S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v LAWRENCE B. SCHAUB, Defendant-Appellant.	FOR PUBLICATION November 15, 2002 9:10 a.m. No. 231009 Macomb Circuit Court LC No. 00-001037-AR Updated Copy February 14, 2003

Before: O'Connell, P.J., and Griffin and Hoekstra, JJ.

O'CONNELL, P.J. (*dissenting*).

I respectfully dissent. The primary shortcoming of the majority's opinion is its conclusion that delivering a ten-month-old infant to a total stranger does not "expose" the infant to injury. In my opinion, the element of exposure is established if the prosecution can show that defendant put his infant daughter at risk. Common sense dictates that anyone who delivers an infant to a total stranger with the intent to totally abandon the infant puts her at risk of being subjected to numerous unknown dangers.[1] I concur with the majority opinion that sufficient evidence was introduced to satisfy the second element of the offense—that defendant intended to abandon his child. Thus, because defendant both abandoned his infant daughter and put her at risk, the district court erred in failing to bind over defendant to stand trial on this matter.[2]

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[1] The child abandonment statute, MCL 750.135, is designed to punish those individuals who abandon their child in a manner that puts the child at risk of some danger. *Shannon v People*, 5 Mich 71, 93-94 (1858). At common law, an individual could be punished only if injury to the child ensued. *Id*. at 90. In 1858, a major purpose of the statute was to punish those individuals who placed their children at risk. *Id*. at 90-91. In today's society, any responsible parent will tell you that, if you deliver your infant daughter to a stranger, you are putting her at risk of being subjected to numerous unknown dangers.

[2] In order to bind over defendant for trial, the district court was only required to determine whether, following the preliminary examination, the prosecutor presented competent evidence constituting probable cause to believe that (1) a felony was committed and (2) the defendant committed the felony. *People v Northey*, 231 Mich App 568, 574; 591 NW2d 227 (1998).

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I. THE COMMON LAW

MCL 750.135 makes it a crime to expose a child with intent to injure or wholly abandon the child. At common law, the exposure of a child with the intent to abandon the child was not a crime unless injury to the child actually occurred. *Shannon v People*, 5 Mich 71, 90 (1858). The crime was measured by the result of the abandonment. In other words, the common law punished the perpetrator for the injury, not for "the *exposure* to, or *hazard* of, the injury." *Id*. (emphasis in original). It was often difficult to determine if the injury was the result of the exposure or of some other cause. *Id*. Because the common-law remedy did not prevent injury, the object of the child abandonment statute was to punish as a crime the act that created the hazard *before* injury could occur.[3] *Id*. at 91. In this way, the *Shannon* Court carefully distinguished the common law from the statute.

A. THE FACTS OF *SHANNON v PEOPLE*

Shannon was decided in 1858, and the Court was concerned with what we now call aiding and abetting. At that time, the principle of law now known as aiding and abetting was in its infancy and subject to much legal discourse. In *Shannon*, *supra* at 73-74, the defendant

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Because the issue before us depends on a question of fact, only a jury may decide it, as well as the ultimate guilt of defendant. *Shannon*, n 1 *supra* at 97 (child abandonment is a fact question); *People v Nash*, 110 Mich App 428, 439; 313 NW2d 307 (1981) (abandonment element in property law case was fact question); *People v Artman*, 218 Mich App 236, 239; 553 NW2d 673 (1996) (questions of fact in criminal cases are for the jury).

[3] Thus, the majority erroneously implies reliance on the fact that in this case defendant's baby was not actually exposed to injury, because an undercover police officer "bought" her and then turned her over to the Family Independence Agency. The problem with this premise is that the majority is looking at the circumstances in this case objectively, *with* the knowledge that a police officer was posing as the child purchaser. See *Shannon*, *supra* at 94 (a defendant's expectations regarding fitness of person receiving the child are irrelevant). To the contrary, it is undisputed that defendant did not definitively know who the buyers were. Thus, regardless of what actually happened to the child, defendant's intent to sell his daughter to a stranger was culpable. Cf. *People v Thousand*, 465 Mich 149, 157-158; 631 NW2d 694 (2001) ("factual impossibility" is no defense to an attempt crime).

