



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHN HERBERT, :
 :
 : **C.A. No. 373, 2022**
 :
 Defendant-Below, :
 Appellant, : **ON APPEAL FROM THE**
 v. : **SUPERIOR COURT OF THE**
 : **STATE OF DELAWARE**
 STATE OF DELAWARE, : **ID No. 2005000034**
 :
 :
 Plaintiff-Below, :
 Appellee. :
 :

**ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
DELAWARE IN AND FOR KENT COUNTY**

APPELLANT'S REPLY BRIEF

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DATED: June 16, 2023

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NATURE AND STAGE OF THE PROCEEDINGS

Appellant hereby adopts the Nature and Stage of the Proceedings set forth in his Opening Brief. In addition, on June 1, 2023 the Appellee filed their Answering Brief.

This is Mr. Herbert's Reply Brief.

SUMMARY OF ARGUMENT

I. The Superior Court erred in denying the Motion to Dismiss since the definition of “Sexual Contact” defined under law violated the 14th amendment of the U.S. Constitution and Delaware Constitution by failing to require the State to prove a Defendant committed a sexual act intending that it be sexual or for the purpose of sexual gratification.

II. The Superior Court erred in excluding Defendant’s Experts from testifying about the particular dynamics in intra-family sexual abuse allegations and about pit falls interviews of the complaining witness may create. Additionally, Defendant’s whole person should be assessed so as to determine whether Defendant possessed the requisite *mens rea* during the alleged sexual contact.

III. The Superior Court erred by imposing a sentence of 5 years of minimum mandatory unsuspended Level V time.

STATEMENT OF FACTS

Appellant, John Herbert, hereby adopts the statement of facts as set forth in his Opening Brief.

LEGAL ARGUMENT

I. THE SUPERIOR COURT ERRED IN DENYING THE MOTION TO DISMISS SINCE THE DEFINITION OF “SEXUAL CONTACT” DEFINED UNDER LAW VIOLATED THE 14TH AMENDMENT OF THE U.S. CONSTITUTION AND DELAWARE CONSTITUTION BY FAILING TO REQUIRE THE STATE TO PROVE A DEFENDANT COMMITTED A SEXUAL ACT INTENDING THAT IT BE SEXUAL OR FOR THE PURPOSE OF SEXUAL GRATIFICATION.

A. QUESTION PRESENTED

Whether the Court committed legal error by failing to hold the definition of “Sexual Contact” violated the U.S. and Delaware Constitutions. This issue was preserved for appeal by filing the Motion to Dismiss before the Trial began (A-16).

B. STANDARD AND SCOPE OF REVIEW

This Court reviews violations of Constitutional rights de novo. *Cooke v. State*, 977 A-2d 803, 840 (Del. 2009).

C. MERIT OF ARGUMENT

“Sexual contact” as Defined under Delaware Law violated the Due Process Clause of the 14th Amendment of the U.S. Constitution and The Law of the Land Clause of the Delaware Constitution by failing to require the State to prove a Defendant committed the act intending that it be sexual in nature or for the purpose of sexual gratification.

The State set forth the statutory history of the Sexual Contact Statutes in their answering brief which included the insertion of the reasonable person standard. The “reasonable person” language was added to the USC statutes in the mid 1980’s. See *State v. Sapps*, 820 A.2d 477 (Del. Fam. Ct. 2002).

The State failed to address the Constitutional aspect of the definition of “Sexual Contact” as an element of both Unlawful Sexual Contact 1st and Sex Abuse by a Person of Trust 2nd that lacks a critical, inherent element of blameworthiness or wrongfulness. The absence of this element violates the due process clause of the 14th Amendment and our Delaware Constitution.

Other states and jurisdictions require that the fact finding needs to consider the “personality of the Defendant” when determining whether “sexual contact” occurred. When there is no direct testimony of sexual arousal or sexual gratification, the trier of fact may infer a purpose of sexual arousal or sexual gratification from the “type, nature and circumstances of the contact along with personality of the Defendant.” *State v. Walker*, No. L-19-1214, 2020 Ohio 5043, 6-7 (Ohio Ct. App. 2020). Federal law requires the government to prove a “sexual act” was committed with intent to abuse, humiliate, harass, degrade or arouse or gratify the sexual desire of any person 18 U.S.C. § 2246. New York’s definition of “Sexual Contact” includes as an

element that the touching be “for the purpose of gratifying the sexual desire of either party.” N.Y. Penal Law §130.00.3 “Sexual Contact”.

