

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee

Michigan Supreme Court No. *084*

Court of Appeals No. 308999 *10-31-13*

vs.

Circuit Court Case No. 11-002103-FC

RANDALL SCOTT OVERTON,

Defendant/Appellant.

*Wayne (MI)
P. Presard*

OK

KYM WORTHY (P 38875)
Wayne County Prosecuting Attorney
1441 Saint Antoine St
Frank Murphy Hall of Justice
Detroit, MI 48226
(313) 224-5777

SHANNON M. SMITH (P 68683)
Attorney for Defendant/Appellant
122 Concord Rd., Ste 102
Bloomfield Hills, MI 48304
(248) 636-2595

GAIL S. BENSON (P 25417)
Attorney for Defendant/Appellant
4143 Euclid Rd.
Interlochen, MI 49643
(248) 425-6789

148347

APK

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NOTICE OF HEARING

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JUDGMENT APPEALED FROM AND RELIEF SOUGHT

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, following a four-day jury trial before the Honorable Patricia S. Fresard in the Wayne County Circuit Court. Mr. Overton was acquitted of child sexually abusive activity, MCL 750.145c(2), and accosting a child for an immoral purpose, MCL 750.145a. The prosecution dismissed a charge of contributing to the delinquency of a minor, MCL 750.145, prior to Mr. Overton's trial. (Trial Transcript ("TT") IV, 6)¹ On June 21, 2011, Mr. Overton was sentenced to 25 to 40 years imprisonment for first degree criminal sexual conduct, 29 months to 15 years for the second degree criminal sexual conduct and 17 months to 5 years for the three counts of gross indecency, with the sentences to be served concurrently. (ST, 6)

Mr. Overton filed a post-conviction Motion for New Trial in the Wayne County Circuit Court on August 1, 2011. Defendant's motion was heard by the Honorable Patricia S. Fresard on January 27, 2012 and January 30, 2012. The Court denied Mr. Overton's Motion for New Trial on January 30, 2012. Mr. Overton appealed to the Court of Appeals as a matter of right.

Mr. Overton now appeals from the Court of Appeals' unpublished Per Curium opinion issued October 31, 2013 affirming his convictions. [Appendix A]. This Court should grant leave to appeal because the Court of Appeals opinion involves legal principles of major significance to the state's jurisprudence, and is clearly erroneous, causing material injustice. MCR 7.302(B)(3), MCR 7.302(B)(5).

¹ "TT I – IV" respectively refer to the four day jury trial, held June 1-2, 2011 and June 6-7, 2011. "ST" refers to the sentencing hearing held on June 21, 2011, and "MT 1" and "MT 2" refers to the Motion for New Trial held on January 27, 2012 and January 30, 2012, respectively. "ST" refers to the sentencing hearing held on June 21, 2011, and "MT 1" and "MT 2" refer to the Motion for New Trial held on January 27, 2012 and January 30, 2012, respectively.

The Court of Appeals' decision is clearly erroneous and will cause material injustice if it is not reversed. MCR 7.302 (B)(5). The Court of Appeals erroneously found that evidence was sufficient to sustain Mr. Overton's convictions and that the jury instructions were sufficient. The Court of Appeals also erroneously found that Mr. Overton received the effective assistance of counsel, that the trial court properly excluded the video of Mr. Overton's police interview, and that Mr. Overton's mandatory minimum sentence of 25 years for first degree criminal sexual conduct was constitutionally valid.

Moreover, the issues presented in this case involve legal principles of major significance to the state's jurisprudence, MCR 7.302 (B)(3). The Court of Appeals' opinion violates the plain language of the applicable statutes and erroneously found that evidence was sufficient to sustain Mr. Overton's conviction for first degree criminal sexual conduct, where the complainant *never* claimed that he actually penetrated her, as required by the applicable statute, and that the complainant used her own finger to penetrate her own vagina.

For these reasons, Mr. Overton prays that this Honorable Court grant leave to appeal, reverse his convictions, and order any other relief this Court deems just.

STATEMENT OF QUESTIONS PRESENTED

- I. WAS THE EVIDENCE PRODUCED AT TRIAL BY THE PROSECUTION LEGALLY INSUFFICIENT TO CONVICT MR. OVERTON OF FIRST DEGREE CRIMINAL SEXUAL CONDUCT?

Trial Court answered, "No."

Court of Appeals answered, "No."

Defendant-Appellant answers, "Yes."

- II. WAS THE EVIDENCE PRODUCED AT TRIAL BY THE PROSECUTION LEGALLY INSUFFICIENT TO CONVICT MR. OVERTON OF SECOND DEGREE CRIMINAL SEXUAL CONDUCT?

Trial Court answered, "No."

Court of Appeals answered, "No."

Defendant-Appellant answers, "Yes."

- III. WERE MR. OVERTON'S DUE PROCESS RIGHTS VIOLATED BECAUSE THE JURY INSTRUCTIONS FOR SECOND DEGREE CRIMINAL SEXUAL CONDUCT WERE DEFICIENT? FURTHER, COULD THE DEFICIENT INSTRUCTION HAVE CAUSED A VERDICT THAT WAS NOT UNANIMOUS?

Trial Court answered, "No."

Court of Appeals answered, "No."

Defendant-Appellant answers, "Yes."

- IV. SHOULD MR. OVERTON'S CONVICTIONS FOR GROSS INDECENCY BE VACATED BECAUSE THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO SUSTAIN THE CONVICTIONS?

Trial Court answered, "No."

Court of Appeals answered, "No."

Defendant-Appellant answers, "Yes."

V. WERE MR. OVERTON'S DUE PROCESS RIGHTS VIOLATED BECAUSE THE JURY INSTRUCTIONS WERE DEFICIENT? FURTHER, DID MR. OVERTON NOT HAVE CONSTITUTIONALLY ADEQUATE NOTICE THAT THE BEHAVIOR AT ISSUE VIOLATED THE GROSS INDECENCY STATUTE?

Trial Court answered, "No."

Court of Appeals answered, "No."

Defendant-Appellant answers, "Yes."

VI. WAS MR. OVERTON DENIED HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL?

Trial Court made answered "No."

Court of Appeals answered, "No."

Defendant-Appellant answers, "Yes."

VII. DID THE TRIAL COURT ABUSE ITS DISCRETION AND VIOLATE MR. OVERTON'S DUE PROCESS RIGHT TO PRESENT A DEFENSE BY EXCLUDING THE VIDEO OF MR.OVERTON'S INTERVIEW WITH THE WYANDOTTE POLICE?

Trial Court answered, "No."

Court of Appeals answered, "No."

Defendant-Appellant answers, "Yes."

VIII. DOES MR. OVERTON'S MANDATORY 25 YEAR MINIMUM SENTENCE CONSTITUTE CRUEL OR UNUSUAL PUNISHMENT IN VIOLATION OF THE STATE AND FEDERAL CONSTITUTIONS?

Trial Court answered, "No."

Court of Appeals answered, "No."

Defendant-Appellant answers, "Yes."

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

Defendant-Appellant Randall Scott Overton was charged with first degree criminal sexual conduct, MCL 750.520b; second degree criminal sexual conduct, MCL 750.520c; three counts of gross indecency, MCL 750.338b; child sexually abusive activity, MCL 750.145c(2); accosting a child for an immoral purpose, MCL 750.145a; and contributing to the delinquency of a minor, MCL 750.145. The prosecution dismissed the contributing to the delinquency of a minor charge prior to trial. Following a four-day jury trial before the Honorable Patricia S. Fresard in the Wayne County Circuit Court, Mr. Overton was convicted of first degree criminal sexual conduct, second degree criminal sexual conduct and three counts of gross indecency. Mr. Overton was acquitted on the remaining charges. (Trial Transcript ("TT") IV, 6)

On June 21, 2011 Mr. Overton was sentenced to 25 to 40 years imprisonment for first degree criminal sexual conduct, 29 months to 15 years for the second degree criminal sexual conduct and 17 months to 5 years for the three counts of gross indecency, with the sentences to be served concurrently. (ST, 6)

Mr. Overton filed a post-conviction Motion for New Trial in the Wayne County Circuit Court on August 1, 2011. Defendant's motion was heard by the Honorable Patricia S. Fresard on January 27, 2012 and January 30, 2012. The Court denied Mr. Overton's Motion for New Trial on January 30, 2012. Mr. Overton appealed to the Court of Appeals as a matter of right.