Indeed, it is defendant's intent that is punishable in the offense of child abandonment. See MCL 750.135; *Shannon*, *supra* at 91. Child abandonment is likely a general intent crime because the statute does not identify a particular state of mind or intended end result for culpability. See *People v Disimone*, 251 Mich App 605, 610-611; 650 NW2d 436 (2002) (definition of specific and general intent crimes). Because child abandonment is a general intent crime, defendant's mere intent to abandon his child was culpable. Again, defendant did not have to specifically intend that the baby be injured to be bound over for trial on the charge of child abandonment. See *id*.; *Shannon*, *supra* at 90-91.

instructed two men to go to his girlfriend's home, take his eight-month-old infant from her, and deliver the child to the doorstep of an unsuspecting third party.[4] One of the issues that arose was whether the child would be properly cared for. The defendant claimed he could not be convicted because he did not personally abandon the child and because his cohorts in crime did not follow his instructions to make sure the child was properly cared for when she was abandoned. *Id*. The defendant also claimed that if the child was properly cared for he could not be convicted of exposing the child to any danger. *Id*. at 74.

B. "ABANDON" AT COMMON LAW

It is important to note that the two elements of abandonment and exposure overlap significantly. See *id*. at 89 ("to 'expose' the child is the substantive act—the 'intent to abandon' is the secondary ingredient; both must concur to complete the offense"). According to *Shannon*, *supra* at 88-89, "the term 'abandon' is here used in its ordinary sense—to forsake, to leave without the intention to return to, to renounce all care or protection of." In the old days, children were generally abandoned where people frequented most, so they might be found and taken care of by compassionate individuals who were in a position to care for them. *Id*. at 89-90. Egyptians and Romans left children on the banks of rivers, Greeks chose the highways, and, in England, it appears that leaving the child on the doorstep of another and ringing the bell was the chosen method of abandonment. See *id*. at 90. If the child was taken in and cared for and no injury occurred, then no crime was committed under the common law.

C. "EXPOSE" AT COMMON LAW

In light of the common law, the *Shannon* Court struggled in 1858 to find a suitable definition for the term "expose." The Court stated:

> The term "expose," in such a connection, does not appear to have become a legal term, the meaning of which is settled by judicial decision, either in this country or in England. . . . [T]herefore, . . . we are compelled to seek for its meaning in the general popular sense of the term, the context, the subject matter, and what we may deem to have been the occasion and design of the statute. [*Id*. at 89.]

In my view, *Shannon* supports the circuit court's decision to reverse the order of the district court and reinstate the charge. *Shannon* held:

> [T]o leave a child, with the intent wholly to abandon it, in a house (or other place) *where it would be certain to be cared for*, would not constitute the exposure contemplated by the statute. . . .
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> * * *

[4] Thus, *Shannon* is distinguishable on its facts because they are inapposite to the case at bar.

> The question, therefore, upon this point, is simply this: Did the acts of the party leaving or abandoning the child, viewed in connection with the time, place, and all the accompanying and surrounding circumstances, subject the child to the hazard of such personal injury?[5] [*Id*. at 90-91 (quotations omitted; emphasis added).]

The *Shannon* Court then concluded that child abandonment "is a question of fact, for the good sense of a jury under the rule of law above laid down." *Id*. at 97.

II. MODERN LAW[6]

The majority diligently relies on *Shannon* to infer a definition of "expose," but more recent authority could aid in their definitional conundrum. While I find the 1858 *Shannon* decision a helpful starting point, I do not find it dispositive of this case.[7]

While the *Shannon* Court's definition of the term "expose" is dicta, it also is distinguishable from the present case by the passage of time, a change in circumstances, and subsequent judicial decisions. See, generally, *In re Edgar Estate*, 425 Mich 364, 380; 389 NW2d 696 (1986) (in statutory interpretation, a court may properly take into consideration societal changes); *Corl v Huron Castings, Inc*, 450 Mich 620, 632; 544 NW2d 278 (1996) (stare decisis

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[5] Another way to explain this standard is whether the defendant "subjected [the child] to the *risk* of injury[.]" *Shannon*, *supra* at 94 (emphasis in original). In my view, if the defendant did not put a child at risk, then the case does not fall within the scope of the child abandonment law. However, if a child was put at risk, then the law applies. The majority erred in failing to determine that if a reasonable person could conclude that the child was put at risk, then child abandonment is a jury question. See also *id*. at 97. Only if, on the basis of all the facts and circumstances, a reasonable person could *not* conclude that this child was put at risk, does the issue become a question of law for a court to decide de novo. See *People v Hudson*, 241 Mich App 268, 276; 615 NW2d 784 (2000) (appellate standard of review).

[6] In *Shannon*, *supra* at 82, our Supreme Court stated that its interpretation of the term "confided" in the statute, *i.e.*, "the first exception," "is well taken, and is decisive of the cause." Because this issue was decisive of the case, the balance of the opinion was not necessary to the Court's decision, and, therefore, obiter dicta. Under the rule of stare decisis, dicta is not controlling precedent. See *People v Squires*, 240 Mich App 454, 458; 613 NW2d 361 (2000). Thus, this Court is not compelled to follow the definition of "expose" expressed in *Shannon*.

