]exual 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.

As Defendant-Appellant argued previously, there was no evidence of any intrusion into **another person's body** by Mr. Overton, which is a required element by the definition of sexual penetration. Taken in the light most favorable to the prosecution, the only testimony at trial regarding penetration was that ██████████ penetrated her vagina with her own index finger. (TT II, 65) Mr. Overton did not penetrate anyone. ██████████ confirmed through the balance of her testimony that it was only her own finger that accomplished the only penetration of her vagina. *Id.*

In the case of *State v Bryant*, 670 A2d 776 (1996), the Supreme Court of Rhode Island considered an almost identical case and conducted a statutory interpretation analysis as this Court must do in Mr. Overton's case. A copy of the *Bryant* opinion is attached as Appendix A. In *State v Bryant*, the Defendant, Roger Bryant, was convicted of first-degree child molestation based on testimony that he persuaded a five-year-old to penetrate her own vaginal area with her finger. *Bryant* at 778. Similar to Mr. Overton's case, the evidence was that the child "inserted her own finger into her vaginal area." *Id.* 778-779. The Rhode Island Supreme Court vacated the conviction, noting that "there was no evidence in support of this count that defendant digitally penetrated the child's vaginal orifice." *Id.* at 779.

When *Bryant* was decided in 1996, the Rhode Island statute and definition of sexual penetration was nearly identical to the current Michigan statute. The Rhode Island statute defined the crime of first-degree child-molestation sexual assault as follows:

A person is guilty of first-degree child molestation sexual assault if he or she engages in sexual penetration with a person fourteen (14) years of age or under.

RI Gen Laws § 11-37-8.1, as amended by P.L. 1988, ch. 219, § 1.

Sexual penetration was also defined as:

'Sexual penetration' — sexual intercourse, cunnilingus, fellatio, and anal intercourse, or any other intrusion, however slight, by any part of a person's body or by any object into the genital or anal openings *of another person's body*, but emission of semen is not required.

§ 11-37-1(8), as amended by P.L. 1986, ch. 191, § 1. (Emphasis added.)

The pertinent facts of *Bryant* are nearly identical to the facts of *Overton*. In *Bryant*, the State argued that the evidence to support the first degree child molestation count was that the five-year-old child penetrated her own vagina with her finger. All parties agreed that that defendant did not commit any penetration of the child's body during this episode. The only evidence of defendant's participation was that he told the child to insert her own finger into her vaginal orifice. As an issue of first impression, the Rhode Island Supreme Court decided this issue by interpreting the statute, and stated as follows, in pertinent part:

Our canons of construction of statutes have often been defined. Generally when a statute expresses a clear and unambiguous meaning, the task of interpretation is at an end and this court will apply the plain and ordinary meaning of the words set forth in the statute. *See, e.g., Rhode Island Chamber of Commerce v Hackett*, 122 RI 686, 690, 411 A2d 300, 303 (1980); *State v Healy*, 122 RI 602, 607, 410 A2d 432, 434 (1980). *State v Angell*, 122 RI 160, 170, 405 A2d 10, 15 (1979); and *First Republic Corp. of America v Norberg*, 116 RI 414, 418, 358 A2d 38, 41 (1976). It is also a canon of statutory construction that the Legislature is presumed to have intended each word or provision of a statute to express a significant meaning, and the court will give effect to every word, clause, or sentence, whenever possible. *State v Reis*, 430 A2d 749, 752 (RI 1981); *Flanagan v Pierce Chevrolet, Inc.*, 122 RI 596, 601, 410 A2d 428, 431 (1980). Additionally "penal statutes must be strictly construed in favor of the party upon whom a penalty is to be imposed." *State v Calise*, 478 A2d 198, 200 (RI 1984); *Eaton v Sealol, Inc.*, 447 A2d 1147, 1148 (RI 1982).

Applying the foregoing canons of construction, we are of the opinion that the state did not prove a violation of the conduct prohibited by § 11-37-8.1 as defined in § 11-37-1. In that definition "sexual penetration" is clearly and unambiguously defined as "intrusion, however slight, by any part of a person's body or by any object into the genital or anal openings of **another person's body** * * *." Section 11-37-1(8). (Emphasis added.)

Bryant, supra, at 779.