The charges in the instant case arose from allegations made by [REDACTED] against Mr. Overton who was a police officer for the City of Detroit. [REDACTED] was the daughter of Mr. Overton's long time live-in girlfriend, Chrystal [REDACTED]. [REDACTED] was 13 years old at the time of trial and had known Mr. Overton since she was 6 years old. (TT II, 36, 38) She lived with her mother, Mr. Overton, and her younger brother, [REDACTED]. (TT II, 41) In the summer of 2010, [REDACTED] met her biological

father, John Owens, and began spending time with him. (TT II, 8) On August 31, 2010, John Owens reported to law enforcement that he believed Mr. Overton and Chrystal [REDACTED] were sexually abusing [REDACTED] (TT II, 13)

[REDACTED] testified that when she was 11 years old, an incident occurred in the bathroom of her Wyandotte home. (TT II, 41, 45) [REDACTED] claimed that her mother, Chrystal, wanted to check whether she was still a virgin. *Id.* [REDACTED] testified that Chrystal made her take her pants and underwear off, open her legs, and inspected her "private area." *Id.* She confirmed that her mother used to be a nurse's aide. (TT, 43) [REDACTED] said that her mother inspected her vagina and called Mr. Overton into the room to check her vagina as well. (TT II, 43) She testified that neither Mr. Overton nor her mother touched her, but her mother made her open her "private" with her fingers. (TT II, 44) Chrystal [REDACTED] and Mr. Overton later took [REDACTED] to a doctor to be checked. *Id.* Dr. Sara Moussa testified that she examined [REDACTED] the exam results were normal and she did not observe any signs of physical or sexual abuse. (TT II, 132-135) [REDACTED] did not tell anyone about the alleged incident at the time. (TT II, 45-46)

[REDACTED] testified that her family later moved to a house in Brownstown. (TT II, 47-48) She claimed that when her mother and Mr. Overton broke up for a period of time, she continued to see and visit Mr. Overton, even though he was not her father. (TT II, 48-49) [REDACTED] explained that she would visit him with her brother, [REDACTED] who was seven at the time and was Mr. Overton's son. (TT II, 49) [REDACTED] testified that when she was 12, Mr. Overton continued to check if she was a virgin. (TT II, 50) She testified that Mr. Overton would have her come into the bedroom for the "virginity checks," lay on the bed, open her legs and open her "private" so he could see if she was a virgin. (TT II, 52-53) [REDACTED] claimed that Mr. Overton did not touch her during the "virginity checks" and that his face was about 18 to 24 inches away from her. (TT II, 52-53)

During one "virginity check" ■ testified that Mr. Overton told her that her vaginal opening appeared bigger. (TT II, 64) She claimed she informed him that it appeared bigger because she began using tampons. *Id.* ■ testified that Mr. Overton told her he was going to tell her mother. *Id.* She then said that he held a full-length mirror in front of her legs. *Id.* ■ testified that she inserted **her own index finger in her vagina** at Mr. Overton's request and he 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.** (TT II, 115) She also confirmed that she had told Mr. Overton that she believed she had put a tampon in the wrong hole. (TT II, 66)

■ also testified that when she was 12 years old Mr. Overton helped her shave her pubic area. (TT II, 54) She testified that she wanted to shave her bikini area because she was going swimming on a field trip and did not want the hair to stick out of her bathing suit. (TT II, 111) ■ stated that she asked to use Mr. Overton's razor. (TT II, 54-55) She testified that after she shaved in the bathroom, he shaved the bottom part of her pubic area. (TT II, 56-57) She also claimed that Mr. Overton applied ointment to treat skin irritation that emerged after shaving. (TT II, 58-59)

■ testified that she did not tell her mother, or other family members or friends about the alleged incidents with Mr. Overton when they allegedly occurred. (TT II, 68-69) However, she testified during trial that she later told her cousin, Amirra, her friend, ■ and her dad. (TT II, 69-70) ■'s father reported the incidents to police and Detective Scott Galeski interviewed ■ (TT II, 74) She testified that she did not tell Detective Galeski everything during this interview. (TT II, 75) She also stated that she did not tell her dad about all the alleged incidents when she first spoke to him. (TT II, 101-102)

Detective Galeski testified that he interviewed D.P., Chrystal [REDACTED] and Randall Overton separately and together as well. (TT II, 141-142) Detective Galeski testified that he determined that Wyandotte did not have jurisdiction over the case and referred the case to the Brownstown Police Department. (TT II, 142) Mr. Overton submitted to a voluntary interview and answered all of his questions. (TT II, 148) After interviewing [REDACTED] Mr. Overton, and Chrystal [REDACTED] Detective Galeski did not make a warrant recommendation to the prosecutor's office and allowed [REDACTED] to return home with her mom and Mr. Overton. (TT II, 149-150)

Mr. Overton testified in his own defense. The testimony showed that he was a Detroit Police Officer since 1998 and was appointed to the Youth Bureau in July 2010. (TT II, 160) He met Chrystal [REDACTED] in 2001, they developed a relationship and subsequently moved in together with Chrystal's daughter, [REDACTED] (TT II, 161-162) Overton assumed duties associated with being [REDACTED]'s father and also had a son with Chrystal [REDACTED] (TT II, 164-165) Mr. Overton and Chrystal [REDACTED] separated several times during their relationship, but eventually got back together. (TT II, 166)

Mr. Overton testified that he did not have a sexual interest in [REDACTED] (TT II, 168) When [REDACTED] was 11, he explained that Chrystal [REDACTED] called him into the bathroom and asked him to look at [REDACTED]'s vagina. (TT II, 168-170) They decided to take [REDACTED] to the doctor the following day. (TT II, 171-172) In the summer of 2010, [REDACTED] began spending time with her biological father and Mr. Overton noticed a change in [REDACTED]'s behavior (TT II, 173-175)

Mr. Overton testified about the incident when [REDACTED] approached him about asking her mother if she could wear tampons. (TT II, 176) He became concerned when [REDACTED] told him she had tried to insert a tampon and believed she had put it in her urethra. (TT II, 177) Mr. Overton held a mirror in front of [REDACTED] in an effort instruct her where a tampon goes. (TT II, 177-178;

204-205) Based on statements [REDACTED] made, he thought she may have inserted a tampon incorrectly. (TT II, 177-178; 204-205) Mr. Overton did not have any sexual intent, he was not trying to get sexually aroused or sexually gratify himself and he did not touch [REDACTED] at all. (TT II, 178) [REDACTED]'s testimony confirmed that Mr. Overton never touched her. (TT II, 115) He stated he did not instruct her to insert her finger in her vagina. (TT II, 178)

Mr. Overton explained the debate between Chrystal and [REDACTED] about [REDACTED] shaving her legs. (TT II, 179-180) Mr. Overton convinced Chrystal to allow her to shave and he instructed her about how to shave her bathing suit line. (TT II, 180) Again, Mr. Overton did not have any sexual intent, was not trying to get sexually aroused or sexually gratify himself and he did not touch [REDACTED]'s vaginal area. (TT II, 181-182) Mr. Overton denied applying ointment to [REDACTED] (TT II, 218)

Chrystal [REDACTED] testified that she is [REDACTED]'s mother and that she previously worked as a Certified Nurse's Assistant. (TT III, 8-9) During January of 2009, when [REDACTED] was 11 years old, she became concerned about [REDACTED] after she walked in on her masturbating with a back massager. (TT III, 13) She was concerned the massager may have injured her. (TT III, 14) Chrystal also had concerns about [REDACTED]'s virginity because of observations she made between [REDACTED] and her friend, [REDACTED]. *Id.* Chrystal attempted to look at [REDACTED]'s vagina in the bathroom and admits she called Mr. Overton into the bathroom because she thought something looked unusual. (TT III, 15) Mr. Overton suggested that she take [REDACTED] to the doctor and she did in fact take her to the doctor the following day. (TT III, 15-16)

Chrystal [REDACTED] confirmed that she knew [REDACTED] was being teased because she had hairy legs and that her daughter wanted to shave them. (TT III, 19-20) Chrystal did not allow [REDACTED] to shave. (TT III, 20) She confirmed that she was present and allowed Mr. Overton to assist [REDACTED]

in shaving her legs. *Id.* [REDACTED] had concerns about pubic hair protruding from her bathing suit so Chrystal gave her permission to shave that area as well. (TT III, 50) Chrystal also explained that she did not want [REDACTED] to use tampons and did not keep tampons in their apartment. (TT III, 41, 45-46)

In 2010, [REDACTED] began to visit her biological father, John Owens, without Chrystal's knowledge or permission. (TT III, 24) That summer, Chrystal noticed changes in [REDACTED]'s behavior. (TT III, 25-27) Chrystal did not know about the alleged incidents between [REDACTED] and Mr. Overton until she received a text message from [REDACTED]'s biological father. (TT III, 9) During the conversation with Mr. Owens, Chrystal had an argument with him about her taking away [REDACTED]'s Blackberry. *Id.* Mr. Owens sent her text messages to return the phone or he threatened that he would go to the police. *Id.* Chrystal testified that [REDACTED] had never approached her about any alleged incidents or concerns about Mr. Overton. (TT III, 18-19) Chrystal [REDACTED] and Mr. Overton continued to live together and continued their romantic relationship after [REDACTED]'s accusations. (TT III, 43)

Monica Overton testified that Randall Overton is her older brother. (TT III, 49) She has known Chrystal and [REDACTED] for approximately nine years. (TT III, 50) [REDACTED] did not make any complaints about Mr. Overton to her. (TT III, 51) Monica testified that she knew her brother well and believed that he is an honest person. (TT III, 51-52) Officer William Hanna also testified at trial. He was a Detroit Police officer for 34 years and has known Mr. Overton for 12 years. (TT III, 54) He explained that he knew Mr. Overton "pretty good" and in his opinion, Mr. Overton is an honest man. (TT III, 55) [REDACTED] "[REDACTED] [REDACTED] who was 8 at the time of trial, testified that Mr. Overton is his father and Chrystal [REDACTED] is his mother, and that [REDACTED] is his

sister. (TT III, 59-60) ██████ testified that ██████ told him that she was going to lie about Mr. Overton. (TT III, 62-63)

On June 7, 2011, the jury found Mr. Overton guilty of first degree criminal sexual conduct, second degree criminal sexual conduct and three counts of gross indecency. Mr. Overton was acquitted on the remaining charges. (TT IV, 6)

On January 27, 2012 and January 30, 2012, the Honorable Patricia Fresard heard Mr. Overton's post-conviction Motion for New Trial. Counsel raised several issues in Defendant's Motion for New Trial, which Defendant Overton raises, *infra*. Judge Fresard denied the Motion for New Trial, finding Defendant Overton's issues without merit. (MT I, 10, 13, 19; MT II 8, 11, 16, 21-22, 31-32, 36) Defendant Overton asserts the trial court improperly denied his motion and request for an evidentiary hearing.

Mr. Overton appealed by right to the Court of Appeals. On October 31, 2013, the Court of Appeals issued an unpublished Per Curium opinion affirming Mr. Overton's convictions.

