STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 5, 2009
v	No. 287730 Kent Circuit Court
DEREK ANTHONY GRAVES, Defendant-Appellant.	LC No. 07-001178-FH

Before: Stephens, P.J., and Cavanagh and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree criminal sexual conduct, MCL 750.520c(1)(h). He was sentenced as an habitual offender, third offense, MCL 769.11, to a prison term of four to 30 years. He appeals as of right. We reverse. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant, who was 38 years at the time of the charged offense, was convicted of sexually assaulting the 15-year-old complainant. The testimony indicated that defendant sucked the complainant's breast while in the presence of the complainant's mother. A DNA sample taken from the complainant's breast matched defendant's DNA. The critical issues at trial were whether the complainant was "mentally disabled" or "mentally incapable," whether defendant was "in a position of authority over" her, and whether defendant used his authority "to coerce the victim to submit." MCL 750.520c(1)(h)(ii).

According to the complainant's mother, Michelle Shullenberger, she met defendant shortly after he moved in next door to her at an extended stay motel, Casa Via. She testified that the relationship consisted of occasional sexual relations with no dates. At some point defendant met the complainant but was not in her residence more than twice. According to Mrs. Shullenberger, the complainant knew defendant "[j]ust as the man next door and she knew I liked him and she thought he was a good guy."

On January 15, 2007, a school holiday, defendant came to Shullenberger's room at approximately 8:30 a.m. At that time, he was no longer living at Casa Via. When Shullenberger opened the door, she told him that the complainant was there, and he said he was "just gonna sit for awhile." He brought in an energy drink and beer and sat in a chair. At some point, the complainant sat on defendant's lap. Shullenberger testified, "As I recall he asked her to come over." While the complainant was on defendant's lap, her shirt was removed. Shullenberger

was unsure if he removed it or if the complainant did, but Shullenberger thought that defendant asked the complainant to take it off and she did so. Defendant put his mouth on the complainant's breast. Shullenberger testified that she was "in shock." "I started saying stuff to him, to the fact of what if I was sitting there with a 15 year old boy doin' that, don't you see somethin' wrong in it? And the two of them weren't listening, they just kept—I just heard sucking noises and saw that he was on her breast." Shullenberger did not think that she could go over and "try to drag him out, because he was very strong." She did not think she could move him, and she did not want to make him angry. She also recalled that he was able to lift her one time. Shullenberger said, "if you guys go in the bed and somethin' happens, I will call the police," but she did not think anything more would happen. However, the complainant and defendant moved to the bed in the efficiency apartment. Shullenberger believed that defendant went on the bed first "because I remember [the complainant] getting in the bed, covering him up almost if he was a baby tryin' to comfort him." The complainant also got in the bed. At that point, Shullenberger testified, she "had to take a chance of just goin' out of the room that hopefully nothing would happen, but I knew I had to call them." She left to call the police, but defendant stayed. When Shullenberger got off of the phone, defendant tried to talk to her, but she cried and waited for him to leave and then went back to the room.

The police apprehended defendant after he drove away from Casa Via. He admitted visiting Shullenberger and the complainant but denied that the complainant sat on his lap or that he touched her breasts.

The complainant, who was 17 years old at the time of trial, testified that she could not recall defendant touching or sucking on her breasts. She recognized defendant and described him as "my mama's boyfriend." She did not know if he came to their room at Casa Via or if he lived next door.

On appeal, defendant challenges the sufficiency of the evidence to support his conviction under MCL 750.520c(1)(h)(ii), which applies where a person engages in sexual contact with another person if:

> (h) That other person is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless, and any of the following:
>
> * * *
>
> (ii) The actor is in a position of authority over the victim and used this authority to coerce the victim to submit.

When reviewing the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999).

Defendant contends that there was insufficient evidence of "mentally disability" or "mental incapacity" on the part of the complainant to support his conviction.

At the time of trial, the complainant was attending an alternative school and was taking classes in history, social studies, math, and language arts. According to the complainant, the school that she attended before that was a "regular school."