The Delaware definition of Sexual Contact lacks any consideration of whether the contact was for the purpose of sexual gratification or any consideration as to whether the contact was intended to be sexual in nature and violates Constitutional standards. (See p. 12-21 of Defendant’s Opening Brief). Defendant respectfully submits that when charging a person with a crime where “Sexual Contact” is an element of that crime, the State must prove the contact was intended to be sexual in nature or for the purpose of sexual gratification, an inherent element of that crime. Also, as set forth in our Opening Brief the current definitions of “Intent” and “Sexual Contact” in 11 *Del.C.* § 231 and 11 *Del.C.* § 761 violates due process because the statutes effectively create a conclusive presumption and not a permissive presumption as to intent and they have the effect of shifting the burden of proof upon the Defendant to disprove intent. (See p. 17-21 of Defendant’s Opening Brief).

LEGAL ARGUMENT

II. THE SUPERIOR COURT ERRED IN EXCLUDING DEFENDANT'S EXPERTS FROM TESTIFYING ABOUT THE INSIGHT IN INTRA-FAMILY SEXUAL ABUSE ALLEGATIONS AND ABOUT THE INTERVIEWS OF THE COMPLAINING WITNESS AND ABOUT DEFENDANTS WHOLE PERSON TO ASSESS WHETHER DEFENDANT POSSESSED THE REQUISITE *MENS REA* DURING THE PURPORTED SEXUAL CONTACT.

A. QUESTION PRESENTED

Whether the Court improperly excluded two experts retained by Defendant who would have provided proper insight about the interviews of the complaining witness and the whole person of Defendant and the requisite *mens rea* during the alleged criminal act. These issues were preserved by the filing of Motion in Limine and response to State's Motion in Limine before Trial began (A-67, 89).

B. STANDARD AND SCOPE OF REVIEW

This Court reviews a Trial Court's decision to admit or exclude expert evidence for abuse of discretion. *Gen. Motors Corp. v. Grenier*, 981 A.2d 531, 536 (Del. 2009). That standard applies as much to the Trial Court's decision about how to determine reliability as to the Trial Court's ultimate conclusion. *MG Ban Corporation, Inc. v. LeBeau*, 737 A.2d 513, 522 (Del. 1999).

C. ARGUMENT

The Trial Court erred by excluding the Expert Testimony of Dr. Cooney-Koss.

The main purpose for presenting the testimony of Dr. Cooney-Koss was for her to testify as an expert about the allegation of intra-familial sexual abuse which formed the basis of the criminal charges. This Court has held that the dynamic of allegations of intra-familial abuse is a subject matter appropriate for expert testimony. *Wheat v. State*, 527 A.2d 269 (Del. 1987); *Powell v. State*, 527 A.2d 276 (Del. 1987).

The Defendant disputes the position of the State that the intent of calling Dr. Cooney-Koss was to attack the veracity of the alleged victim. Dr. Cooney-Koss's analysis would have provided academic helpful background and context for the fact finder. A.H. was 3 and 4 years old at the time of her interviews. A lay person does not possess the understanding of the appropriate vocabulary, social skills and social dynamics at play when a complaining witness of that age is asked about these issues which were crucial. Dr. Cooney-Koss's testimony would have been helpful in understanding and interpreting their evidence to the jury. Such testimony is permitted pursuant to *Wheat* and *Powell*.

The Trial Court erred when it totally excluded the testimony of Dr. Cooney-Koss. Her testimony would not have touched upon the "credibility" of

A.H.. Her testimony would have addressed the dynamics of allegations of intra-familial abuse and the special development and communication skills of a 3 and 4 year old. Both topics are an appropriate subject matter for expert testimony.

The Trial Court erred by excluding the Expert Testimony of Dr. Jospeh Zingaro

Dr. Zingaro's testimony would not have been offered for the belief that Defendant did not present the "profile" of a child sexual abuser. Defendant sought to admit the testimony of Dr. Zingaro to explain how Defendant's upbringing and experience shaped his ability to understand and perceive mores and norms pertaining to touching, nudity and societal norms concerning what is and is not appropriate for children and adults pertaining to sexual touching. Dr. Zingaro's testimony would have assisted the jury in understanding what might otherwise be considered "unusual" or "bizarre" behavior in allowing A.H. to touch his penis on two occasions without reprimanding her. Dr. Zingaro would have been able to assist the jury in the appreciation of the whole person of the Defendant and the mens rea Defendant possessed at the time of the incidents.