Presently incarcerated, Mr. Overton now seeks leave to appeal the Court of Appeals' decision.

I. THE EVIDENCE PRODUCED AT TRIAL BY THE PROSECUTION IS LEGALLY INSUFFICIENT TO CONVICT MR. OVERTON OF FIRST DEGREE CRIMINAL SEXUAL CONDUCT.

Standard of Review and Issue Preservation

Claims of insufficiency of the evidence are reviewed *de novo*. *People v Wolfe*, 440 Mich 508, 513; 489 NW2d 748 (1992); *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). There is no preservation requirement for challenging the sufficiency of the evidence on appeal. *People v Patterson*, 428 Mich 502, 505; 410 NW2d 733 (1987). Appellate counsel raised this issue in Defendant's Motion for New Trial, however, the trial court denied this claim. (MT, 10)

Discussion

If the evidence at trial is insufficient to sustain a criminal conviction, sustaining that conviction would "simply eviscerate the 'sufficiency of the evidence' requirement that is 'part of every criminal defendant's due process rights.'" *People v Tennyson*, 487 Mich 730; 790 NW2d 354 (2010) citing *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); See also *In re Winship*, 397 US 358; 90 S Ct 1068; 25 L Ed 368 (1970). In this case, the evidence at trial was not sufficient to sustain a conviction for first degree criminal sexual conduct. Taken in the light most favorable to the prosecution, the trial testimony unequivocally showed that [REDACTED] penetrated her own vagina with her own finger, thereby making it impossible for Mr. Overton to penetrate another person.

The Due Process Clauses of both the Federal and Michigan Constitutions require that a criminal conviction be supported by sufficient evidence. US Const Am XIV; Mich Const 1963, art 1, § 17; *In re Winship*, 397 US 358; 90 S Ct 1068; 25 L Ed 368 (1970). The test on appeal is whether "a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt" when that evidence is viewed in a light most favorable to the

prosecution. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979). A rational trier of fact at the trial level “may make reasonable inferences from the facts of record, but may not indulge in inferences completely unsupported by any evidence, either direct or circumstantial.” *People v Vaughn*, 186 Mich App 376, 379-80; 465 NW2d 365 (1990). Even when there are conflicting theories about the facts, “all conflicts in the evidence must be resolved in favor of the prosecution.” *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). When looking at a statute, all undefined “words and phrases shall be construed and understood according to the common and approved usage of the language[.]” *People v Stone*, 463 Mich 558, 563; 621 NW2d 702 (2001); *See also Smith v United States*, 508 US 223, 227; 113 S Ct 2050; 124 L Ed 2d 138 (1993).

When a Defendant pleads not guilty to charges, all elements of the criminal offense are “in issue.” *People v Phelps*, 288 Mich App 123; 791 NW2d 732 (2010) citing *Crawford v Washington*, 541 US 36 (2004); *See also Apprendi v New Jersey*, 530 US 466, 478; 120 S Ct 2348; 147 L Ed 2d 435 (2000).

MCL 750.520b(1)(a) provides, in pertinent part, 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 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.

At trial, there was no evidence of any intrusion into **another person’s body** by Mr. Overton. The testimony at trial, taken in the light most favorable to the prosecution, clearly showed the following: ■ testified that on one occasion when Mr. Overton was looking at her vagina during a “virginity check”, he stated her vaginal opening appeared bigger. (TT II, 64) She claimed that she informed him that it appeared bigger because she began using tampons. *Id.* ■ testified that she told him she believed she had put a tampon in the wrong hole. (TT II, 66) She said that Mr. Overton held a full-length mirror in front of her legs. (TT II, 64) She claimed that while he held the mirror, she inserted her own index finger into her vagina. (TT II, 65-66) ■ confirmed that Mr. Overton **did not touch her or penetrate her with his finger**. (TT II, 64-66)

In Mr. Overton’s case, it would be impossible for a rational trier of fact to conclude that the elements of “sexual penetration with another person” were met beyond a reasonable doubt because there was no evidence whatsoever to prove those elements of the crime at trial. Taken in a 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 accomplished the only penetration of her vagina. *Id.* Since Mr. Overton did not penetrate another person, the evidence does not establish first degree criminal sexual conduct.

The evidence also does not support convicting Mr. Overton on an aiding and abetting theory. Pursuant to MCL 767.39, the law does not distinguish between accessories and principal perpetrator, and states as follows:

Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

MCL 767.39.

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, ■■■s acts would have had to satisfy 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).

In *People v Moore*, 470 Mich 56, 67; 679 NW2d 41 (2004), the Michigan Supreme Court explained as follows:

The general rule is that, to convict a defendant of aiding and abetting a crime, a prosecutor must establish that “(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement.” *Id.* citing *People v Carines*, 460 Mich 750, 768; 597 NW2d 130 (1999).

The facts of this case involve only ■ penetrating herself with her own finger. This is insufficient to satisfy the element of sexually penetrating another person.

If the Court finds that Mr. Overton could have been convicted as an aider and abettor, there was still a critical error at trial because the jury was not instructed to consider the same. The jury was not instructed regarding aiding and abetting. 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). Therefore, if the Court finds that Mr. Overton could have been convicted as an aider and abettor, Mr. Overton would still be entitled to a new trial based on the fact that the jury was not instructed with respect to aiding and abetting.

Mr. Overton could also not have been convicted on an agency theory. This concept is explained in *People v Dilling*, 222 Mich App 44, 564 NW2d 56 (1997) and *People v Hack*, 219 Mich App 299 (1996). In *Dilling*, the Defendant was convicted of two counts of first degree criminal sexual conduct involving a person less than 13 years old. The co-defendant, Mr. Hack, was convicted of 4 counts of first degree criminal sexual conduct and other charges. The facts of this case involved teenage boys who after skipping school and consuming alcohol, forced a 3 year old and a 1 year old to engage in sexual acts with one another and videotaped those acts. Neither *Dilling* nor *Hack* were alleged to have committed the penetration in this case, however, they were both convicted of first degree criminal sexual conduct using MCL 767.39.

The Defendants in *Dilling* and *Hack* were found to be active participants in forcing the two children to engage in sexual acts. 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 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 penetrate a third party. Mr. Overton’s case is distinguishable because [REDACTED] did not penetrate a third person unlike the children who penetrated one another in *Dilling* and *Hack*. The penetration element of the crime could be met in *Dilling* and *Hack* where the 3 year old and 1 year old engaged in sexual penetrations with one another at the adult defendant’s direction.

The Court of Appeals found that a rational trier of fact could find that Mr. Overton engaged in sexual penetration because he was “engaged in the intrusion of a human body part – a finger—into the genital opening of another person’s body—the victim’s vagina—when the victim obeyed Overton’s instruction to digitally penetrate herself under the pretext of teaching her how to use a tampon.” (Appendix A, pg.4) This rationale not only completely **ignores** the plain language of the statute, but if it is applied to other common situations it would criminalize many other types of appropriate parental actions that are simply not crimes. For example, every time a parent instructs his or her daughter to wipe between the vaginal labia after the child uses the bathroom – the parent would be guilty of first degree criminal sexual conduct. Any time a parent instructs their child to put a suppository into his or her anal opening with his or her finger, that parent would be guilty of first degree criminal sexual conduct. Any time a parent instructs a child to apply ointment or medication between the labia, that parent would be guilty of first degree criminal sexual conduct. Any time a parent instructs their daughter to wash between the labia in a bathtub, that parent would be guilty of first degree criminal sexual conduct. In this situation, Mr. Overton unequivocally was talking to [REDACTED] about where a tampon goes. The transcripts reflect that [REDACTED] had confusion about which “hole” was the correct place for the

tampon. Instructing ■ on the correct location to insert a tampon does **not** amount to sexually penetrating a child.

Further, the Court of Appeals states that it would be the same “if either (1) Overton himself digitally penetrated the victim’s genital or anal openings or (2) Overton instructed the victim to digitally penetrate his own anal opening.” (Appendix A, pg. 4, FN2) Defendant-Appellant **disagrees** that these scenarios by the Court of Appeals are the same as Mr. Overton’s conduct. Clearly, the two scenarios proposed by the Court of Appeals satisfy the elements of penetrating “another person” and would be sufficient bases to convict. The facts of Mr. Overton’s case are clearly distinguishable. Even if Mr. Overton’s actions are seen as inappropriate or unusual, they simply do not satisfy the elements of first degree criminal sexual conduct.

The prosecution did not attempt to introduce any evidence at trial that Randall Overton penetrated ■ or evidence that would sustain his conviction on an aiding and abetting or agency theory. Because the prosecution failed to establish an essential element of the charged offense, Mr. Overton’s first degree criminal sexual conduct conviction should be vacated. See *People v Tennyson*, 487 Mich 730; 790 NW2d 354 (2010); *In re Winship*, supra; *Thompson v Louisville*, 362 US 199; 80 S Ct 624; 4 L Ed 2d 654 (1960).

II. THE EVIDENCE PRODUCED AT TRIAL BY THE PROSECUTION IS LEGALLY INSUFFICIENT TO CONVICT MR. OVERTON OF SECOND DEGREE CRIMINAL SEXUAL CONDUCT.

Standard of Review and Issue Preservation

Claims of insufficiency of the evidence are reviewed *de novo*. *People v Wolfe*, 440 Mich 508, 513; 489 NW2d 748 (1992); *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). There is no preservation requirement for challenging the sufficiency of the evidence on appeal. *People v Patterson*, 428 Mich 502, 505; 410 NW2d 733 (1987). Appellate counsel raised this issue in Defendant's Motion for New Trial, however, the trial court denied this claim. (MT, 13).

Discussion

The state of the law with respect to sufficiency of the evidence is previously stated by Appellant in Argument I above. The statute for second degree criminal sexual conduct, MCL 750.520c(1)(a) provides, in pertinent part, as follows:

A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and if any of the following circumstances exists...That other person is under 13 years of age.

