

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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In the Matter of RASHID ABDULLAH, Minor.

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PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

RASHID ABDULLAH,

Respondent-Appellant.

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UNPUBLISHED

July 21, 2009

No. 284905

Wayne Circuit Court

Juvenile Division

LC No. 07-465255-DL

Before: Fitzgerald, P.J., and Talbot and Shapiro, JJ.

PER CURIAM.

Respondent, a 16-year-old juvenile at the time of the charged offense, was adjudicated responsible for third-degree criminal sexual conduct, MCL 750.520d(1)(b) (CSC III), by the trial court and was sentenced to a juvenile facility. Respondent appeals as of right. We reverse. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Respondent's conviction arises out of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(g) (CSC I). The complainant, who was six days shy of her twenty-first birthday on the date of the incident, testified that she passed out in the basement of respondent's family's apartment following a night of heavy drinking, and awoke in the morning to find respondent sexually penetrating her. She had no recollection of any events between approximately 3:00 a.m. and 10:00 a.m. Photographs admitted into evidence revealed slight abrasions to the victim's elbows, some slight bruising on her arm, and bruising on her neck. The victim testified that she suffered vaginal pain for which she received medical treatment. No medical testimony regarding the victim's injuries was presented.

Respondent gave a statement to the police. He stated that the complainant was drunk when he and a mutual friend picked the complainant up at her house at her request and brought her to respondent's house. The three drank and, while dancing, took off their shirts. He and the complainant started kissing and then had sex twice under a blanket on the floor. They fell asleep, woke up a few hours later, and had sex again. He then drove her home.

Although defendant was charged with CSC I, during the closing arguments the prosecutor urged the trial court to consider, in the alternative, the offense of CSC III. Respondent did not object. The trial court, after finding that the complainant was drunk and

unable to give consent, rejected the original charge of CSC I for injury to an incapacitated victim because no medical testimony was presented to support a finding that an injury occurred. MCL 750.520(1)(g). However, the court found respondent guilty of CSC III for engaging in sexual penetration accomplished by force or coercion.

This brings us to a problem not raised by respondent. Generally we do not address issues not raised by the parties on appeal. But our function is to dispense justice, and we are given the limited power to raise questions on our own. *Vermeylen v Knight Investment Corp*, 73 Mich App 632, 642-643; 252 NW2d 574 (1977); *People v Noel*, 88 Mich App 752, 754; 279 NW2d 305 (1979). We deem this issue to be of sufficient merit to warrant raising it on our own motion as defendant's due process rights are implicated.<sup>1</sup>

In the present case, the prosecutor chose to charge respondent with a violation of MCL 750.520b(1)(g). The essential elements of that charge are that the defendant (1) engages in sexual penetration with the victim, (2) causes personal injury to the victim, and (3) that the victim was mentally incapable, mentally incapacitated, or physically helpless at the time of the alleged act. Under Michigan law "physically helpless means that a person is unconscious, asleep, or for any other reason is physically unable to communicate unwillingness to act." MCL 750.520a(k).

The essential elements of CSC III under MCL 750.520d(1)(b) are that the defendant (1) engages in sexual penetration with the victim and (2) uses force or coercion. "Force or coercion" means the defendant either used physical force to accomplish the penetration or did something to make the victim "reasonably afraid of present or future danger." CJI2d 20.15.

Under the facts of this case it was possible for respondent to be convicted of CSC I under MCL 520b(1)(g) without having committed CSC III under MCL 750.520d(1)(b) because of the additional element of force or coercion required under CSC III. Thus, CSC III in this case is a cognate lesser offense, rather than a necessarily included lesser offense, because it was not necessarily committed.<sup>2</sup>

In *People v Nyx*, 479 Mich 112; 734 NW2d 548 (2007), the defendant was charged with CSC I, but following a bench trial the trial court sua sponte convicted the defendant of two counts of CSC II. The defendant appealed, arguing that the trial court was without authority to

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<sup>1</sup> "A defendant's right to adequate notice of the charges against the defendant stems from the Sixth Amendment, as applied to the states through the Due Process Clause of the Fourteenth Amendment." *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998).

<sup>2</sup> In certain factual scenarios CSC III may be a necessarily included lesser offense, but this case is not one of them. Had respondent been charged with CSC I under MCL 750.520b(1)(f), which requires proof that the defendant (1) caused personal injury to the victim, (2) engaged in sexual penetration with the victim, and (3) used force or coercion to accomplish the sexual penetration, the offense of CSC III under MCL 750.520d(1)(b) would be a necessarily included lesser offense because it is not possible to commit CSC I without first having committed CSC III.

consider the cognate lesser offense of CSC II. *Id.* at 116. The lead opinion in *Nyx* agreed, concluding:

[E]ven if the crime is divided by the Legislature into degrees, the offense of a lesser degree cannot be considered under MCL 768.32(1) unless it is inferior, i.e., it is within a subset of the elements of the charged greater offense. Given that all the elements of CSC II are not included within CSC I, the trial court was without authority to convict defendant of CSC II after it acquitted him of CSC I. [*Id.* at 121 (Taylor , C.J.), 137 (Markman, J.).]

Justices Cavanagh and Kelly concurred with the result reached by Justices Taylor and Markman, reasoning that “[d]efendant did not have adequate notice that he faced the charge of CSC II, so convicting him of that offense would violate his right to due process.” *Id.* at 142-143.

Like in *Nyx*, respondent in the present case was charged with CSC I, and the trial court erred by considering the lesser cognate offense of CSC III, thereby violating respondent’s substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999). The appropriate remedy under *Nyx*, *supra* at 136, is that respondent must be discharged. Accordingly, in light of our resolution, it is unnecessary to address respondent’s remaining issues.

Vacated and remanded for the entry of an order of discharge. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald  
/s/ Michael J. Talbot  
/s/ Douglas B. Shapiro