

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

v

ROBIN SCOTT DUENAZ
Defendant-Appellant.

No. 150286

L.C. No. 12-000721-FC
COA No. 311441

BRIEF OF THE PROSECUTING ATTORNEYS
ASSOCIATION OF MICHIGAN AS AMICUS CURIAE
IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

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Counterstatement of the Question

I.

1. **Whether evidence of a child’s prior sexual abuse is “sexual conduct” barred by the rape-shield statute, MCL 750.520j?**

Amicus answers YES

2. **If so, whether evidence of prior sexual abuse was nevertheless admissible in this instance to preserve the defendant’s right of confrontation and to present a defense?**

Amicus answers NO, though there can be such cases

3. **Whether any error in excluding evidence of prior sexual abuse in this case was harmless?**

Amicus answers that there was no error, and adopts the People’s response to this question

Statement of Facts

Amicus adopts the statement of facts by the People.

Argument

I.

Prior sexual abuse of a child is inadmissible under MCL § 750.520j, the statute making no distinction between voluntary and involuntary sexual conduct. The constitution may require admission of prior sexual conduct of a victim in circumstances not described in the statutory exceptions to the bar, but this not such a case.

Introduction: the questions the Court has directed be addressed, and the answer of the amicus

The questions the Court has directed be addressed are:

1. whether evidence of a child's prior sexual abuse is "sexual conduct" barred by the rape-shield statute, MCL 750.520j;
2. if so, whether evidence of prior sexual abuse was nevertheless admissible in this instance to preserve the defendant's right of confrontation and to present a defense (see *People v Hackett*, 421 Mich 338 (1984)); and
3. whether any error in excluding evidence of prior sexual abuse in this case was harmless.

This is not the first time these issues have been before the Court. In *People v Parks*¹ a majority of the Court first remanded for a hearing "affording the defendant the opportunity to offer proof that the complainant made a prior false accusation of sexual abuse against another person." After the trial judge found at the hearing that there was no such proof, the Court scheduled oral argument on several questions, including "(5) whether the sexual abuse of a young child constitutes 'the victim's past sexual conduct' within the meaning of MCL 750.520j(a); and (6) whether the defendant in this case must be allowed to introduce the evidence of the

¹ *People v Parks*, 478 Mich. 910 (2007).

complainant's prior accusations of sexual abuse in order to preserve his constitutional right of confrontation and to present a defense."² After argument, the Court denied leave. Justice Markman, joined by Justice Cavanagh, dissented and would have held that "the rape-shield statute only applies to volitional acts,"³ and thus has nothing to say regarding admission of evidence of previous sexual assaults on child victims. Justice Young, now Chief Justice, joined by Justice Corrigan, concurred in the denial of leave, and disagreed with Justice Markman's conclusion, observing that though "not controlling the interpretation of this state's statute, it is nevertheless reassuring that nearly all states ruling on this question have read their rape shield protections as encompassing both voluntary sexual conduct and involuntary sexual conduct."⁴ And now these questions, questions (5) and (6) from *Parks*, are questions (1) and (2) in the Court's order here.

Amicus answers:

1. Evidence of a child's prior sexual abuse is "sexual conduct" barred by the rape-shield statute, MCL 750.520j.
2. There may be circumstances where the rape-shield statute is overcome by the defendant's right of confrontation and to present a defense, but those circumstances are not present here.
3. there is thus no error here, but if the evidence should have been admitted here, its absence is harmless. Amicus here adopts the arguments presented by the People, and will not further address the point.

² *People v. Parks*, 481 Mich. 860 (2008).

³ *People v. Parks*, 483 Mich. 1040, 1062 (2009) (Markman, J. dissenting).

⁴ *People v. Parks*, 483 Mich. 1046-1047.

Discussion

A. Evidence of a child’s prior sexual abuse is “sexual conduct” barred by the rape-shield statute, MCL 750.520j, subject to case-by-case consideration under the constitution

The first question is one of statutory construction. Michigan’s statement of the task of the judiciary in statutory construction is orthodox:

- Our primary aim is to effect the intent of the Legislature.
- We first examine the language of the statute and if it is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written. In this examination, common words must be understood to have their everyday, plain meaning, and technical words, including terms of “legal art,” are to be given their understood technical meaning.⁵
- Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent” and look to such aids as legislative history.⁶

When a court looks to determine “what the law is” when the law is a statute, the court is attempting to ascertain the “expressed” intent of the legislature, which naturally leads one first to the principal expression of intent—the text of the statute. The “law” is what the “objective

⁵ Helpfully, Michigan has statutes on the point: MCL 8.3a provides that “All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning”; see also MCL 750.2 regarding construction of penal statute: “The rule that a penal statute is to be strictly construed shall not apply to this act or any of the provisions thereof. All provisions of this act shall be construed according to the fair import of their terms, to promote justice and to effect the objects of the law.”