Like criminal sexual conduct in the first degree, criminal sexual conduct in the second degree is a general intent crime, *People v Brewer*, 101 Mich App 194, 300 NW2d 491 (1980). In *People v Piper*, 223 Mich App 642, 647, 567 NW2d 483 (1997), the court emphasized that the statute does not require that the defendant actually engage in the intimate touching for the purpose of sexual arousal or gratification, but merely that his or her conduct "when viewed objectively, could reasonably be construed as being for a sexual purpose." To prove this charge in this case, the prosecutor must prove each of the following elements beyond a reasonable doubt: (1) that the defendant intentionally touched the complainant's genital area/groin/inner

thigh and (2) that this was done for a sexual purpose or could reasonably be construed as having been done for a sexual purpose. 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). The element that could not have been proven beyond a reasonable doubt was that Mr. Overton had a sexual purpose or that it could reasonably be construed to be for a sexual purpose when he assisted [REDACTED] in shaving her inner thigh or if he applied ointment to the red bumps that resulted from shaving.

[REDACTED] testified that when she was 12 years old Mr. Overton helped her shave her pubic area. (TT II, 54) She testified that she wanted to shave her bikini area because she was going swimming on a field trip and did not want the hair to stick out of her bathing suit. (TT II, 111) [REDACTED] stated that she asked to use Mr. Overton’s razor. (TT II, 54-55) She testified that after she shaved in the bathroom, he shaved the bottom part of her pubic area. (TT II, 56-57) When asked specifically what exactly he shaved, [REDACTED] stated that it was her “swim suit part.” (TT II, 57) She also claimed that Mr. Overton applied ointment to treat skin irritation that emerged after shaving. (TT II, 58-59)

Taken in the light most favorable to the prosecution, [REDACTED] and Chrystal [REDACTED] testified that the purpose of shaving was to remove pubic hair so that it would not show through [REDACTED]’s bathing suit. [REDACTED] testified that she wanted to eliminate the hair in this area so that it would not show when she went swimming. (TT II, 111) There was no evidence presented that Mr. Overton received any sexual gratification by assisting [REDACTED] in shaving and the circumstances surrounding

the incident do not suggest that his actions were sexual.

The touching at issue was not an overtly sexual touching such as fondling or groping. The touching did not involve a type of touching that could be reasonably construed to be sexual such as rubbing, stroking, cuddling or massaging. According to [REDACTED]'s testimony, she was touched in two different ways, as explained above. First, [REDACTED] testified that her inner thigh and pubic area were touched by Mr. Overton's electric razor that he held in his hand. (TT II, 57-58) The purpose of the contact was to remove unwanted hair on [REDACTED]'s body so that it would not show through her bathing suit bottom. (TT II, 111) [REDACTED] also testified that Mr. Overton applied ointment to the red bumps that resulted from shaving. (TT II, 59)

While the inner thigh and pubic areas are included in the standard jury instruction for second degree criminal sexual conduct, Mr. Overton was clearly trying to accomplish the non-sexual objectives of shaving and applying necessary medication. These activities are not the type of behaviors that the second degree criminal sexual conduct statute intended to prohibit. Since the element of "sexual purpose" cannot be proven beyond a reasonable doubt, the evidence was therefore insufficient to sustain a charge of second degree criminal sexual conduct. Therefore, Mr. Overton's conviction for second degree criminal sexual conduct should be vacated.

III. MR. OVERTON'S DUE PROCESS RIGHTS WERE VIOLATED BECAUSE THE JURY INSTRUCTIONS REGARDING SECOND DEGREE CRIMINAL SEXUAL CONDUCT WERE DEFICIENT AND THE JURY VERDICT MAY NOT HAVE BEEN UNANIMOUS.

Standard of Review and Issue Preservation

Claims that the trial court failed to instruct the jury correctly regarding all of the elements of a crime are reviewed de novo. *People v Wolfe, supra*. Failure to instruct the jury on all elements of the offense is error of constitutional dimension. *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999); citing *US v Gaudin*, 515 US 506, 510; 115 S Ct 2310; 132 L Ed 2d 444 (1995) (the Fifth and Sixth Amendments “required criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt”). Appellate counsel raised this issue in the Motion for New Trial, however, the trial court denied relief. (MT II, 8)

Discussion

“A criminal defendant has the right to have a properly instructed jury consider the evidence against him.” *People v Rodriguez*, 463 Mich 466, 472; 620 NW2d 13 (2000), quoting *People v Mills*, 450 Mich 61, 80-81; 537 NW2d 909 (1995) (internal citation omitted). Accordingly, “[j]ury instructions must clearly present the case and the applicable law to the jury.” *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). “[W]hen a jury instruction is requested on any theories or defenses and is supported by evidence, it must be given to the jury by the trial judge.” *Rodriguez, supra* at 472 (citations omitted). “Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them.” *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). Even if the instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant’s rights. *People v Aldrich*, 246 Mich

App 101 (2001). In the instant case, the instructions given regarding the second degree criminal sexual conduct allegations were reversibly deficient as the jury was not informed of the specific act that was the basis for the single charge.

During trial, [REDACTED] testified to two distinct acts that could have been the basis for Randall Overton's second degree criminal sexual conduct conviction. First, [REDACTED] testified that she wanted to shave her "private" because she wanted to go swimming for a field trip, as explained in detail in Argument II above. (TT II, 54)² [REDACTED] testified that Mr. Overton shaved the whole bottom part of her private part. (TT II, 54) On re-direct examination, [REDACTED] confirmed that when Mr. Overton shaved her, the electric razor in his hand touched her private part. (TT II, 117) Second, [REDACTED] testified that after her private part had been shaved, she developed red bumps. She testified that Mr. Overton put ointment on the red bumps. (TT II, 59) [REDACTED] stated that Mr. Overton's finger touched her private when asked how he put the ointment on her. (TT II, 117)

It is evident from the trial transcript that at least one juror considered the ointment issue as a possible basis for the charge. When asked if the jurors had any questions during Mr. Overton's testimony, one juror passed a note that read, "Can you describe the incident with the ointment." (TT II, 216) Finally, during closing argument the prosecution stated as follows:

In this case, [Randall Overton] touched [REDACTED]s pubic area and perhaps her upper inner thigh as he was putting on ointment. It doesn't matter if it is done with an item like a clipper or his hand. I have to show you that when that happened, [REDACTED] was under the age of 13.

(TT III, 107)

² Transcripts are cited hereinafter as set forth below followed by page number.
Jury Trial, June 1, 2011= TT I
Jury Trial, June 2, 2011=TT II
Jury Trial, June 6, 2011=TT III
Jury Trial, June 7, 2011=TT IV

While instructing the jury, the Court did not specify which act was the basis for the second degree criminal sexual conduct charge. The Court stated, "To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt: First that Defendant, Overton, intentionally touched [REDACTED]'s genital area, in her thigh, or the clothing covering that area..." (TT III, 139)

Unless waived by a defendant, the right to a jury trial includes the right to a unanimous verdict. *People v Burden*, 395 Mich 462, 468; 236 NW2d 505 (1975)(opinion by Kavanagh, C.J.); *People v Miller*, 121 Mich App 691; 239 NW2d 460 (1982), *Apodaca v Oregon*, 406 US 404; 92 S Ct 1628; 32 L Ed 2d 184 (1972). It is the duty of the trial court to properly instruct the jury regarding the unanimity requirement. See generally, *People v Liggett*, 378 Mich 706, 714; 148 NW2d 784 (1967)("Defendant has a right to have a properly instructed jury pass upon the evidence"). In *People v Yarger*, the Michigan Court of Appeals considered a case where the a defendant was charged with one count of third degree criminal sexual conduct, however, the jury was presented with two different acts of third degree criminal sexual conduct. *People v Yarger*, 193 Mich App 532, 485 NW2d 119; 485 NWd 119 (1992).

During the *Yarger* trial, the complainant testified that on one occasion she performed fellatio on the defendant. See *id.* at 536. She also testified to a second incident when she engaged in intercourse with the defendant. See *id.* The trial court instructed the jury that the prosecution only had to prove one of the events for the jury to convict the defendant on the single count of third degree criminal sexual conduct. See *id.* at 535. The Court of Appeals reversed the single conviction because there were two possible acts that may have been the basis of the conviction and the jury may not have been unanimous.

Counsel's failure to object to the jury instructions does not preclude the Court from considering this argument. In *Yarger*, the Court of Appeals found that although defendant failed to object to the jury instructions, the Court could still review this argument if it resulted in manifest injustice. Citing *People v Crawford*, 187 Mich App 344, 352; 467 NW2d 818 (1991). The Court of Appeals concluded that the complainant's trial testimony, if accepted as true, would have supported two separate convictions of third degree criminal sexual conduct. See *Yarger* at 536. Similarly, in Mr. Overton's case, if [REDACTED]'s trial testimony is accepted as true and this court believes sexual gratification could be found, there is support for two separate convictions of second degree criminal sexual conduct. In Mr. Overton's case, it is impossible to determine if the jury considered the act of shaving or the act of applying ointment. The prosecutor argued both alternative theories and the jury instruction read at trial for second degree criminal sexual conduct allowed the jury to consider both possibilities without making a unanimous decision, although they were two separate and distinct acts. When it is impossible to discern which act caused a defendant to be found guilty, the error requires reversal of the conviction. See *Id.* at 537.

IV. MR. OVERTON'S CONVICTIONS FOR GROSS INDECENCY SHOULD BE VACATED BECAUSE THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO SUSTAIN THE CONVICTIONS.