Further, the Rhode Island Supreme Court found that the trial court improperly amended the definition of sexual penetration by interpreting it to include "directing the child to insert her own finger into her vaginal orifice" after statutes from numerous other states were cited where it was a crime to "cause another person to penetrate his or her own body."¹ The Rhode Island Supreme Court "respectfully recommend[ed] to the General Assembly its consideration of an amendment to the statute to include provisions similar to those which have been adopted by the foregoing jurisdictions." *Id.* at 779. The Court found that considering other jurisdictions where it was illegal for a defendant to cause another person to penetrate his or her own body was not applicable or persuasive to consider when interpreting the Rhode Island statute. *Id.* at 780. The Michigan Supreme Court should apply the same analysis to the Michigan statute. As it is currently written, the Michigan statute does not include any language specifically prohibiting a person from "directing" another person to penetrate his or her own body.

At the time that the Rhode Island Supreme Court considered this issue, New Jersey, New Hampshire, Virginia and Minnesota had statutes including language to make it illegal for the actor to instruct the minor to penetrate his or her own body. The current statutes for each of these states are attached as Appendix B. After *Bryant*, the Rhode Island legislature amended its

¹ See, e.g., New Jersey Code of Criminal Justice §§ 2C:14-1(c), which defines sexual penetration as "vaginal intercourse, cunnilingus, fellatio or anal intercourse between persons or insertion of the hand, finger or object into the anus or vagina either by the actor or upon the actor's instruction." (Emphasis added.) N.J. Stat. Ann. § 2C:14-1(c) (West 1982 & Supp. 1995). Similar provisions are found in the N.H. Rev. Stat. Ann. § 632-A:1 V (Supp. 1994), Va. Code Ann. § 18.2-67.2A (Michie 1950 & Supp. 1995), and Minn. Stat. § 609.341 Subd. 12(2)(ii) (1994).

statutory definition of sexual penetration to read as follows:

“Sexual penetration” means sexual intercourse, cunnilingus, fellatio, and anal intercourse, or any other intrusion, however slight, by any part of a person's body or by any object into the genital or anal openings of another person's body, **or the victim's own body upon the accused's instruction**, but emission of semen is not required.

R.I. Gen. Laws § 11-37-1(8) (Emphasis added.)

Wisconsin also amended its statutory definition of sexual intercourse to include “upon the defendant's instruction.” Wis. Stat. § 948.01. The Wisconsin statute and the amended Rhode Island statute is attached as Appendix C. The phrase “... upon the defendant's instruction” in this statute established that for the element of intercourse to be satisfied, the defendant either had to perform one of the actions on the victim or instruct the victim to perform one of the actions on himself or herself. *See State v Olson*, 238 Wis2d 74, 81 (2000).

When the Michigan Court of Appeals analyzed the acts in Mr. Overton's case, it failed to consider the statute as a whole. The opinion reads as follows:

The fact that the victim's vagina was penetrated by her own finger, instead of one of Overton's body parts, does not mean that the act did not constitute sexual penetration under MCL 750.520a(r). Sexual penetration under MCL 750.520a(r) includes an “intrusion...of any part of a person's body...into the genital...opening [] of another person's body...” The use of the words “any part of a person's body” is another way of saying “any human body part.” Thus sexual penetration under MCL 750.520a(r) includes an intrusion of any human body part into the genital opening of another person...

Slip. Op. at 4.

The statement by the Court of Appeals is inaccurate; it fails to cite the statute in its entirety, specifically, by omitting the words “of another person.” The definition of “another” is “different or distinct from the first one considered;” “some other;” or “being one more in

addition to once or more of the same kind.” “Another.” Merriam-Webster.com. (Accessed July 22, 2014). <http://www.merriam-webster.com/dictionary/another>. The plain language of MCL 750.520a(r) does not have language that allows penetration to be established by a defendant directing a victim to penetrate his or her own body. As the Michigan Legislature has not amended this section, the plain language of the Michigan definition of “sexual penetration” clearly requires that a defendant penetrate “another person.” At this time, the statute must be read and interpreted as it is, without the assumption the Legislature intended to include anything more. At this time, according to Michigan law, Mr. Overton’s conduct does not satisfy the definition of sexual penetration of another person.