[7] However, even if I were to accept *Shannon*'s definition of "expose," I believe that *Shannon* supports the conclusion that whether exposure actually occurred in the present case is a question of fact for a jury. See *Shannon*, *supra* at 97.

will not apply to prevent consideration of a better law in view of changed societal circumstances, where an error was made, or where injustice will result from adhering to the old rule).

In 1858, times were a little different. The Family Independence Agency did not exist and adoption procedures were not what they are today. Families were the cornerstone of society, and large, two-parent families were not unusual. People in a community generally knew each other. Cities were more rural than urban, and crime was not what it is today. Thus, this Court should examine the societal evolution of the terms used in the child abandonment statute, as well as the modern "time, place . . . and all the circumstances surrounding" this issue to make its decision.[8] *Shannon*, *supra* at 92.

A. MODERN DEFINITION OF "ABANDON"

Because the elements of child abandonment have not been clearly defined in their specific context, dictionary definitions may be relied on to determine the meaning of the child abandonment statute.[9] *Id*. at 89; *People v Stone*, 463 Mich 558, 563; 621 NW2d 702 (2001). "Abandon" is defined as "to leave completely and finally; forsake utterly; desert: to abandon a child . . . ." *Random House Webster's College Dictionary* (2001) (emphasis omitted); see also *Shannon*, *supra* at 88-89. Abandonment is a question of fact. See *People v Nash*, 110 Mich App 428, 439; 313 NW2d 307 (1981) (abandonment element in property law case was fact question); see also *Shannon*, *supra* at 97 (child abandonment is a fact question).

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[8] I note, as the circuit court in this case did, that the district court declined to bind over defendant because it found that the element of intent to wholly abandon was not established. See *People v Northey*, 231 Mich App 568, 574; 591 NW2d 227 (1998). The circuit court's decision, in contrast, found that the prosecution established that defendant did intend to wholly abandon his infant daughter. The circuit court also stated that the district court had confused the abandonment and exposure elements. Finally, the circuit court concluded that the prosecution presented enough evidence to proceed to a jury regarding whether the infant was exposed in violation of *Shannon*, because a reasonable person would have been apprehensive about defendant's actions in this case. See *People v Crippen*, 242 Mich App 278, 281-282; 617 NW2d 760 (2000) (circuit court standard of review). I reiterate that, after a sufficient showing by the prosecution, see *Northey*, *supra*, whether a child abandonment has occurred is a question of fact for a jury. See *Shannon*, *supra* at 97; see also, generally, *Nash*, *supra*; *Artman*, *supra*.

[9] I note that statutory interpretation is the responsibility of the judges of the court system. Contrary to the majority's implication, statutory interpretation is not the responsibility of the Legislature. See, generally, Const 1963, art 3, § 2, art 4, § 1, art 6, § 1; *People v Warren*, 462 Mich 415, 427; 615 NW2d 691 (2000). In the present case, the circuit court properly determined that defendant's actions fit within the four corners of the child abandonment statute.

B. MODERN LEGAL DEFINITION OF "EXPOSE"[10]

Today, unlike in *Shannon's* day, the term "expose" does have a legal meaning. In the past 150 years, numerous courts have defined the term. "Exposure" is defined as "a laying open to the action or influence of something . . . ." *Random House Webster's College Dictionary* (2001); see also *People v Vronko*, 228 Mich App 649, 653-654; 579 NW2d 138 (1998) (definition of "exposure" in indecent exposure case); *Shannon*, *supra* at 89 ("expose" means "'to place in a situation to be affected or acted on . . . to cast out . . . in a situation unprotected.'"), quoting *Webster's Dictionary*. The statute does not necessarily require that the defendant have an intent to injure, but the element of exposure must possibly subject the child to the hazard of personal injury. See *Shannon*, *supra* at 90. For example, to commit the crime of indecent exposure, one only has to expose a part of one's anatomy to another and the crime is complete. *Vronko*, *supra* at 656-657. Using this definition of expose, in my opinion, the crime of child abandonment is complete when one exposes his child with the intent to abandon.[11]

III. APPLICATION OF MODERN LAW

Applying these principles to the facts of this case, it is clearly a question of fact for a jury to determine whether selling your child to a total stranger meets the definitional requirements of exposure. See *Shannon*, *supra* at 97; *People v Artman*, 218 Mich App 236, 239; 553 NW2d 673 (1996). This is especially true considering the fact that in the present case, defendant had no idea to whom he was selling his child.