Standard of Review and Issue Preservation

Claims of insufficiency of the evidence are reviewed *de novo*. *People v Wolfe, supra*. There is no preservation requirement for challenging the sufficiency of the evidence on appeal. *People v Patterson, supra*. However, the issue is preserved for appellate review by Defendant's Motion for New Trial which was denied by the trial court on January 30, 2012. (MT II, 11)

Discussion

The Due Process Clauses of both the Federal and Michigan Constitutions require that a criminal conviction be supported by sufficient evidence. US Const Am XIV; Mich Const 1963, art 1, § 17; *In re Winship*, 397 US 358; 90 S Ct 1068; 25 L Ed 368 (1970). The test on appeal is whether "a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt" when that evidence is viewed in a light most favorable to the prosecution. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979).

MCL 750.338b provides in pertinent part:

Any male person who, in public or in private, *commits or is a party to the commission of any act of gross indecency with a female person* shall be guilty of a felony, punishable as provided in this section. Any female person who, in public or in private, commits or is a party to the commission of any act of gross indecency with a male person shall be guilty of a felony punishable as provided in this section. Any person who procures or attempts to procure the commission of any act of gross indecency by and between any male person and any female person shall be guilty of a felony punishable as provided in this section. (Emphasis added).

The gross indecency statute was, originally, only concerned with sexual conduct occurring in a public place. See *People v Howell*, 396 Mich 16; 238 NW2d 148 (1976). However, the statute

was amended to the form quoted above, which by its express terms applies to both public and private conduct.

In *People v Lino*, 447 Mich 567; 527 NW2d 434 (1994), a divided Supreme Court addressed a challenge to the constitutionality of the gross indecency statute as it applied to both public and private conduct. With respect to public conduct, the Court held that the defendant was on notice that a public act of oral sex constituted gross indecency. With respect to private conduct, the court held that the defendant had notice that sexual activity (masturbating) in front of a child who had not reached the age of consent constituted gross indecency.

In *People v John Jones and Shurie Jones*, 222 Mich App 595; 563 NW2d 719 (1997), the Court of Appeals held that when evaluating gross indecency cases a case-by-case analysis is required. The focus should be on the specific conduct alleged and not the parameters of the statute. The evaluation should include consideration of whether the act is public or private and the circumstances surrounding the act.

In *People v Drake*, 246 Mich App 637, 633 NW2d 469 (2001), the Court of Appeals rejected the argument that the gross indecency statute required some type of sexual act. It held that any overt act, when performed for the purpose of sexual arousal or gratification, "can be considered sexual activity in the context of the gross indecency statute."

Subsequently, in *People v Bono*, 249 Mich App 115, 641 NW2d 278 (2002), the Court of Appeals backed away from such an expansive view of the scope of the gross indecency statute:

In *People v Howell*, 396 Mich 16, 24; 238 NW2d 148 (1976), Justice Levin rejected the common sense of society test and authored a plurality opinion that construed the term "act of gross indecency" to "prohibit oral and manual sexual acts committed without consent or with a person under the age of consent or any ultimate sexual act committed in public." However, only two other justices joined Justice Levin's opinion, and therefore this section of

his opinion is not binding legal precedent. *People v Jones*, 222 Mich App 595, 599-600; 563 NW2d 719 (1997).

In *Lino*, the Supreme Court held...that "orchestrating the conduct of [a minor], to facilitate . . . sexual arousal and masturbation in the presence of the minors would constitute the offense of procuring, or attempting to procure, an act of gross indecency even though it was not committed in a public place." *Id.* at 439. *Lino* did not hold that the acts themselves were grossly indecent, but that because of the attending circumstances the defendants' conduct violated the gross indecency statute. *fn4 Thus, *Lino* is in harmony with Justice Levin's conclusion in *Howell* that (1) oral and manual sexual acts committed without consent or with a person under the age of consent and (2) an "ultimate sex act committed in public" are included within the definition of "gross indecency." In *Lynch*, supra, this Court held that masturbation of an exposed penis is an "ultimate sex act" under Justice Levin's definition of gross indecency in *Howell*. It cannot be seriously argued that masturbation is not an "ultimate sex act." *Lynch*, supra. See also *People v Trammel*, 171 Mich App 128; 429 NW2d 810 (1988). Thus, if the facts as alleged by the prosecution are true, then defendants' conduct would constitute an act of gross indecency under MCL 750.338 (emphasis added).

If *Bono* correctly interprets *Lino* as adopting Justice Levin's *Howell* standard, *Drake* was either wrongly decided or must be limited to its facts.³

Under the *Howell* standard, the evidence presented in the instant case was clearly insufficient to sustain Mr. Overton's convictions because there was no evidence of an oral or manual sex act committed without consent or with someone under the age of consent.

Even under the actual holding in *Drake*, as opposed to the dicta, the evidence was still insufficient.⁴ First, at issue in *Drake* was whether the evidence was sufficient to establish

³ The standard adopted in *Drake*, if taken literally, is clearly unreasonable, unworkable, and would lead to absurd results. By ignoring the nature of the act, and focusing solely on the defendant's intent the *Drake* court promulgated a standard under which any act, no matter how objectively innocent it was, could result in a gross indecency conviction if it was done for purposes of sexual arousal or gratification. For example, an individual is aroused by seeing 12-year-old girls wearing their hair in a ponytail tied with a pink ribbon. Under *Drake*, it would be an act of gross indecency for that individual to give a 12 year old girl a pink ribbon for the purpose of having her use it to tie her hair in a ponytail. Absent any requirement for a connection between the act in question and overtly sexual conduct, what the *Drake* standard is punishing are thought crime. Punishing individual for having bad thoughts was not the intent of the legislature when it enacted the gross indecency statute.

probable cause, not whether it was sufficient to constitute proof beyond a reasonable doubt. Second, just because the evidence in *Drake* was sufficient to support binding that case over for trial does not mean that, when the facts are viewed on a case-by-case basis, *People v Jones, supra*, the evidence was sufficient to establish guilt beyond a reasonable doubt in this case. The conduct that occurred in *Drake*, the consumption of excreta provided by the minor complainants in their presence and being physically beaten by them, involves conduct much more like the conduct in *Howell* and *Bono* than the conduct in the instant case. Here, there was no physical contact between the complainant and Mr. Overton, he did not perform any physical act such as consuming a substance he received from her (such as excreta), and he did not even receive any article from her (such as a used tampon). All he did was look at her genitals. A mere act of voyeurism does not constitute an act of gross indecency. Thus, the evidence adduced at trial was insufficient to sustain convictions for gross indecency and Mr. Overton's gross indecency convictions should be vacated.

⁴Considering the gross and bizarre nature of the acts in question, it is not surprising that the *Drake* Court instinctively felt that those behaviors were sufficient to form the basis of a gross indecency prosecution. Unfortunately, when attempting to provide a rationale for allowing the prosecution in that case to proceed, the Court adopted a standard much broader than necessary. Consequently, the holding in *Drake* should be limited to its facts. Much of the conduct at issue in *Drake* (consuming excreta, acquiring used tampons, and being beaten) consisted of acts that are generally recognized as being associated with forms of sexual perversion. Therefore, the actual holding in *Drake*, as opposed to the more broadly stated dicta, is that acts directly associated with sexual arousal and gratification can form the basis of a gross indecency prosecution even though they do not constitute actual sex acts or involve actual sexual contact.

V. MR. OVERTON'S DUE PROCESS RIGHTS WERE VIOLATED BECAUSE THE JURY INSTRUCTIONS WERE DEFICIENT. FURTHER, MR. OVERTON DID NOT HAVE CONSTITUTIONALLY ADEQUATE NOTICE THAT THE BEHAVIOR AT ISSUE VIOLATED THE GROSS INDECENCY STATUTE.

Standard of Review and Issue Preservation

Claims that the trial court failed to instruct the jury correctly regarding all of the elements of a crime are reviewed de novo. *People v Wolfe, supra*. Failure to instruct the jury on all elements of the offense is error of constitutional dimension. *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999); citing *US v Gaudin*, 515 US 506, 510; 115 S Ct 2310; 132 L Ed 2d 444 (1995) (the Fifth and Sixth Amendments “required criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt”). The standard of review for the unpreserved notice issue is whether there was plain error that affected the defendant's substantial rights. *People v Carines*, 460 Mich. 750 (1999). At trial, Defense Counsel objected to the jury instruction and the lack of notice issue was also raised in the Motion for New Trial. (TI, 135-136; MT II, 11)

Discussion

“A criminal defendant has the right to have a properly instructed jury consider the evidence against him.” *People v Rodriguez*, 463 Mich 466, 472; 620 NW2d 13 (2000), quoting *People v Mills*, 450 Mich 61, 80-81; 537 NW2d 909 (1995) (internal citation omitted). Accordingly, “[j]ury instructions must clearly present the case and the applicable law to the jury.” *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). “[W]hen a jury instruction is requested on any theories or defenses and is supported by evidence, it must be given to the jury by the trial judge.” *Rodriguez, supra* at 472 (citations omitted). “Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and

theories if the evidence supports them.” *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). Even if the instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant’s rights. *Aldrich, supra*. In the instant case, the instructions given regarding the elements of gross indecency were reversibly deficient.

At trial, the gross indecency counts stemmed from the “virginity checks” that ■ testified happened when she was 12. (TT II, 50) ■ claimed that Mr. Overton would have her come into the bedroom for the “virginity checks,” lay on the bed, open her legs and open her “private” so he could see if she was a virgin. (TT II, 52-53) ■ testified that Mr. Overton did not touch her during the “virginity checks” and that his face was about 18 to 24 inches away from her (TT II, 52-53)

At trial, the jury instruction that was read by the Court stated as follows:

The Defendant is charged with committing the crime of Gross Indecency. To prove this charge, the prosecutor must prove each of the elements beyond a reasonable doubt. First, the Defendant caused ■ to engage in a sexual act that involved spreading apart her genital area, with her hand, so Defendant, Overton, could look in her genital area. Second, that when Defendant, Overton, did this, he did it with the intent that he derived sexual gratification from the act. To prove this charge, the prosecution does not have to prove there was sexual contact between ■ and Defendant, Overton.