Michigan case law holds that “[c]riminal statutes should be so construed as to include what is fairly and reasonably within the legitimate scope of the language, but not to include what is not within the language though partaking of similar mischievous qualities.” *People v Reilly*, 50 Mich 384, 386; 15 NW 520 (1883). “Statutes applicable to criminal matter may not be extended beyond their plain terms by judicial construction to include those acts which possibly should be, but are not, within the terms of the statute.” *People v Silver*, 302 Mich 359, 367; 4 NW2d 687 (1942) citing *People v Goulding*, 275 Mich 353; 266 NW 378 (1936). “A criminal statute is to be construed according to its language and not beyond it . . .” *People v Johnson*, 104 Mich App 629, 633; 305 NW2d 560 (1981) citing *Meister v People*, 31 Mich 99, 111-112 (1875). Finally, a person may not be convicted under the language of a statute unless his acts are clearly encompassed by its terms. *People v Kasparis*, 107 Mich App 294, 303; 309 NW2d 241 (1981) citing *People v Lyons*, 93 Mich App 35; 285 NW2d 788 (1979), *People v Kirstein*, 6 Mich App 107; 148 NW2d 539 (1967).

The Michigan Legislature acts purposely in drafting the language it uses to construct statutes and definitions. The Legislature explicitly includes language, for example, in other statutes to make “encouraging” certain conduct illegal. For example, MCL 28.722 is the “Definitions” section of the Sex Offenders Registration Act. MCL 28.722(c)(vi) defines “custodial authority” to include:

That other person was under the jurisdiction of the department of corrections and the actor was an employee or a contractual employee of, or a volunteer with, the department of corrections who knew that the other person was under the jurisdiction of the department of corrections and used his or her position of authority over the victim to gain access to or to coerce or **otherwise encourage the victim to engage in sexual contact.** (Emphasis added.)

In Mr. Overton’s case, the statute used to convict him does not include language about “encourag[ing] the victim to engage in sexual contact”. If the Legislature had intended for it to be illegal for a defendant to “encourage” or “direct” a complainant to act, the statute would explicitly include it. Therefore, we must assume that by excluding the language “to encourage” or “to direct” from the definition of “sexual penetration,” the Legislature did not intend for this type of action to be illegal under the first-degree criminal sexual conduct statute.

While Defendant-Appellant argues that the legislative intent is clear based on the plain and unambiguous wording of the statute itself, if the Court does believe there is any ambiguity in the statute, the Court should be mindful that penal statutes are to be strictly construed. See *People v Hall*, 391 Mich 175, 189-190; 215 NW2d 166 (1974). Any ambiguity is to be resolved in favor of lenity:

“When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a

penal code against the imposition of a harsher punishment.” *Bell v United States*, 349 US 81, 83; 75 S Ct 620; 99 L Ed 905 (1955), quoted approvingly in *People v Bergevin*, 406 Mich 307, 312; 279 NW2d 528 (1979).

This rule applies only in the absence of a firm indication of legislative intent. *People v Wakeford*, 418 Mich 95, 113-114; 341 NW2d 68 (1983). Since Mr. Overton did not complete an act of “sexual penetration” pursuant to MCL 750.520a(r), the evidence to support his conviction of first-degree criminal sexual conduct under MCL 750.520b is insufficient.

Response to the Prosecution’s Argument

In the Prosecutor’s Answer Opposing Defendant-Appellant’s Application for Leave to Appeal and in their Supplemental Brief, the prosecution states that the “[d]efendant acted as a principal under his own direction in committing first-degree CSC.” The prosecution did not raise this as a theory of guilt at trial, the jury was not instructed on an aiding and abetting or agency theory and therefore, this argument by the prosecution was waived. The rule that issues for appeal must be preserved in the record by notation of objection is a sound one. *People v Carines*, 460 Mich 750, 762-765, 597 NW2d 130 (1999). A party “may not waive objection to an issue before the trial court and then raise it as an error” on appeal. *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998).

Waiver has been defined as “the intentional relinquishment or abandonment of a known right.” *Carines, supra* at 762-763, n. 7, 597 NW2d 130. It differs from forfeiture, which has been explained as “the failure to make the timely assertion of a right.” *Id.* “One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error.” *United States v. Griffin*, 84 F3d 912, 924 (C.A.7, 1996). In the instant case, the People waived the issue when they expressed satisfaction with and did not object to the jury instructions. The prosecution did not request any jury instructions

related to an aiding or abetting or agency theory. When there is evidence that more than one person was involved in committing a crime and the defendant's role in the crime may have been less than direct participation in the wrongdoing, it is appropriate for the jury to be instructed about aiding and abetting. See *People v Head*, 211 Mich App 205; 535 NW2d 563 (1995). In this case, no instruction was requested and this was not argued by the prosecution at trial.