⁶ See e.g. *Wickens v. Oakwood Healthcare Sys.*, 465 Mich. 53, 60 (2001); *People v. Phillips*, 469 Mich. 390 (2003); *Gilbert v. Second Injury Fund*, 463 Mich. 866 (2000); *People v. Davis*, 468 Mich. 77 (2003); *Dan De Farms, Inc. v. Sterling Farm Supply, Inc.*, 465 Mich. 872 (2001). This court has criticized the use of legislative history in the construction of statutes that are not ambiguous. See e.g. *People v. Guerra*, 469 Mich 966 (2003).

indication of the words” of the statute mean.⁷ And included in an “objective indication of the words” is the *context* in which they are used within the statutory scheme. The overarching principle is that the text of the statute—even the “plain” text—must be “placed alongside the remainder of the *corpus juris*”⁸ to ascertain its meaning.

1. The text of the statute

It is always wise to begin with the actual language of the statutory provision or provisions at issue:

(1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

(a) Evidence of the victim's past sexual conduct with the actor.

(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.⁹

The two sides of the textual issue concerning the meaning of “victim’s sexual conduct” have been mined rather thoroughly by Chief Justice Young and Justice Markman in *Parks*. Justice Markman there expressed the view that “conduct” can only be volitional:

The definition of “conduct” varies little from dictionary to dictionary. Conduct is defined as: “personal behavior; way of

⁷ Antonin Scalia, *Matter of Interpretation*, at 29.

⁸ Scalia, at 17.

⁹ MCL § 750.520j.

acting; deportment,” Random House Webster's College Dictionary (1997); “[t]he way a person acts; behavior,” The American Heritage Dictionary of the English Language (1981); and “[t]he manner of guiding or carrying one's self; personal deportment; mode of action; behavior,” Webster's Revised Unabridged Dictionary (1996). The common theme of these definitions is that “conduct” pertains to an individual's own behavior, to actions initiated or set in motion by the individual. Being the victim of, or having been subjected to, sexual abuse by another does not by this definition of “conduct” constitute something within the scope of the rape-shield statute, and therefore should not be excluded from evidence under the authority of this statute.¹⁰

Chief Justice Young, on the other hand, argued that this view is mistaken, as demonstrated, in part, by the defense of duress:

The Legislature did not specifically define the term “conduct.” Therefore, it is appropriate to look to the dictionary definition to discern the term's meaning. “Conduct” is relevantly defined, as one's “personal behavior.” This definition is silent about whether “conduct” encompasses only voluntary “personal behavior” or both voluntary and involuntary “personal behavior.” The term's plain meaning in the criminal context, however, implies that both voluntary behavior and involuntary behavior are “conduct.” Justice Markman's understanding of the term “conduct” artificially restricts the term to one's voluntary behavior only. Instead, it encompasses all of one's “personal behavior.”

[Footnote 15] The criminal defense of duress aptly illustrates why Justice Markman's construction is underinclusive. Someone who maintains a duress defense admits that otherwise criminal acts are part of his “conduct,” but seeks to excuse it as involuntary. Thus, though involuntary, the act remains a person's conduct. *People v. Merhige*, 212 Mich. 601, 610-611, 180 N.W. 418 (1920), states the rule of duress: “An act which would otherwise constitute a crime may also be excused on the ground that it was done under compulsion or duress. The compulsion which will excuse a criminal act, however, must be present, imminent and impending, and of such a nature as to induce a well-grounded apprehension of death or serious bodily harm if the act is not done.” . . . Particularly

¹⁰ *People v. Parks*, 483 Mich. at 1060.

telling is the Court's subsequent discussion: “ Whether the defendant was responsible for his conduct on September 19th and whether his actions on that occasion were voluntary, would be a fair question for a jury under all the circumstances of the case.” Id. at 611, 180 N.W. 418 (emphasis added). Rather than being “a single, stray reference to [conduct],” as Justice Markman indicates, . . . this understanding of “conduct” as encompassing all of one's “personal behavior,” not just volitional behavior, illustrates a foundation of our criminal law. . . .The fact that . . . [the] alleged sexual conduct was forced is not relevant to whether it was “conduct” within the meaning of the statute.¹¹

Amicus believes Chief Justice Young has the better of the argument here. “Behavior” or “conduct” that is forced remains behavior or conduct, though there may arise legal issues when that behavior or conduct is forced. And one may engage in conduct passively. To put it delicately, if one has a sexual act performed on him or her while remaining a “passive participant,” it would still be said that the individual has engaged in sexual conduct or behavior. If that behavior was forced or involuntary, though passive, the active participant certainly might face legal consequences, but as to MCL § 750.520j, the passive, and in this case, involuntary, participant has engaged in sexual conduct. And as the Chief Justice pointed out, and amicus will return to, this is the common understanding in jurisdictions that have addressed the matter.