(TT III, 142)

Trial counsel objected to the Gross Indecency jury instruction because the standard jury instruction did not fit the facts of the case. (TT I, 9) The issue of the gross indecency jury instruction read at trial and the issue of the lack of notice to Mr. Overton was raised in the Motion for New Trial, which the trial court denied.

As discussed in Issue IV, *supra*, unless the approach taken in *Drake* is followed, the evidence is insufficient to sustain Mr. Overton’s convictions. Because the issue in *Drake* was

whether the evidence presented at a preliminary examination was sufficient to sustain a bindover, it offers little guidance regarding how the jury should be instructed regarding the elements of gross indecency.

As *Lino* and *Jones* make clear, for purposes of the gross indecency statute it is relevant whether the act is done in public or in private because acts which would constitute gross indecency if performed in public do not necessarily constitute gross indecency when performed in private. For example, oral sex between consenting adults is not grossly indecent when done in private but would be when performed in a public place. *Jones, supra*.

For the reasons set forth above, the prosecution was also obligated to prove that Mr. Overton did something more than perform an overt act from which he derived sexual arousal or gratification. The act itself must be found to be associated with sexual arousal or gratification. Consequently, the trial judge was obligated to instruct the jury that in order to convict Mr. Overton of gross indecency it had to find both that he performed the act in question (observing the complainant's genitals) and that the act in question was a sexual act (that it is conduct generally recognized as being associated with sexual arousal/activity). Additionally, because of the Supreme Court's rejection of the "common sense of the community" standard in *Lino*, the trial judge was also obligated to instruct the jury regarding how to determine whether the act in question was a sexual act.

Mr. Overton was actually prejudiced by the deficient instructions because he disputed the prosecution's claim that he engaged in improper conduct that constituted a sexual act and because the instructions given, in essence, violated his right to a trial by jury because it constituted a finding in the prosecution's favor regarding a disputed fact (whether the act in question was a sexual act).

Further, Mr. Overton did not have adequate notice that the charged conduct was unlawful. There is a due process right to notice of what conduct is prohibited by a criminal statute. Here, Mr. Overton did not have constitutionally adequate notice that the charged conduct violated the gross indecency statute, MCL 750.338b, because the statute is unconstitutionally vague and overbroad.

"Statutes are presumed to be constitutional unless their unconstitutionality is clearly apparent." *People v MacLeod*, 254 Mich App 222, 226; 656 NW2d 844 (2002). The party challenging the constitutionality of the statute bears the burden of overcoming this presumption and proving the statute unconstitutional. "In order to pass constitutional muster, a penal statute must define the criminal offense 'with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Lino, supra*, at 575, citing *Kolender v Lawson*, 461 US 352, 357; 103 S Ct 1855, 1858; 75 L Ed 2d 903 (1983). A penal statute is unconstitutionally vague if it (1) fails to provide fair notice of what conduct is prohibited, (2) encourages arbitrary and discriminatory enforcement, or (3) is overbroad and infringes on First Amendment freedoms. *Id.* at 575-576.

Where there is not a claim that First Amendment rights have been infringed, a vagueness challenge is examined in light of the facts of this particular case. *Id.* at 575. When determining if a statute is unconstitutionally vague, the court should consider if the statute's meaning can be fairly ascertained by reference to judicial interpretations, common law, dictionaries, treatises, and commonly accepted meanings of words. *People v Beam*, 244 Mich App 103, 105; 624 NW2d 764 (2001).

In light of the holding in *Lino, supra*, Mr. Overton did not have notice that the behavior at issue here was prohibited by the gross indecency statute. The only case which could have

arguably provided the requisite notice was *Drake, supra*. However, because *Drake* purports to say that any act which is overt can be the basis of a gross indecency prosecution if performed with the requisite intent, it does not provide any actual notice or guidance. Additionally and/or alternatively, if the actual *Drake* holding and not the broader dicta is used as the basis for determining whether Mr. Overton had adequate notice, the critical factual differences between the two cases discussed above establishes that he did not have adequate notice.

Since the jury instruction given deficient and Mr. Overton did not receive adequate notice, his convictions for gross indecency must be reversed.

VI. MR. OVERTON WAS DENIED HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

Standard of Review and Issue Preservation

The question whether counsel was ineffective is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Factual findings are reviewed for clear error and questions of law are reviewed de novo. *Id.* Implicitly, trial counsel did not preserve this issue for appellate review. However, the issue was raised and preserved in Defendant's Motion for New Trial which was denied on January 30, 2012. (MT II, 16, 24, 27)

Discussion

The Sixth Amendment establishes not only the right to counsel, but the right to effective counsel. US Const Am VI, Const 1963, art 1, § 20. The denial of effective assistance of counsel to the extent it prevents a fair trial is a ground for appellate reversal. In *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the United States Supreme Court definitively laid out the tests, to be used by state and federal courts in interpreting the federal constitutional guarantee of counsel under the Sixth Amendment, to determine whether a criminal defendant was afforded due process when he or she claims that counsel was ineffective. In *Strickland* the Court noted that the "object of an ineffectiveness claim is not to grade counsel's performance." *Strickland* at 697. The *Strickland* standard for judging ineffective assistance of counsel has two components, performance and prejudice: "First, the Petitioner must show that counsel's performance was deficient. . . . Second, the Petitioner must show that the deficient performance prejudiced the defense." *Id.* at 687.

As to performance, the basic question is "whether counsel's assistance was reasonable considering all the circumstances." *Id.* at 688. As to prejudice, the required showing is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different.” *Id.* at 694. A “reasonable probability” is defined as “a probability sufficient to undermine confidence in the outcome.” *Id.* There is no need to prove prejudice by a preponderance of the evidence: “The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.” *Id.*

The *Strickland* Court stressed the importance of assessing the totality of the evidence as “a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.” *Id.* at 695-696. The *Strickland* standard has been adopted in Michigan. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

(a) Trial counsel was ineffective for failing to move for a directed verdict challenging the sufficiency of the evidence and for failing to object to erroneous jury instructions.

In the instant case, for the reasons discussed in Issues I, II and IV, *supra*, counsel’s failure to move for a directed verdict challenging the sufficiency of the evidence regarding all of the charges against Mr. Overton constitutes deficient performance which actually prejudiced Mr. Overton. There is no reasonable strategic reason for not moving for a directed verdict where the motion would have been successful, and prejudice is obvious. For the reasons discussed in Issues III, IV and V, *supra*, trial counsel’s failure to object to the final instructions regarding the elements of second degree criminal sexual conduct and gross indecency constitutes deficient performance, which actually prejudiced Mr. Overton.

(b) Trial counsel failed to investigate and interview critical witnesses that would have diminished complainant’s credibility at trial.

At trial in this case, [REDACTED] testified that she told two witnesses about the allegations, her cousin [REDACTED] and a friend, [REDACTED]. (TT II, 73) She claimed to tell one witness as the allegations were happening and she claims to have told the other witness a

summary of all the allegations at one time. *See id.* Appellate counsel raised this issue in the Motion for New Trial because trial counsel failed to contact either witness before trial, failed to investigate these critical impeachment witnesses and failed to interview them. Trial counsel knew these potential witnesses would be necessary for impeachment. The trial court records reflects the prosecutor, Ms. Weingarden confirming that [REDACTED] would testify [REDACTED] never told her anything, contrary to [REDACTED]'s testimony at trial. (TT I, 7) These witnesses would have directly contradicted [REDACTED]'s testimony and put her credibility at issue as she did not disclose the allegations as she claimed. In the Motion for New Trial, appellate counsel asserted that after watching the DVD of [REDACTED] [REDACTED]'s interview, she was clearly a necessary and critical witness for trial. The trial court refused to grant a *Ginther* hearing based on that assertion.

Further, trial counsel admitted that he never met [REDACTED] who was also a critical impeachment witness. (TT III, 94) In the Motion for New Trial, appellate counsel attached an Affidavit from investigator Timothy Gilbert who found [REDACTED] and confirmed that [REDACTED]'s testimony was false and that she was not aware of the allegations in the case. The Affidavit which was previously affixed to the Motion for New Trial is attached hereto as Appendix B.

Had trial counsel properly investigated and interviewed critical trial witnesses, the trial outcome would have been different. The entire case hinged on [REDACTED]'s credibility and these two witnesses would have shown that she was not credible. There was no strategic reason for trial counsel not to interview these potential witnesses who were identified by the prosecution.

Michigan law states that the failure to interview witnesses does not by itself establish inadequate preparation. *See People v Alcorta*, 147 Mich App 326; 383 NW2d 182 (1985), lv den 425 Mich 876 (1986). It must be shown that the failure resulted in counsel's ignorance of

valuable evidence, which would have substantially benefited the accused. *People v Johnson*; 125 Mich App 76; 336 NW2d 7 (1983).

In this case, the interviews would have substantially benefitted Mr. Overton. The interviews would have given counsel the ability to impeach [REDACTED] and show that she was not credible. Trial counsel was ineffective for failing to properly interview and investigate these witnesses. For the above reasons, all of Mr. Overton's convictions should be vacated. Defense counsel requests a *Ginther* hearing at this time to fully develop a record regarding counsel's ineffective representation.