Shullenberger testified that the complainant had been in special education since at least 2001 because of her very low IQ. "They said she works at a second grade level and I guess she was considered half her age." She was able to read "[s]imple books like a little child would read." "They're basic, simple, like Tom and Jerry or Dick and Jane books." Although the complainant testified that she had never used a computer, according to Shullenberger the complainant "seems to be pretty well able to" use a computer. "I think that's--'cause they've taught her the computer for a very long time." The complainant was able to take a shower, dress herself, and use the bathroom. She was able to buy something at the store and know approximately how much money she should get back. She was also able to make her own food or get a snack. The complainant was learning to cook. "She started collecting recipes and when she would go to the store she would bring things home and start making her own dishes basically." When she lived at Casa Via, the complainant walked a couple blocks to school by herself.

According to Officer Carl Frederick, the complainant "did not appear to be quite as alert as most 15 year olds we deal with. Most 15 year olds are able to explain everything quite clearly. I guess I want to say function almost like an adult, where this 15 year old seemed much younger, less mature." She told him that she was not able to read and write and was unable to write a statement.

Margaret Dayton, a sexual assault nurse who examined the complainant after the incident, testified that she indicated on a form that the complainant was "learning disabled" and had "mild mental retardation" based on information from Shullenberger. Dayton testified that her impression was consistent with that description. Dayton testified, "She was calm and cooperative and, you know, talked to me, answered questions and such, but she was vague and almost didn't seem normal. Didn't seem to recognize that this situation was not normal. She seemed to think everything was--that it was okay." "I think she clearly--seemed to clearly understand that [sic] what had went on, but I didn't get the feeling that she understood thoroughly what the implications were."

"Mentally incapable," defined by MCL 750.520a(g), "means that a person suffers from a mental disease or defect which renders that person temporarily or permanently incapable of appraising the nature of his or her conduct." The statutory language "is meant to encompass not only incapability of appraising the physical act but also "an appreciation of the nonphysical factors, including the moral quality of the act, that accompany such an act." *People v Breck*, 230 Mich App 450, 455; 584 NW2d 602 (1998).

Although the complainant knew the 38-year-old defendant as her mother's boyfriend, there was no evidence that she was cognizant of the inappropriate or unusual nature of the sexual contact by him in her mother's presence. Shullenberger described that, as she protested, "the two of them weren't listening . . . ." When defendant lay in the bed, the complainant covered him up, "almost if he was a baby tryin' to comfort him," and got in the bed. According to Dayton, the complainant did not understand that the situation was not normal and did not seem to understand thoroughly the implications of what had happened. Viewing this evidence in a light most

favorable to the prosecution, a reasonable juror could conclude that, because of her mental "disease or defect," the complainant was "mentally incapable," i.e., "incapable of appraising the nature of her conduct." MCL 750.520a(g).

Moreover, the evidence was also sufficient to conclude that the complainant was "mentally disabled," which is an alternative to "mentally incapable," for the purposes MCL 750.520c(1)(h). "Mentally disabled," defined under MCL 750.520a(g), "means that a person has mental illness, is mentally retarded, or has a developmental disability." "Mentally retarded," defined under MCL 750.520a(i) "means significantly subaverage general intellectual functioning which originates during the developmental period and is associated with impairment in adaptive behavior." Shullenberger's description of the complainant's IQ--her functioning at a level of half of her age, her inability to read and write, and her apparent deficits in ability to recollect--is adequate evidence for a reasonable jury to conclude that the complainant was "mentally disabled" because she was "mentally retarded."

Defendant also argues that there was no evidence that defendant used "a position of authority over" the complainant to coerce her. MCL 750.520c(1)(h)(ii).

The complainant was not asked about her relationship with defendant, except when defense counsel asked, "Derek never bossed you around or anything like that, did he?," and the complainant responded, "Not as far as I can remember, sir." The complainant testified that defendant "was my mama's boyfriend." Asked what, in her opinion, is a boyfriend, the complainant responded, "Someone who cares and loves another person." The complainant mother testified that the defendant had had little contact with the complainant and did not have authority to excuse the complainant from school, was not listed as her emergency contact at school, and had "basically no legal authority" over her.

