STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v MICHAEL SAMUEL BONO, Defendant-Appellee.	FOR PUBLICATION January 4, 2002 9:00 a.m. No. 227278 Oakland Circuit Court LC No. 99-169631-FH ON REMAND
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v DOUGLAS LAKE, Defendant-Appellee.	No. 227280 Oakland Circuit Court LC No. 99-169629-FH Updated Copy March 15, 2002

Before: Neff, P.J., and Fitzgerald and Markey, JJ.

FITZGERALD, J.

This case is on remand from the Supreme Court.[1] In our earlier opinion,[2] we held that defendants' conduct did not occur in a public place as a matter of law within the meaning of the statute prohibiting gross indecency between males, MCL 750.338, and affirmed the trial court's dismissal of the charges against defendants. In lieu of granting the prosecution leave to appeal, the Supreme Court vacated this holding[3] and remanded the case to this Court "to address whether

[1] *People v Bono*, 465 Mich 888 (2001).

[2] *People v Bono*, unpublished opinion per curiam of the Court of Appeals, issued June 12, 2001 (Docket Nos. 227278, 227280).

[3] The Court stated:

(continued…)

the act which occurred here is grossly indecent within the meaning of MCL 750.338 and direct it to consider if CJI2d 20.31 is consistent with the case law on the question whether masturbation can be grossly indecent." 465 Mich 888. We reverse and remand.

The facts are succinctly set forth in our earlier opinion:

> On November 19, 1999, Mark Bowering, a Meijer store detective, entered the restroom at Meijer and noticed that both of the two adjoining stalls were occupied. Bowering washed his hands, walked out of the restroom, and waited in the front center lobby of the store for approximately eight to ten minutes. When nobody exited the restroom during that time, Bowering contacted his supervisor, Brian Reaver. Reaver and Bowering entered the restroom, and Bowering kneeled down and lowered his head to within one or two inches of the floor so that he could see under the stall doors. Bowering observed that the occupant of the handicapped stall, defendant Bono, was down on his knees, facing the adjacent stall, with his pants and underwear around his ankles. The occupant of the adjacent stall, defendant Lake, was sitting on the toilet. Defendant Lake was "moving his arm up and down near the bottom of the handicapped stall" where defendant Bono was kneeling. Bowering did not actually see defendants touching each other and did not see either defendant's penis.
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> Both defendants were charged with gross indecency between males and bound over for trial. Defendant Lake moved to quash the charge against him, and defendant Bono moved to dismiss the charge against him. Following a hearing on the motions, the trial court granted the motions, concluding that (1) there was neither evidence that there was an entry of one defendant's penis, finger, or tongue into the other defendant's anus or mouth, nor evidence of the touching of one defendant's tongue or mouth to the other defendant's anus or genital organs, and (2) defendants had a reasonable expectation of privacy in the stall. [*People v Bono*, unpublished opinion per curiam of the Court of Appeals, issued June 12, 2001) (Docket Nos. 227278, 227280).

I

On remand, we are directed to first determine whether the act that occurred here is grossly indecent within the meaning of MCL 750.338, which states in pertinent part:

> Any male person who, in public or in private, commits or is a party to the commission of or procures or attempts to procure the commission by any male

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(…continued)

> Assuming arguendo that the prosecution has to establish that the act occurred in public as an element of the crime, there was sufficient evidence to establish probable cause that the area was a public place and it remains a question for the factfinder whether this element was established. See *People v Williams*, 462 Mich 861-862 (2000). [465 Mich 888.]

person of any act of gross indecency with another male person shall be guilty of a felony . . . .

In the absence of a clear definition by the Legislature of the term "gross indecency," we must examine the longstanding body of Michigan case law addressing the subject. Beginning with *People v Hicks*, 98 Mich 86, 90; 56 NW2d 1102 (1893), a case involving the taking of indecent liberties with a child, the Supreme Court applied a "common sense of the community" standard. The common sense of society rationale was later applied in gross indecency cases. See, e.g., *People v* Carey, 217 Mich 601; 187 NW 261 (1922); *People v Dexter*, 6 Mich App 247, 253; 148 NW2d 915 (1967).

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).

Several panels of this Court held that Justice Levin's definition of gross indecency has no precedential value and therefore adhered to the *Hicks* lines of authority. See, e.g., *People v Austin*, 185 Mich App 334, 338; 460 NW2d 607 (1990) (this Court applied the "common sense of society" standard in holding that MCL 750.338 was not unconstitutionally vague as applied to the defendants, who had allegedly engaged in consensual acts of fellatio and masturbation in a public restroom). Other panels of this Court chose to follow *Howell*. See, e.g., *People v Lynch*, 179 Mich App 63, 66-68; 445 NW2d 803 (1989) (this Court applied Justice Levin's standard from *Howell, supra*, and held masturbation in public constitutes "gross indecency").