2. The context of the statute

The Chief Justice [then Justice] and Justice Markman also disagreed on the force of the context of MCL § 750.520j in the statutory scheme, and context is important, for, as Justice Scalia and Bryan Garner have said, the “words of a governing text are of paramount concern, and

¹¹ *People v. Parks*, 483 Mich. at 1044 (footnotes omitted; emphasis supplied).

what they convey, *in their context*, is what the text means.”¹² Justice Markman’s view as expressed in *Parks* was that:

- The statute provides additional insight on the meaning of “conduct” by distinguishing “conduct” from “activity” in paragraphs (a) and (b) of MCL 750.520j(1). . . . Paragraph (a) renders admissible evidence of the “victim’s past sexual conduct with the actor,” and paragraph (b) renders admissible “specific instances of sexual activity” concerning the “source or origin of semen, pregnancy, or disease.” “Activity” does not connote the concept of volition to the same extent as “conduct.” “Activity” in paragraph (b) pertains to conditions that directly result from the physical sex act itself—semen, pregnancy, disease—in which the concept of volition is essentially irrelevant. In contrast, “conduct” in paragraph (a) pertains to a range of interpersonal behavior that extends beyond the physical act itself, and in which the concept of volition may be quite relevant in assessing whether the victim chose to behave in such a way that the defendant should be deemed less culpable, or not culpable at all, for the alleged offense. Interpreting “conduct” to include non-volitional action blurs the Legislature’s apparently careful distinction between “conduct” and “activity.”
- The Legislature’s use of “conduct” throughout 1974 PA 266 further supports interpreting “conduct” to include only volitional actions. See, e.g., MCL 750.520b (describing first-degree criminal sexual “conduct”). It seems unlikely that the Legislature intended to punish non-volitional activity under the criminal code. Interpreting “conduct” to mean only volitional action maintains this understanding. . . .
- Further uses of “conduct” in 1974 PA 266 are found in MCL 750.520a, in which the Legislature defined “actor” as “a person accused of criminal sexual conduct,” MCL 750.520a(a), and “victim” as “the person alleging to have been subjected to criminal sexual conduct,” MCL 750.520a(s). These definitions distinguish a person who has chosen to perform a certain act from one who had no choice in performing such act. If a victim, for example, is raped by an actor, the rape is considered to be the actor’s conduct. The

¹² Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, p. 56 (2012) (emphasis supplied).

victim is considered to have been “ subjected to ” the conduct, strongly suggesting that rape is not fairly characterized as the victim's conduct.FN60 Rather, it would only be the “conduct” of the person who chose to perform the act.¹³

Chief Justice Young’s view of the statutory context was to the contrary:

- An examination of the statutory scheme as a whole underscores why Justice Markman's construction of “conduct” is too limited. MCL 750.520a provides definitions for Chapter LXXVI of the Michigan Penal Code, which encompasses the rape shield statute (MCL 750.520j). Although the section does not define the word “conduct,” it does define both “actor” and “victim” with reference to their “conduct.” An “actor” is someone “accused of criminal sexual conduct,” MCL 750.520a(a), while a “victim” is someone “subjected to criminal sexual conduct,” MCL 750.520a(p).
- By including these definitions, the Legislature expressed its understanding that “sexual conduct” is something that both “actors” and “victims” take part in—“actors” voluntarily and “victims” involuntarily.
- The protections of the rape shield statute, therefore, do not distinguish involuntary “sexual conduct” experienced as a victim of sexual abuse from voluntary “sexual conduct” engaged in as a consenting adult. To hold otherwise would presume that the Legislature intended to give prostitutes more protection than rape victims. I do not think the plain meaning of the term “conduct” within the context of the statute conveys that particular legislative intent.¹⁴

Amicus will not belabor these points; again, amicus believes Chief Justice Young has the better of the argument here.¹⁵

¹³ *People v. Parks*, 483 Mich. at 1060-1061.