The authoritative position required by the statute need not be a formal one, such as a teacher or psychotherapist. *People v Reid,* 233 Mich App 457, 473; 592 NW2d 767 (1999), lv den 461 Mich 899 (1999). A defendant may act in a position of authority because of the role that the complainant's parents allowed the defendant to play. *Id*. at 468. Thus, in *Reid,* the complainant's father knew the defendant through their jobs. The complainant's father spoke to the defendant about problems that the complainant was having at school. The defendant said that he used to be a counselor at church and offered to help by talking with the complainant. The Court concluded that the evidence was sufficient to establish that the defendant held a position of authority because the parents "placed him in a position of authority over the complainant, particularly at times when they allowed the complainant to spend time with the defendant outside their presence, and the complainant was aware of this." *Id*. at 468.

In this case, the trial court explained its reasoning with respect to defendant's "position of authority" when it denied defendant's motion for directed verdict:

> Now, it's obvious that Mr. Graves is not a day-care provider, or a high school principal, or a physician, or clinician, or counselor, or anything of that sort. But those are authority figures who have authority not by virtue of access typically to the complaining witness's household, but by virtue of their position in an out-of-the-home setting . . . . Here what's alleged is something closer, a relationship which gives Mr. Graves access to [the complainant's] home itself.

* * *

> And, certainly, [the complainant], although she may have cognitive-functioning difficulties, recognized Mr. Graves as a person in a close personal relationship with her mother.
>
> It should also be noted that there is a significant age disparity here. According to the Information, the defendant was born October 16, 1968. [the complainant] testified that she was born May 31st, 1991. . . . Twenty-three years or something in the way of age difference between the parties, virtually a generation. So, certainly [the complainant] would look at Mr. Graves as being someone in the same general age range as her mother, and since he was, obviously, a person very close to her mother, it seems to me [she] would naturally look to him as an authority figure, even if we can't define the relationship with great precision.
>
> Certainly, [the complainant] could see that Mr. Graves had access to her residence by virtue of the relationship he had with her mother, and he was in there at least on regular occasions. So it's hard to imagine that this is not seen by the child as having some kind of authoritative aspect to it.

We disagree with the trial court's reasoning. The position that defendant held with respect to the complainant was derived from his relationship with her mother. In the complainant's view, he was Shullenberger's "boyfriend." Whether a parent's boyfriend has a "position of authority" with respect to the child depends on the circumstances, including the parties' conduct and perceptions. There was no testimony that the defendant had ever acted as a surrogate parent for the complainant or had spent an appreciable amount of time with her. Unlike the defendant in *Reid*, the complainant's mother did not seek or accept defendant's assistance in counseling her child. The fact that the incident was carried out in front of the complainant's mother is certainly bizarre, but that fact alone is insufficient to imply informal authority. The circumstances in this case were very different from those in *People v Knapp*, 244 Mich App 361, 370; 624 NW2d 227 (2001), where the Court opined that coercion may be shown through evidence of exploitation of a victim's special vulnerability. In *Knapp* the defendant was a teacher who clearly had authority over the student victim. In that context the Court reasoned that age difference allowed coercion without the use of force. The *Knapp* court also made note of the fact that the victim's mother had encouraged a high level of trust between Knapp and the victim. The court did not find that the difference in age and size, alone were sufficient to create a "position of authority."

In the present case, there was no evidence that the complainant was tricked into the contact or that she feared defendant. Shullenberger was asked for her opinion about the reason for the complainant's actions:

> *Q.* Okay. It may be hard for us to understand, but why would [the complainant] go over and sit on this man's lap?
>
> *A.* Well, she is very easily attracted to African-Americans.

Q. Okay. Is she naïve?

A. No, I just don't think she has [sic] a good judge of character. She just wanted somebody to care about her and she didn't know the person real well.

A reasonable juror could not conclude, beyond a reasonable doubt, that defendant used his position of authority to coerce the complainant to submit. Therefore, the evidence was insufficient to support defendant's conviction.

Reversed.

/s/ Cynthia Diane Stephens
/s/ Mark J. Cavanagh
/s/ Donald S. Owens