Dr. Zingaro's report and research included no discussion of percentage terms about the truth or falsity of the statements of A.H. Dr. Zingaro's testimony would have been based upon his extensive professional experiences and upon, present in Defendant's psyche the facts of this case; social norms and

mores and how his upbringing and experience in diverse cultures on other continents may shape and inform one's understanding of boundaries about touching that would be markedly or starkly different than the average American juror.

Again, Defendant sought only to admit Dr. Zingaro's testimony so the jury would have heard evidence about his "whole person" including his unusual unique upbringing and social background, in order to assess whether or not the State's evidence proved beyond a reasonable doubt that he possessed the requisite *mens rea* as to any purported sexual contact that may have occurred.

LEGAL ARGUMENT

III. THE SUPERIOR COURT ERRED BY IMPOSING A SENTENCE OF 5 YEARS MINIMUM MANDATORY OF UNSUSPENDED LEVEL V TIME

A. QUESTION PRESENTED

Whether Defendant received a sentence not within the statutory structure when the Court imposed a mandatory 5 year sentence.

Defense Counsel caused an objection to the sentence by filing a Motion to Vacate an Illegal Sentence on September 22, 2022 (A-374-379).

B. STANDARD AND SCOPE OF REVIEW

This Court reviews statutory construction issues de novo. *Snyder v. Andrews*, 708 A.2d 237, 241 (Del. 1998).

C. ARGUMENT

Defendant respectfully submits §4205A(d)(1) provides the Court with the discretion to suspend some or all of the sentence here. Counsel submits that the operative language “shall sentence a defendant . . . to not less than 5 years to be served at Level 5” does not mandate the imposition of 5 years of unsuspended Level 5 time. Rather, it only requires the Court to impose a sentence of 5 years to be served at Level 5, and the Court, in its discretion, may suspend some or all of that Level 5 sentence.

The State acknowledges in their Answering Brief the language in 11 § 4205 is not consistent with other provisions containing mandatory minimum sentences. Such as the habitual offender statute or the statute codifying possession of a firearm by a person prohibited.

The habitual offender statute, codified at § 4214 of Title 11, specifically states in paragraph (e) in pertinent part:

Notwithstanding any provision of this title to the contrary, any minimum sentence required to be imposed pursuant to subsection (b), (c), or (d) of this section *shall not be subject to suspension by the court, and shall be served in its entirety at full custodial Level V institutional setting without the benefit of probation or parole ...* 11 Del.C. § 4214(e)(emphasis added).

Section 1448 of Title 11, codifying all the provisions that criminalize the possession of a firearm by a person prohibited, includes a similar provision:

“Any sentence imposed for a violation of this subsection *shall not be subject to suspension and no person convicted for a violation of this subsection shall be eligible for good time, parole or probation during the period of the sentence imposed.*” 11 Del.C. § 1448(e)(4)(emphasis added).

Given that neither §§ 769, nor § 4205A include any such similar language as in § 4214(e) or § 1448(e)(4), Defendant respectfully submits that, pursuant to § 4205(g), the Trial Court had the discretion to suspend all, or a portion of, the sentence imposed pursuant to § 4205A(d)(1).

The State admitted in their answering brief that § 4205A(d)(1) does not contain a similar provision to § 4205(d) that provides that “where a minimum, mandatory, mandatory minimum or minimum mandatory sentence is required by subsection (b) of this section, such sentence shall not be subject to suspension by the Court.” This language is not set forth in § 4205A(d)(1).

Defendant submits that § 4205A(d)(1) did not mandate a sentence of 5 years of unsuspended Level 5 time, and therefore such a sentence is not “authorized” by the statute. Accordingly, Defendant’s sentence should have been corrected by the Court pursuant to Rule 35(a).

Even if this Court finds that Mr. Herbert’s sentence is not “illegal”, if this Court finds that the Court below had the discretion to suspend all, or a portion of a sentence pursuant to § 4205(d)(1), then the sentence should have been reconsidered pursuant to Rule 35(a).

CONCLUSION

For the foregoing reasons, Appellant John Herbert respectfully requests that this Court reverse the judgment of the Superior Court.

Respectfully submitted,

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