¹⁴ *People v. Parks*, 483 Mich. at 1044-1045.

¹⁵ Chief Justice Young also pointed to legislative history, which supports the argument that the statute includes nonconsensual acts. *People v. Parks*, 483 Mich. at 1045.

3. Construction of similar statutes around the country

As Chief Justice Young pointed out in *Parks*, decisions from throughout the country overwhelmingly support the view that "sexual conduct" or "sexual behavior" includes involuntary or nonconsensual behavior or conduct.¹⁶ Though not binding, these cases counsel against a restrictive reading of the Michigan statute.

B. The constitution may compel admission of prior assaults

As Chief Justice Young recognized in *Parks*, “[n]otwithstanding the requirements of the rape shield statute, a criminal defendant has the constitutional right to present a defense,” a right that is not, however, absolute, for it may “bow to accommodate other legitimate interests in the criminal trial process.’ Indeed, courts have ‘wide latitude’ to limit reasonably a criminal defendant’s right to cross-examine a witness ‘based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.’¹⁷ And so the Court in *People v. Hackett*¹⁸ required courts “to determine the constitutionality of exclusion of evidence under the rape shield statute on a case-by-case basis, as long as ‘[t]he defendant ... make [s] an offer of proof as to the proposed evidence and ... demonstrate[s] its relevance to the purpose for which it is sought to be admitted.’

¹⁶ See *People v. Parks*, 483 Mich. at 1049 (footnote 23, collecting cases). See also *Grant v. Demskie*, 75 F.Supp.2d 201, 211 -212 (S.D.N.Y., 1999) (collecting cases on both the majority and minority view).

¹⁷ *People v. Parks*, 483 Mich. at 1049.

¹⁸ *People v. Hackett*, 421 Mich. 338 (1984).

Only then does a trial court possess the relevant information to decide whether a defendant is constitutionally entitled to present particular evidence excluded under the rape shield statute.”¹⁹

Chief Justice Young also noted that in the constitutional case-by-case inquiry, admission of evidence is not required by the constitution where it is sought to be introduced only to “wage a general attack on a witness's credibility, as opposed to a specific attack on a witness's ‘possible biases, prejudices, or ulterior motives’”²⁰ But a claim that the evidence arguably provides an alternative explanation of the source of age-inappropriate sexual knowledge and behavior by the victim “is somewhat more compelling.”²¹ And so the Court need not swim against the national tide and decide that prior sexual assaults are not within the rape-shield protection in order to allow the defendant constitutionally required evidence to make his defense, for *Hackett* and *People v. Arenda*²² allow admission of evidence where constitutionally required. In the case of prior molestations of a child, *People v. Morse*²³ provides an appropriate template concerning admission of a prior assault or assaults as an alternative source of arguably age-inappropriate knowledge of sexual matters by the child; the trial judge must hold an in camera hearing to determine that the evidence is relevant, that the defendant can show that another person was convicted of CSC involving the victim(s), and that the underlying facts of the previous conviction are significantly identical to be relevant to the instant proceeding. An Illinois case,

¹⁹ *People v. Parks*, 483 Mich. at 1049-1050.

²⁰ *People v. Parks*, 483 Mich. at 1050.

²¹ *People v. Parks*, 483 Mich. at 1049-1051.

²² *People v. Arenda*, 416 Mich. 1 (1982)

²³ *People v. Morse*, 231 Mich. App. 424 (1998).

among others, also provides guidance. In *People v. Hill*²⁴ the court said that “under proper circumstances, evidence of a child witness's prior sexual conduct is admissible to rebut the inferences that flow from a display of unique sexual knowledge,” despite the Illinois rape shield law. But the “prior sexual conduct must be sufficiently similar to defendant's alleged conduct to provide a relevant basis for its admission. It must engage the same sexual acts embodied in the child's testimony.” And the court found that though the 6-year-old female child did possess what might be termed “age-inappropriate” knowledge regarding the specific sexual act with which the defendant was charged, that the child had previously reported similar contact with a young boy was properly excluded because it lacked sufficient detail and so did not fully rebut the inference that the child's knowledge was derived from the defendant in the charged event.

This Court has spoken to this question previously, in *Arenda*. The victim was 8 years old, and thus any prior sexual contact would have constituted a sexual assault, the child not being able to consent. Defense counsel wished to admit prior sexual conduct, allegedly to “explain the victim's ability to describe the sexual acts that allegedly occurred and to dispel any inference that this ability resulted from experiences with defendant.”²⁵ This Court, finding that this sort of evidence is within the shield, rejected the claim for *most* cases:

In most cases, the relevancy, if any, of such evidence will be minimal. A jury is unlikely to consider a witness's ability to describe sexual conduct as an independent factor supporting a conviction. This ability, unlike pregnancy, semen or disease, need not be acquired solely through sexual conduct.