Nevertheless, in response to the Prosecutor's Answer, Defendant-Appellant does assert that he could not have been convicted under an aiding and abetting theory. An aider and abettor may be convicted and punished as if he directly committed the offense, even if the principal is not convicted. *People v Turner*, 213 Mich App 558, 568-569; 540 NW2d 728 (1995); See also *Nye & Nissen v US*, 336 US 613, 618; 69 S Ct 766; 93 L Ed 919 (1949). For ██████████ to be the principal and Mr. Overton to be an aider or abettor, ██████████ herself must have committed the criminal act charged, specifically, her act must have satisfied the elements of the crime of first-degree criminal sexual conduct, including the sexual penetration of another person. Thus, the testimony would have to show that ██████████ sexually penetrated *another person*, meaning someone other than herself (e.g. a third person). ██████████ self-penetration was not sufficient to establish that a crime was committed by ██████████ or Mr. Overton.

In their Supplemental Brief, the prosecution relies on *People v Hack* to argue that Mr. Overton could be considered guilty as a principal because he "...used another person to accomplish a crime on his behalf." 219 Mich App 299, 303; 556 NW2d 187 (1996) lv den. The facts of *Hack* are entirely different than those of Mr. Overton's case therefore making the two cases distinguishable from each other.

In *Hack*, the defendant was convicted of four counts of first-degree criminal sexual conduct and other charges. The defendant was a teenage boy who forced a three year old and a

one year old to engage in sexual acts with each other and the defendants videotaped those acts. Neither Hack nor his co-defendant, Dilling, were alleged to have committed the penetration in this case, however, they were both convicted of first-degree criminal sexual conduct.

The facts of *Dilling* and *Hack* included obvious criminal activity – that being the three year old and one year old penetrating each other. The three year old and one year old still penetrated “another person” as required by law. Even though Dilling and Hack did not do the penetrating, there was still penetration by one person of another person’s body. This made the Defendants in *Dilling* and *Hack* active participants in forcing the children to engage in sexual penetration. *Hack, supra; see also People v Dilling, 222 Mich App 44, 564 NW2d 56 (1997).*

In *Dilling*, the Court concluded that the Defendant was “not guilty because he aided and abetted one child in committing a sexual penetration with the other, but [he was guilty] as a principal for using one child as the instrumentality to perform a sexual penetration with the other.” Based on the holding in *Dilling*, the agent must still penetrate “another person,” a third party. Mr. Overton’s case is distinguishable because ██████ did not penetrate a third person but penetrated herself. Therefore, the element of penetration as statutorily defined, which was established by the facts in *Dilling* and *Hack*, cannot be established in Mr. Overton’s case.

The People also cite to out of state cases in their Supplemental Brief to argue that Mr. Overton’s conduct was sufficient to establish penetration. Because the opinions cited do not concern or reflect an interpretation of statutory language that is identical to the language of the Michigan statute at issue, Defendant-Appellant asserts that the cases cited in the People’s Supplemental Brief are clearly distinguishable, and, therefore, not instructive. The Michigan Legislature has defined sexual penetration with the operant language that the penetration, however slight, must have been made by the defendant into the listed parts of “another person”.

Michigan, unlike the states some of the decisions cited by the prosecutor, does not include any language that would allow a conviction.

First, the People cite to *Simmons v Indiana*, 746 NE2d 81 (2001), and *Connecticut v Grant*, 33 Conn App 133 (1993). These cases are attached for the Court's review as Appendix D. In *Simmons*, the three year old victim alleged that the *defendant's* finger was used to accomplish the penetration of a child. If Mr. Overton had used **his** finger to penetrate [REDACTED] this case might be relevant. In *Grant*, the defendant used **his** fingers to touch a seven year old's vagina. Again, that case is irrelevant and the facts of Mr. Overton's case are clearly distinguishable as there was no testimony presented as to this count that Mr. Overton made contact with or penetrated [REDACTED]

Further, several of the cases cited in the prosecutor's brief involved convictions that were dependent on an additional element, the use of force, threats or coercion, which was not required in the charge against Mr. Overton. Although force or coercion is an element that can elevate the degree of the charged offense under the Michigan statutory scheme, this did not apply to Mr. Overton. An element of force, coercion or threats is not included in the definition of "sexual penetration" that the jury considered in Mr. Overton's case.