In an effort to resolve the conflict between the standards used for gross indecency, a special panel of this Court held that the "common sense of society" standard was the appropriate standard to determine what constituted an act of gross indecency. *People v Brashier*, 197 Mich App 672, 679; 496 NW2d 385 (1992), aff'd in part and reversed in part sub nom *People v Lino*, 447 Mich 567; 527 NW2d 434 (1994). However, the portion of this Court's decision in *Brashier* that adopted the common sense of society rationale was reversed in *Lino, supra* at 571. In *Lino*, a majority of the justices rejected the "common sense of society" standard for gross indecency. However, the Court could not agree on what standard should be used to determine if an act is grossly indecent. Justice Levin wrote separately, *id.* at 578-603, and opined that the Court should state what is not gross indecency: adults engaging in "oral sex (fellatio, cunnilingus) or anal sex, or manual sex, including masturbation or other manual penetration or arousal, as long as the activity is consensual and in private." *Id.* at 582. Justice Boyle and Justice Brickley opined that the gross indecency statute should punish only oral sexual conduct. *Id.* at 603-617. Justice Riley and Justice Griffin opined that Michigan should continue to use the "common sense of society" standard used in the past. *Id.* at 617-623. Therefore, *Lino* leaves us with a "definitive statement regarding how not to determine whether an act is grossly indecent, but without a definitive statement regarding which acts are grossly indecent." *Jones, supra* at 602.

Attending to the Court's admonition that "[o]ne of the lessons of the *Lino* inquiry is that it is prudent to decide only the case before us, and not attempt to catalog what is permitted and

prohibited," *People v Warren*, 449 Mich 341, 345; 535 NW2d 173 (1995), we must determine whether masturbation in public between consenting adult males is grossly indecent.

The purpose of the gross indecency statute is to protect the public from the possibility of being exposed to certain acts of sexual conduct. *People v Vronko*, 228 Mich App 649, 656; 579 NW2d 138 (1998). Thus, the circumstances are relevant to a determination whether an act is grossly indecent. *Jones, supra* at 603.

In *Lino, supra* at 571, the Supreme Court held that oral sexual conduct in a public place is grossly indecent. The Court also held that "orchestrating the conduct of [a minor], to facilitate . . . sexual arousal and masturbation in the presence of the [minor] 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 578. *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.[4] 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* at 68, 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* at 67. See also *People v Trammell*, 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.

II

We have also been directed to address whether CJI2d 20.31,[5] the jury instruction concerning what constitutes gross indecency, is consistent with the case law regarding the

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[4] Thus, we question the continued validity of *People v Holland*, 49 Mich App 76; 211 NW2d 224 (1973). In *Holland*, the Court opined that the similar language of MCL 750.338b involving activities between males and females prohibits grossly indecent activity without regard to whether it occurred in public or in private. *Id.* at 78-79. However, the Court ultimately held that the defendant's act of allowing a young girl to willingly have her hand on the defendant's exposed penis in a car parked in a dark area of a private parking lot did not constitute an act of gross indecency within the meaning of the criminal statute prohibiting acts of gross indecency between males and females.

[5] CJI2d 20.31 states:

> (1) The defendant is charged with the crime of committing an act of gross indecency with another person. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:
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> (2) First, that the defendant engaged in a sexual act that involved
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> [*Choose (a), (b), (c), or (d)*:]

(continued…)

question whether masturbation can be grossly indecent.[6] CJI2d 20.31 provides that "gross indecency" must include some sort of penetration, fellatio, or cunnilingus. However, there are no Michigan cases holding that there *must* be some penetration, fellatio, or cunnilingus to constitute gross indecency. There is Michigan case law, however, holding that public masturbation is a grossly indecent act, *Lynch, supra* at 68, and that masturbation in the presence of a minor, regardless of whether the conduct is performed in public, is a grossly indecent act. *Lino, supra* at 578. Because the instruction does not permit a conviction of gross indecency where a manual sexual act occurs under any set of circumstances, the instruction is not consistent with Michigan case law concerning masturbation as a grossly indecent act. *Lino, supra; Lynch,*

(…continued)

> (a) entry into another person's [vagina / anus] by the defendant's [penis / finger / tongue / (*name object*)]. Any entry, no matter how slight, is enough. It does not matter whether the sexual act was completed or whether semen was ejaculated.
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> *or*
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> (b) entry into another person's mouth by the defendant's penis. Any entry, no matter how slight, is enough. It does not matter whether the sexual act was completed or whether semen was ejaculated.
>
> *or*
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> (c) touching of another person's [genital openings / genital organs] with the defendant's mouth or tongue.
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> *or*
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> (d) entry by [any part of one person's body / some object] into the genital or anal opening of another person's body. Any entry, no matter how slight, is enough. It is alleged in this case that a sexual act was committed by [*state alleged act*]. It does not matter whether the sexual act was completed or whether semen was ejaculated.
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> (3) Second, that the sexual act was committed in a public place. A place is public when a member of the public, who is in a place the public is generally invited or allowed to be, could have been exposed to or viewed the act.

[6] The trial court stated that "I am duty bound by the standard jury instructions that are promulgated by the Michigan Supreme Court that require the entry into a cavity or a touching and we don't have that." The standard jury instructions do not have the official sanction of the Michigan Supreme Court and, consequently, adherence to their choice of language is not required. *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985); *People v Sullivan*, 231 Mich App 510, 520, n 1; 586 NW2d 578 (1998).

supra. Thus, on remand the trial court will have to modify the criminal jury instruction to comport with the alleged act of masturbation.

Reversed and remanded for further proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald
/s/ Janet T. Neff
/s/ Jane E. Markey