

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFERY DUANE COX,

Defendant-Appellant.

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FOR PUBLICATION

October 18, 2005

9:05 a.m.

No. 250773

Calhoun Circuit Court

LC No. 02-004877-FH

Official Reported Version

Before: Cooper, P.J., and Bandstra and Kelly, JJ.

COOPER, P.J. (*dissenting*).

I must respectfully dissent from the majority opinion of my colleagues. The prosecutor withheld highly relevant exculpatory evidence that negated an element of the charged offenses. This evidence certainly would have affected the outcome of defendant's trial. Accordingly, I would vacate defendant's conviction and remand for a new trial.

Defendant was convicted of two counts of third-degree criminal sexual conduct for engaging in sexual acts with a mentally incapable young man. Such conduct is prohibited to protect those "presumed to be incapable of truly consenting to the sexual act."<sup>1</sup> The complainant in this case was seventeen years old and, therefore, was otherwise able to engage in consensual sexual acts.

During discovery, defendant requested from the prosecutor all potentially exculpatory information and the criminal history of all prosecution witnesses. Rather than make all the requested disclosures, the prosecutor indicated that the criminal history of the witnesses would only be provided upon court order. It was not until the week before sentencing that defense counsel learned that the complainant, who was allegedly mentally incapable of consenting to a sexual act, was mentally competent to enter a plea in an unrelated criminal action.<sup>2</sup>

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<sup>1</sup> *People v Breck*, 230 Mich App 450, 455; 584 NW2d 602 (1998).

<sup>2</sup> There is no indication on the record whether the complainant pled guilty or nolo contendere to the larceny charge. However, the nature of that plea would have no affect on this appeal or the lower court proceedings.

Although this evidence involves the criminal history of a witness, the evidence is also clearly exculpatory and should have been disclosed by the prosecutor. A prosecutor, upon request, must provide a defendant with any known exculpatory information or evidence.<sup>3</sup> The prosecutor is under a constant duty to automatically disclose additional exculpatory information as it is discovered.<sup>4</sup> The prosecutor learned of the plea from the complainant's Family Independence Agency caseworker, who also served as a witness for the prosecution in this case. The prosecutor should have discovered this information in a timely fashion and made the required disclosure to defendant.

I disagree with the majority's determination that the prosecutor's failure to disclose this information was harmless. A trial court's previous determination that the complainant was competent to enter a plea is directly relevant to whether he was mentally capable of consenting to a sexual act. A trial court "may not accept a plea of guilty or nolo contendere unless it is convinced that the plea is understanding, voluntary, and accurate. . . ."<sup>5</sup> The court must first determine that the defendant understands the legal ramifications of pleading guilty and the rights that he or she will give up in exchange for that plea.<sup>6</sup> The standard of competency to enter a plea of guilty or nolo contendere is the same as that to stand trial<sup>7</sup>—"a] defendant to a criminal charge . . . shall be determined incompetent to stand trial only if he is incapable because of his mental condition of understanding the nature and object of the proceedings against him or of assisting in his defense in a rational manner. . . ."<sup>8</sup>

Being "mentally incapable" of consenting to a sexual act 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."<sup>9</sup> This inability to appraise the nature of his conduct encompasses both the physical act of sex and the nonphysical factors that accompany the act.<sup>10</sup> A rational finder of fact could find that a person who is deemed capable of understanding the nature and object of the criminal proceedings against him and the legal effects of pleading guilty or nolo contendere to criminal charges is also capable of understanding the physical, emotional, and moral nature and object of a sexual act.

The fact that a trial court deemed the complainant competent to enter a plea in criminal proceedings would directly negate an element of the charged offense—the complainant's ability to consent to sexual acts. However, at defendant's trial, the jury heard only the prosecution's

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<sup>3</sup> MCR 6.201(B)(1).

<sup>4</sup> MCR 6.201(H).

<sup>5</sup> MCR 6.302(A).

<sup>6</sup> MCR 6.302(B).

<sup>7</sup> *People v Belanger*, 73 Mich App 438, 447-448; 252 NW2d 472 (1977).

<sup>8</sup> MCL 330.2020(1); *People v Harris*, 185 Mich App 100, 102; 460 NW2d 239 (1990).

<sup>9</sup> MCL 750.520a(g).

<sup>10</sup> *Breck*, *supra* at 455.

undisputed evidence regarding the level of the complainant's mental ability. Defendant's inability to place this highly material and relevant evidence before his jury clearly affected the outcome of his trial. Accordingly, I would find that defendant was entitled to a new trial.

/s/ Jessica R. Cooper