²⁴ *People v. Hill*, 683 N.E.2d 188, 192 (Ill.App., 1997).

²⁵ *People v. Arenda*, 416 Mich. at 11.

In contrast, *the potential prejudice from the admission of such evidence is great*. First, in order for it to have miniscule probative value, it would have to refer not only to the existence of sexual conduct but also to the details of such conduct. To demonstrate a source of knowledge the details of such conduct would have to be compared to the details as presented at trial. *There would be a real danger of misleading the jury. There would be an obvious invasion of the victim's privacy.*

Second, striking down the prohibitions as they relate to the issue of this case would permit the admission of evidence of a like nature in every case. In almost every instance, the victim testifies to the conduct that occurred and so could be exposed to cross-examination on these points. A blanket exception for this issue would swallow the rule.

Furthermore, the only cases in which such evidence can arguably have more than a de minimis probative value are ones involving young or apparently inexperienced victims. These children and others are the ones who are most likely to be adversely affected by unwarranted and unreasonable cross-examination into these areas. *They are among the persons whom the statute was designed to protect.*

Therefore, we are persuaded that the prohibitions in the rape-shield law will not deny a defendant's right of confrontation *in the overwhelming majority of cases* and, in particular, not in this case. *If such a set of facts arises as to place in question the constitutional application of the rape-shield law, it can be addressed.*²⁶

People v. Morse provides the template for examining whether, in a particular case, the shield should be pierced; as said in *Arenda*, where a “set of facts arises” that puts in question application of the rape-shield law, “it can be addressed.” As with *Arenda*, the present case is not such a case.

²⁶ *People v Arenda*, 416 Mich. at 12-13 (emphasis supplied).

It must be remembered that the constitution does not compel the admission of any and all relevant evidence the defendant wishes to offer, else MRE 403 would be inapplicable to criminal defendants,²⁷ and no rape-shield provision could be constitutional.²⁸ It is where relevant evidence is excluded for an inconsequential reason and that evidence is crucial to the defense that the constitution is implicated, and so the shield yields in the circumstances delineated in the statute, and in other situations that might be identified on a case-by-case basis, such as those identified in *Morse*.²⁹

²⁷ See Graham, 7 *Handbook of Fed. Evidence* § 1101:1: “It is . . . well-settled that the right [to present a defense] is subject to the application of procedural and evidentiary rules. . . . Restrictions on presenting evidence do not offend the Constitution if they serve ‘legitimate interests in the criminal trial process’ and are not ‘arbitrary or disproportionate to the purposes they are designed to serve.’ *Rock v. Arkansas*, 483 U.S. 44, 55–56, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) (internal quotation marks omitted). Similarly, the right to confront and cross examine witnesses is tempered by a trial judge’s ‘wide latitude’ to impose ‘reasonable limits’ in order to avoid matters that are confusing or of marginal relevance. . . . Nor are an accused’s constitutional rights necessarily violated because he was prevented from introducing hearsay, . . . or from presenting otherwise relevant evidence that is privileged, such as communications between a doctor and patient, a lawyer and client, or between a husband and wife, . . . And courts may constitutionally preclude defendants from offering otherwise relevant evidence if they fail to comply with procedural rules that require notice to be given” (case citations omitted).

²⁸ Evidence of prior consensual sexual activity on the part of a victim is not inadmissible under rape-shield provisions because never relevant under MRE 401 on the issue of consent, but because, as a categorical matter, that limited relevance that evidence may have under the liberal admissibility standard of MRE 401 is outweighed by unfair prejudice to the victim. See *People v Arenda*, 416 Mich. at 10: “The prohibitions contained in the rape-shield law represent a legislative determination that, in most cases, such evidence is irrelevant. This determination does not lack a rational basis and is not unreasonable.”

²⁹ *United States v. Spencer*, 1 F.3d 742, 747 (CA 9, 1992): “. . . because that relevant evidence was crucial to Spencer’s defense, he not only has a statutory entitlement (under Rules 402 and 401) to introduce it, but a fundamental constitutional right to do so as well.”

C. The constitution does not compel admission of the evidence here

For the reasons stated by the Court of Appeals and the People, Amicus submits that preclusion of the evidence was not error here.

Relief

Wherefore, amicus respectfully submits that leave should be denied.

Respectfully submitted,

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