In my view, any parent or juror would be "reasonably apprehensive" about turning over a child to a total stranger, who could actually be a pedophile or a child pornographer.[12] *Shannon*,

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[10] *Walton v Southfield*, 748 F Supp 1214 (ED Mich, 1990), interpreted the *Shannon* Court's definition of exposure. However, *Walton* does not apply to the present case for several reasons. In *Walton*, *supra* at 1216-1217, a grandmother sued the police under MCL 750.135 for child abandonment of her daughter and granddaughter when the police arrested the grandmother and left the children alone in the car for some time. *Walton* is a nonbinding federal district court opinion that was reversed in part at 995 F2d 1331 (CA 6, 1993). See *Sharp v Lansing*, 464 Mich 792, 802-803; 629 NW2d 873 (2001). Moreover, there was no sale of children in *Walton*, and the children were not left with a stranger, as in the present case. *Walton*, *supra* at 1216-1217.

[11] I note that MCL 750.135(2) now provides a safe harbor for persons delivering to a hospital an infant seventy-two hours old or less.

[12] Indeed, I note that on occasion, children are sold for drugs, into prostitution, or like situations. See, e.g., *In re Thacker*, 881 SW2d 307, 310 (Tex, 1994) ("The evils inherent in baby-bartering are loathsome for a myriad of reasons. The child is sold without regard for whether the purchasers will be suitable parents."); *In re Adoption of E W C*, 89 Misc 2d 64, 75; 389 NYS2d 743 (Surrog Ct NY, 1976) (detailing interstate baby-selling operation with no regard to assuring proper "adoptive" parents); Note, *Responses to the international child sex tourism trade*, 19 BC Int'l & Comp L R 397, 401, 415-416 (1996) (noting that Americans' participation in international child sex trade is punishable in the United States under new law).

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supra at 92. In the present case, defendant could not be certain that the buyer of his infant daughter would care for her. It is undisputed that defendant did not thoroughly investigate the buyer or his fictitious son and daughter-in-law who were to be the ultimate recipients and caregivers of the child. In fact, the "buyers" were not who defendant allegedly thought they were. The buyer was an undercover police officer, and the claimed father-to-be was an associate; the "mother" did not appear at all for defendant to meet. The majority erroneously assumes that defendant could reasonably believe the word of total strangers that the baby would be raised properly. In my opinion, under the statute, defendant criminally exposed his daughter by intending to sell her to total strangers, without establishing that the baby would be properly cared for. See *id*. at 90.

Today, adoptive parents, foster parents, and even daycare providers have strict licensing regulations placed on them by this state. Moreover, prospective parents and caregivers are thoroughly investigated for proof of their character. See, e.g., MCL 722.954b(3), 722.958(3) (Foster Care and Adoption Services Act). These practices reflect the reasonable belief that, especially in today's society, this state must be sure that persons entrusted with the care of children are above reproach. Regulations include background checks, surprise home visits, and so forth. See, e.g., MCL 722.954b(3) (in-home visits of adoptive homes). Even custody determinations between two known parents are made with extensive inquiry into the parents' fitness. See MCL 722.23 (best interest of the child factors considered in custody cases); see also MCL 712A.19b(3) (standards for termination of parental rights). In contrast, the present defendant did not even attempt an investigation comparable to one that the law requires of daycare providers, although he was selling his baby daughter to a complete stranger and agreed never to see her again (for a higher price). Thus, taking into account the modern "time, place . . . and all the circumstances surrounding" this incident, defendant could not "be certain" that his baby would "be cared for," and, therefore, he violated the statue. *Shannon*, *supra* at 90, 91, 92.

IV. CONCLUSION

The majority's interpretation of the term "expose," using nineteenth century societal norms, is diligent.[13] Perhaps at that time it was not dangerous to give your child to a stranger.

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In fact, in the present case, the record reveals that defendant was only concerned about the price he would get for his infant daughter, not the fitness of the prospective parents, and that defendant compared the sale of his child to selling a dog.

[13] In my opinion, if defendant had sold his infant daughter to a pedophile, the majority opinion would conclude that defendant's actions are within the scope of this statute. Not even the majority could disagree that selling your child to a pedophile puts the child at risk. The flaw in the majority's logic is the conclusion that the purchasers of this baby were respectable individuals. It is beyond dispute that defendant had no idea who was purchasing his daughter. Defendant did not know whether the purchasers were pedophiles, child pornographers, solicitors of child prostitution, or drug addicts. In my opinion, to view the facts of this case in hindsight is simply untenable.

Today, it is at a minimum a fact question for a jury whether selling your baby to a stranger exposes her to injury. *Nash*, *supra*; *Shannon*, *supra* at 97.

For these reasons, I would affirm the circuit courts order reversing as an abuse of discretion the district court's order dismissing the charge against defendant.

/s/ Peter D. O'Connell