(c) *Mr. Overton did not receive the effective assistance of counsel at trial because his lawyer failed to request the court to sever⁵ his trial from co-defendant, Chrystal [REDACTED] or in the alternative, request an instruction that Chrystal [REDACTED] hearsay statements could not be used against him at trial. Further, counsel was deficient for failing to properly object to inadmissible hearsay.*

At trial, Chrystal [REDACTED] was tried for the crime of obstruction of justice, however she was not charged with substantive sexual offenses like Mr. Overton. Mr. Overton was **not** charged with obstruction of justice. The prosecution's theory against Chrystal [REDACTED] was that before [REDACTED] was taken to the forensic interview to make a statement, Chrystal [REDACTED] allegedly told [REDACTED] to change her story and allegedly attempted to influence what she said. Amanda Doss testified that she instructed Chrystal [REDACTED] not to drive [REDACTED] to the forensic interview at Kids Talk. (TT 1, 19) Chrystal [REDACTED] did not obey this request, however, and drove [REDACTED] to the interview. *Id.*

As a general rule, a defendant does not have a right to a trial separate from codefendants. *People v Hana*, 447 Mich 325, 347-348, 524 NW2d 682 (1994), mod in part *People v Gallina*, 447 Mich 1203 (1994). On a defendant's motion, the court must sever the trial of defendants on related offenses when there is a showing that severance is necessary to avoid prejudice to

⁵ The issue with severance in this case is that Defendant Overton should have had a separate jury from Defendant [REDACTED]

substantial rights of the defendant. MCR 6.121(C). A potential for prejudice exists where evidence that a jury should not consider against a defendant, and that would not be admissible if a defendant were tried alone, is admitted against a codefendant. *Hana*, 447 Mich at 347 n 7.

Severance is mandated under MCR 6.121(C) only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice. The failure to make this showing in the trial court, absent any significant indication on appeal that the requisite prejudice in fact occurred at trial, will preclude reversal of a joinder decision. See *People v Moore* (Unpublished Opinion, COA NO. 272400, December 27, 2007). Mr. Overton asserts that at trial, he was in fact prejudiced by the evidence presented against Chrystal [REDACTED] and by her statements, which were inadmissible in Mr. Overton's trial as hearsay.

In an attempt to prove that Chrystal [REDACTED] was guilty of obstruction of justice the prosecution called Amanda Doss, the caseworker from Child Protective Services, to testify about her investigation of the [REDACTED] family and Mr. Overton. Amanda Doss testified extensively about statements that both Mr. Overton and Chrystal [REDACTED] made to her. (TT 1, 18-19) She testified about setting up the forensic interview at Kids Talk and how Chrystal [REDACTED] disobeyed her instructions not to drive [REDACTED] to the interview. (TT 1, 19) Amanda Doss testified in detail about needing to find a safe place for [REDACTED] and her brother to go after the interview. (TT I, 20) She testified, without objection from trial counsel, that [REDACTED] said she was "very afraid to go home," and that "she was very afraid there would be repercussions for her telling the truth." (TT I, 20) This testimony was clearly hearsay and prejudicial against Mr. Overton. Further, Amanda Doss continued to testify about how she placed [REDACTED] in a shelter for approximately a week and put her

half-brother, ██████ Jr., in foster care. She also testified that even after this case began, the children (█████ and ██████ Jr.) were never allowed to go back home to live with their mother after the allegations came out. (TT I, 28)

This information was in no way relevant to Mr. Overton's trial, as he was not charged with obstruction of justice. Further, the testimony regarding the facts that the children were removed from the mother and placed in foster care and a shelter were highly prejudicial to Mr. Overton and irrelevant to his case. Mr. Overton did not make any decisions with respect to driving ██████ to the Kids Talk interview, nor was he charged with a crime for anything remotely close to obstruction of justice. From Amanda Doss's testimony, it appears that CPS removed the children based on Chrystal's discussions with ██████ prior to the interview and because she disobeyed the instructions not to bring ██████ to the interview. The jury may have believed that the allegations ██████ reported during the interview about Mr. Overton caused the children to be removed. This information was highly prejudicial against Mr. Overton and would have never been a part of his trial had separate juries considered the different evidence against each Defendant.

Finally, Chrystal ██████ statements were hearsay in Mr. Overton's trial, however, counsel not only failed to request severance of the trials or separate juries, but also failed to ask the court for a limiting instruction or cautionary instruction. There was no strategic benefit to Mr. Overton's case by failing to request severance of the trials or by failing to request a limiting instruction. As previously explained, much of the evidence against Crystal ██████ was irrelevant and prejudicial to Mr. Overton. With respect to the inadmissible hearsay, for example, ██████ testified as to Chrystal ██████ statements to her. One of the statements was that that Chrystal ██████ told her not to say what happened with Randall Overton and that she should word stuff

differently. (TT II, 78) This hearsay testimony that should have been found to be inadmissible in Mr. Overton's trial could be construed to mean that Chrystal [REDACTED] believed Mr. Overton did something wrong to [REDACTED]. The facts of Chrystal [REDACTED] obstruction of justice charge certainly prejudiced Mr. Overton, especially her hearsay statements. Defense Counsel should have objected, or at least requested a limiting instruction. Counsel was ineffective as there was no strategic reason not to request a limiting instruction.

(c) Mr. Overton did not receive the effective assistance of counsel at trial because his lawyer failed to object to questions that called for expert testimony and/or a conclusion regarding the ultimate issue of guilt.

During the testimony of Amanda Doss, the prosecution asked for her opinion regarding Mr. Overton's actions. Specifically, the transcript reads as follows:

A. Yes, [Chrystal [REDACTED] stated that it was [Mr. Overton] being a parent to [REDACTED]

Q. Was your opinion the same?

A. No, it was not. (TT I, 28)

Q. So, [Chrystal [REDACTED] attitude was, he was just helping her and that is what parents do?

A. Correct. (TT I, 26)

This question clearly called for Amanda Doss to testify as to the ultimate issue of guilt in the instant case. Mr. Overton's defense was that some of [REDACTED]'s claims never happened, however, the ones that did were in the normal scope of acting as a parent and were not for any sexual purpose. When Amanda Doss testified that Mr. Overton was not being "a parent to [REDACTED]" the jury could conclude that he was guilty of sexual crimes since the only other explanation was the defense strategy that it was normal parenting. If Amanda Doss had been qualified as an expert in parenting, her opinion may have been allowed, however, she did not testify as an expert at trial, nor was any foundation provided that could have qualified her as an expert. Whether Mr. Overton was acting as a "parent" was for the jury to determine as the fact-finder in this case.

There was no strategic reason for Mr. Overton's attorney not to object to Amanda Doss testifying about the ultimate issue of guilt. Defense Counsel was deficient and ineffective for failing to object.

(d) *Mr. Overton did not receive the effective assistance of counsel at trial because his lawyer failed to object to questions that called for expert testimony and/or a conclusion regarding the ultimate issue of guilt.*

When Mr. Overton testified, the prosecution asked him to give an opinion as to various hypothetical questions about crimes when he was not qualified as an expert to give such testimony. The prosecution asked Mr. Overton the following line of questions:

Q. Now, you attended the police academy, where you could become a police officer, right?

A. Yes, Ma'am.

Q. Some of the curriculums involved teaching about the Criminal sexual Conduct Law, right?

A. Yes.

Q. So you are well aware, that if a person penetrates a child, that is illegal, right. Do you know that.

A. Yeah.

Q. You are aware if a person touches the private genital area of a little girl, that is illegal, right?

A. Yeah.

Q. And you know that if a person forces a child to spread her legs and spread her vagina open, so that he can look at it. You know that is illegal, right?

A. Sure. (TT II, 192)

Randall Overton was not qualified as an expert in this case and these questions were irrelevant to his case. There were no allegations that Mr. Overton had penetrated a child. There were no allegations that Mr. Overton "force[d] a child to spread her legs and spread her vagina

open, so that he [could] look at it.” These question was irrelevant and misleading to the jury, especially because the facts of this case did not involve Mr. Overton penetrating ■■■ or forcing her to spread her legs and spread her vagina open. Defense Counsel should have objected to the relevance of these questions and to Mr. Overton providing answers to hypothetical questions since he was not an expert. As such, trial counsel was ineffective for failing to object.

VII. THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED MR. OVERTON'S DUE PROCESS RIGHT TO PRESENT A DEFENSE BY PRECLUDING MR. OVERTON FROM PRESENTING THE ENTIRE VIDEO INTERVIEW UNDER THE RULE OF COMPLETION, MRE 106.

Standard of Review and Issue Preservation

Generally, a trial court's decision to either admit or exclude evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). A preliminary question of law regarding the admissibility of evidence is reviewed *de novo*. *Id.* Defendant preserved this issue by requesting the entire video be played at trial and the issue was raised again in the Motion for New Trial.

Discussion

Every criminal defendant has both a federal and state constitutional right to present a substantial defense. US Const Ams VI, XIV; Mich Const 1963 art I § 13, 17. Whether rooted in notions of 14th Amendment Due Process or the confrontation clause of the Sixth Amendment, "the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v Kentucky*, 476 US 683, 690; 106 S Ct 2142; 90 L Ed 2d 636 (1986). This Court reviews *de novo* whether a defendant has been deprived of the right to present a defense. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

During the investigation of this case, Mr. Overton submitted to an interview with the Wyandotte police. (TT II, 141-142) The police asked Mr. Overton various questions that he voluntarily answered. (TT II, 148) A video of the interview was provided to trial counsel. At Mr. Overton's trial, various answers that Mr. Overton gave to questions asked during the police interview were admitted. These statements were admitted because they were statements by a party and therefore, not hearsay. Trial counsel requested that the entire video be played for the

jury so that the jury could understand the context of Mr. Overton's statements and answers to the questions. (TT I, 15-16; 139-142; 218-222). Without the questions that would explain the context of Mr. Overton's answers, any admissions and statements by Mr. Overton could not be truly understood by the jury. The statements appeared to be admissions of misconduct by Mr. Overton.