For example, the People cite *Territory of Guam v Quidachay*, 374 F3d 820, 821-822 (2004), in their argument. The case is attached as Appendix E for the Court's review. In *Quidachay*, the defendant robbed a business while armed with a gun. The defendant instructed the complainant to remove her clothes and to finger herself by inserting her finger in her vagina. *Quidachay, supra* at 821. The relevant statute in *Quidachay* provided, as follows:

- a) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with the victim and if any of the following circumstances exists:

.....

(3) sexual penetration occurs under circumstances involving the commission of any other felony;

....

(5) **the actor is armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon.**

9 Guam Code § 25.15(a). (Emphasis added.) In *Quidachay*, the Court reasoned that by using “the threat of force that could have been lethal, Quidachay forced his victim to penetrate herself” and in doing so he engaged in sexual penetration with her.

The People also cite *North Carolina v Green*, 746 SE2d 457 (2013) which is attached as Appendix F. *Green* is also distinguishable as the statute in *Green* included different elements than the statute in the instant case. Specifically, the statute in *Green* stated, in relevant part:

A person is guilty of a sexual offense in the first-degree if the person engages in a sexual act ... [w]ith another person **by force and against the will of the other person....**

N.C. Gen. Stat. § 14-27.4(a) (Emphasis added.) In *Green*, the defendant forced the complainant, at gunpoint, to remove her clothing and insert her own fingers into her vagina. The Court reasoned that the defendant was ‘involved’ in that he coerced the complainant to touch herself. *Green*, at 463.

Finally, the people cite *People v Keeney*, 24 Cal App 4th 886 (1994), which also applies a distinguishable statute. The case is attached as Appendix G. In *Keeney*, the relevant part of the statute provided,

Every person who causes the penetration, however, slight, of the genital or anal openings of any person or causes another person to so penetrate the defendant's or another person's genital or anal openings for the purpose of sexual arousal ... by any foreign object ... **when the act is accomplished against the victim's will ...**

Cal. Pen. Code § 289(a) (Emphasis added.) In *Keeney*, the defendant directed the victim to lie down and insert fingers into her vagina and anus at gunpoint and his conviction was sustained.

Clearly, the statutes in *Quidachay*, *Green*, and *Keeney* are distinguishable from the Michigan statute in that the statutes in those cases incorporate an element of coercion, threat or force. It is improper to compare these cases to Mr. Overton's because the proofs required to support the conviction were different. The prosecution has failed to identify any opinion or decision that is relevant to analyzing the Michigan statute, or that supports any alternative reading of the plain and unambiguous language of the Michigan statute at issue. Clearly, cases where the defendant was the person penetrating a minor child do not apply. Further, citing statutes that have additional elements such as force, coercion or acts against the complainant's will are distinguishable from Michigan law and irrelevant to analyzing Mr. Overton's case.

Conclusion

The evidence presented in the instant case is insufficient to show that Mr. Overton engaged in sexual penetration, as defined by MCL 750.520a(r), such that his conviction for first-degree criminal sexual conduct cannot be sustained. In Mr. Overton's case, the evidence presented failed to satisfy the necessary element of "sexual penetration with another person." There was no evidence presented of any intrusion into **another person's body** by Mr. Overton, which is a required element by the plain language of the statute defining sexual penetration, MCL 750.520a(r).

Applying the rules of statutory interpretation and legislative intent, Mr. Overton's conduct does not satisfy the clear and unambiguous language of the statute. Since Mr. Overton did not complete an act of "sexual penetration" pursuant to MCL 750.520a(r), the evidence to support his conviction of first-degree criminal sexual conduct under MCL 750.520b is insufficient and the conviction must be vacated.

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellant requests that this Honorable Court grant his Application for Leave to Appeal, or in the alternative, vacate his conviction for first-degree criminal sexual conduct and remand for resentencing.

Respectfully Submitted:



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PROOF OF SERVICE

On July 24, 2014, I submitted the above Supplemental Brief to the Michigan Supreme Court by hand delivery and served a copy of the same to the prosecuting attorney by hand delivery.

Dated: 7/24/14



Shannon M. Smith (P 68683)