Trial counsel requested that the video be played during trial, pursuant to MRE 106. (TT I, 15-16; 139-142; 218-222). The Court ruled that the video could not be played and the Court ruled that playing the video would be too prejudicial to the prosecution. (TT II, 139-142). MRE 106, commonly referred to as the Rule of Completion, states as follows:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. MRE 106

When Mr. Overton's statements were admitted, the rest of the record should have also been considered by the jury to understand the context of the answers. The Court's ruling seriously prejudiced Mr. Overton because the jury could not understand why the statements were made. The jury was misled to believe that Mr. Overton made admissions when really the context of the questions would show why he answered questions certain ways.

VIII. MR. OVERTON'S MANDATORY 25 YEAR MINIMUM SENTENCE CONSTITUTES CRUEL OR UNUSUAL PUNISHMENT IN VIOLATION OF THE STATE AND FEDERAL CONSTITUTIONS.

Standard of Review and Issue Preservation

Issues of constitutional law are reviewed de novo. *People v Swint*, 225 Mich App 353, 364; 572 NW2d 666 (1997). A defendant may challenge the constitutional validity of a statute for the first time on appeal. *People v Noble*, 238 Mich App 647, 651; 608 NW2d 123 (1999) citing *People v Wilson*, 230 Mich App 590, 593; 585 NW2d 24 (1998).

Discussion

Mr. Overton was sentenced on June 22, 2011 before this Court. Probation did not score Mr. Overton's sentencing guidelines with respect to his conviction for first degree criminal sexual conduct because he was charged pursuant to MCL 750.520b(2)(b), which carries a minimum 25-year prison sentence.⁶ If this court does not rule in favor of Mr. Overton on Issue I with respect the evidence being insufficient, Defendant asserts that the 25-year mandatory minimum sentence is unconstitutionally cruel or unusual. For that reason, it is in violation of the Michigan and United States Constitution. The facts surrounding the first degree criminal sexual conduct conviction were ■ penetrating her own vagina with her finger, which has been extensively discussed in Issue I of this Application.

First degree criminal sexual conduct is normally punishable by imprisonment for life or any term of years. MCL 750.520b(2)(a). However, as in this case, when the defendant is over the age of 17 and the victim is under the age of 13, the offense is punishable "by imprisonment for life or for any term of years, but not less than 25 years." MCL 750.520b(2)(b). A legislatively mandated sentence is presumptively valid and proportionate, *People v Williams*, 189 Mich App

⁶ If Mr. Overton's guidelines had been scored, he would have faced a sentence within the range of 81 to 135 months in prison.

400, 404; 473 NW2d 727 (1991); and this Court must construe statutes "as being constitutional absent a clear showing of unconstitutionality." *People v Launsbury*, 217 Mich App 358, 363; 551 NW2d 460 (1996).

The United States Constitution prohibits "cruel and unusual punishments," US Const., Am VIII, while its Michigan counterpart prohibits "cruel or unusual punishment." Const 1963, art 1, § 16. This includes in Michigan a prohibition of "grossly disproportionate sentences." *People v Bullock*, 440 Mich 15, 32; 485 NW2d 866 (1992).

In *Bullock*, our Supreme Court explained that whether a penalty may be considered cruel or unusual is to be determined by a three-pronged test that considers (1) the severity of the sentence imposed and the gravity of the offense, (2) a comparison of the penalty to penalties for other crimes under Michigan law, and (3) a comparison between Michigan's penalty and penalties imposed for the same offense in other states. *Id.* at 33-34. The Court stated that under the Michigan Constitution, the prohibition against cruel or unusual punishment included a prohibition on grossly disproportionate sentences. *Id.* at 32. But, the Court noted that "the constitutional concept of 'proportionality' under Const 1963, art 1, § 16 is distinct from the nonconstitutional 'principle of proportionality' discussed in *People v Milbourn*, 435 Mich 630, 650; 461 NW2d 1 (1990), although the concepts share common roots." *Id.* at 34 n 17. The principle of proportionality requires that a sentence be tailored to fit the nature of the offense and the background of the offender. See *Milbourn* at 650-651. The purpose of the sentencing guidelines is to determine a sentence that meets the principle of proportionality. *People v Smith*, 482 Mich 292, 305; 754 NW2d 284 (2008). However, the principle of proportionality "has no applicability to a legislatively mandated sentence because the trial court, in that case, lacks any discretion to abuse." *Bullock* at 34 n 17.

Mr. Overton contends that the 25-year mandatory minimum sentence is disproportionate as applied to the facts of his case. First, the 25-year mandatory minimum grossly exceeds the appropriate sentence range under the sentencing guidelines. After calculating the appropriate guidelines, Mr. Overton should have faced from 81 to 135 months in the Michigan Department of Corrections. Second, the court could not fashion an individualized sentence and consider all relevant information to Mr. Overton, including information that was favorable to him.

In the case of *People v Smith*, unpublished per curiam of the Court of Appeals, issued May 18, 2010 (Docket No. 290866), the Michigan Court of Appeals considered whether the 25-year mandatory minimum was unconstitutional. The facts in *Smith* are much more grave than the facts in Mr. Overton's case. The defendant in *Smith* was convicted of two counts of first degree criminal sexual conduct. He was an adult man who sexually abused a child who was under 13 over several years. Mr. Overton's facts are not nearly as grave. As applied to Mr. Overton only, the 25-year mandatory minimum should be found unconstitutional. Mr. Overton's conviction is based on **████ penetrating her own vagina with her own finger** while he was present. There was **no testimony that Mr. Overton even touched █████ during this incident** and █████ agreed that Mr. Overton kept his hands on the full-length mirror in front of her. Mr. Overton's facts are clearly distinguishable from *Smith*.

To determine if a penalty is cruel or unusual, the court also looks at the penalties imposed for other crimes in this state, the penalty imposed for the same offense in other states and considers the goal of rehabilitation. Within the crime of first degree criminal sexual conduct within this state, there are a broad range of activities that would be deemed illegal and punishable by the 25-year mandatory minimum. Other defendants convicted by the first degree statute and subject to the mandatory minimum include defendants who have forcibly raped

children at gunpoint and/or actually penetrated children with their own body parts. Mr. Overton's actions are **grossly different** and should not fit in the group of defendants subject to the 25-year mandatory minimum. Because Defense Counsel believe that Mr. Overton was charged with the wrong offense given the facts to support the first degree conviction, it is unnecessary at this time to continue an analysis based on other states rape statutes. Mr. Overton was not charged with the correct offense given the facts of his case.

In *People v Benton*, 294 Mich App 191 (2011), this Court held that the mandatory 25-year minimum sentence for a conviction of first degree criminal sexual conduct does not constitute cruel or unusual punishment. Slip. Op. at 6-8. The defendant in *Benton*, who was a former elementary school teacher, was convicted of first degree criminal sexual conduct for engaging in sexual intercourse with a 12 year old former student from her sixth grade class. *Id.* at 1. In *Benton*, the defendant asserted that the offenses did not involve any force, violence, coercion, or trickery and argued she should be considered a less culpable offender. *Id.* at 7. The Court disagreed stating that Michigan public policy on statutory rape conflicted with the defendant's attempt to minimize the severity of the offense and that given the immaturity and innocence of the victim, his acquiescence could not be considered a mitigating factor. *Id.* at 7-8.

The facts in *Benton* are distinguishable from the facts in the instant case. The instant case is one of a very unique nature. Mr. Overton never penetrated [REDACTED] and the charges arose from [REDACTED] penetrating her own vagina with her own finger while he was present. There was no testimony that Mr. Overton even touched [REDACTED] during this incident and [REDACTED] agreed that Mr. Overton kept his hands on the full-length mirror in front of her. Mr. Overton testified that he was simply attempting to help [REDACTED] and show her how to use a tampon. Although the Court in *Benton* held that the defendant could not be deemed a less culpable offender, the facts in the

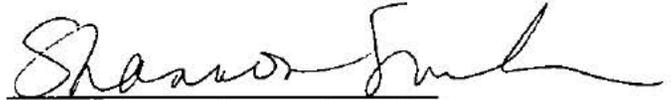
instant case support finding Mr. Overton less culpable than other offenders.

As discussed in Issue I, *supra*, Mr. Overton's conviction for first degree criminal sexual conduct should be vacated because the facts at trial were insufficient to sustain the conviction. If the Court disagrees with the sufficiency argument, the Court should agree that Mr. Overton's actions were not nearly as grave as defendants' convictions of first degree criminal sexual conduct in *Smith* and *Benton*. Therefore, the 25-year mandatory minimum that Mr. Overton was sentenced to was unconstitutional and therefore, should be vacated.

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellant requests that this Honorable Court reverse his convictions, or alternatively, grant a new trial.

Respectfully Submitted:



SHANNON M. SMITH (P 68683)

GAIL S. BENSON (P 25417)

Attorneys for Defendant-Appellant

122 Concord Rd., Ste 102

Bloomfield Hills, MI 48304

(248) 636-2595

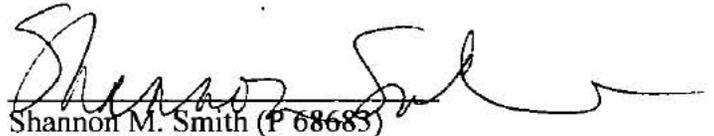
Dated: 12/23/13

PROOF OF SERVICE

On December 23, 2013, I submitted the above Application and Notice of Hearing to the Michigan Supreme Court by hand delivery, and served a copy of the same to the prosecuting attorney by first class mail.

A copy of the Notice of Filing of the Application was also served by first class mail on December 23, 2013 upon the Court of Appeals, the prosecuting attorney and the trial court.

Dated: 12/23/13



Shannon M. Smith (P 68683)