STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 14, 2019
v DANIEL RAY BEAN, Defendant-Appellant.	No. 342953 Muskegon Circuit Court LC No. 17-000174-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	
v DANIEL RAY BEAN, Defendant-Appellee.	No. 343008 Muskegon Circuit Court LC No. 17-000174-FC

Before: METER, P.J., and SAWYER and CAMERON, JJ.

PER CURIAM.

In Docket No. 342953, defendant, Daniel Ray Bean, appeals by leave granted the trial court's order denying his motion to quash a charge of first-degree criminal sexual conduct (CSC-I) on the basis that the sexual penetration occurred under circumstances involving the commission of another felony, MCL 750.520b(1)(c). In Docket No. 343008, the prosecution appeals by leave granted the trial court's order granting defendant's motion to quash the charge on the theory that defendant was not related to the child by affinity, MCL 750.520b(1)(b)(*ii*). These consolidated appeals are interlocutory. We reverse in part and affirm in part.

This case arises out of the alleged sexual assault of a 15-year-old child. Defendant's wife is the sister of the child's stepfather, and therefore, defendant is the child's stepuncle by marriage. Defendant is accused of digitally penetrating the child and touching her breast while

she slept on a couch at defendant's home. The prosecution originally charged defendant with third-degree criminal sexual conduct (sexual penetration of a victim between the ages of 13 and 16), MCL 750.520d(1)(a). However, the prosecution later sought to elevate the charge to CSC-I on two theories: (1) that the sexual penetration occurred under circumstances involving the commission of any other felony; and (2) defendant and the child were related by affinity. The "other felony" was second-degree child abuse, MCL 750.136b(3)(b) (knowingly or intentionally committing an act likely to cause serious mental harm). The second-degree child abuse was based solely on the alleged digital penetration. At the conclusion of the preliminary examination, the district court agreed to bind over defendant on a charge of CSC-I under both theories.

In circuit court, defendant moved to quash the information, arguing that he could not be charged with CSC-I because he was not related to the child by affinity, and the same conduct (the digital penetration) could not constitute the "other felony" for purposes of MCL 750.520b(1)(c). The trial court granted defendant's motion on the affinity ground but denied it on the other-felony ground. Both parties applied for leave to appeal the trial court's decision. This Court granted both applications for leave to appeal and consolidated the appeals. *People v Bean*, unpublished order of the Court of Appeals, entered August 23, 2018 (Docket No. 342953); *People v Bean*, unpublished order of the Court of Appeals, entered August 23, 2018 (Docket No. 343008).

First, in Docket No. 342953, defendant argues that the trial court erred in denying his motion to dismiss the information on the other-felony theory. We agree.

"This Court reviews a trial court's decision on a motion to quash the information for an abuse of discretion. To the extent that a lower court's decision on a motion to quash the information is based on an interpretation of the law, appellate review of the interpretation is de novo." *People v Miller*, 288 Mich App 207, 209; 795 NW2d 156 (2010) (citation omitted). In addition, "[t]he primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature." *Id.* "To determine the intent of the Legislature, this Court must first examine the language of the statute." *Id.* This Court will "enforce clear and unambiguous statutory provisions as written." *Id.* "If a statute is ambiguous, judicial construction is appropriate." *Id.* at 210.

Under MCL 750.520b(1)(c), "[a] person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if . . . [the] [s]exual penetration occurs under circumstances involving the commission of any other felony." In this case, the prosecution submits that the "other felony" is second-degree child abuse contrary to MCL 750.136b(3)(b), which provides that a person is guilty of second-degree child abuse if "[t]he person knowingly or intentionally commits an act likely to cause serious . . . mental harm to a child regardless of whether harm results."

The phrase "any other felony" is not defined in MCL 750.520b(1)(c) or elsewhere in MCL 750.520a (containing the definitions to be used in the criminal sexual conduct chapter). Therefore, this Court may "consult the dictionary to discern [the word's] meaning." *People v Caban (On Remand)*, 275 Mich App 419, 422; 738 NW2d 297 (2007). In pertinent part, the dictionary defines "other" as "being the one (as of two or more) remaining or not included;"

"being the one or ones distinct from that or those first mentioned or implied;" or "not the same [or] different." *Merriam-Webster's Collegiate Dictionary* (11th ed).

In *People v Jones*, 144 Mich App 1, 4; 373 NW2d 226 (1985), this Court explained:

> The Legislature . . . did not attempt to narrowly define the coincidence or sequence of the sexual act and the other felony; rather it chose to address the increased risks to, and the debasing indignities inflicted upon, victims by the combination of sexual offenses and other felonies by treating the sexual acts as major offenses when they occur "under circumstances involving the commission of any other felony."

This Court upheld *Jones* in *People v Waltonen*, 272 Mich App 678, 692-693; 728 NW2d 881 (2006), stating:

> The key language of the statute is "occurs under circumstances involving," which does not necessarily demand that the sex act occur during the commission of the felony, although this generally will be the case. But the statutory language does require a direct interrelationship between the felony and the sexual penetration.

The Court concluded that to support a charge of MCL 750.520b(1)(c), the prosecution is

> required to submit evidence sufficient to establish probable cause to believe that defendant sexually penetrated the victim, that defendant committed the underlying felony, and that there existed a direct interrelationship between the felony and the sexual penetration, which does not necessarily require that the penetration occur during the commission of the felony. [*Id*. at 680.]

In this case, there is no separate act underlying the "other felony"—the second-degree child abuse. Therefore, there are no "increased risks" or "debasing indignities inflicted" upon the child because there was no combination of a sexual act with another felony. See *Jones*, 144 Mich at 4. In addition, the prosecution must show "a direct interrelationship between the felony and the sexual penetration." *Waltonen*, 272 Mich App at 694. In this case, there is no "direct interrelationship between the felony and the sexual penetration" because the felony *is* the sexual penetration. That is to say, the sexual penetration underlying the second-degree child abuse is not "distinct" or "different" from the sexual penetration, but rather is the exact same conduct.[1] As such, under the facts of this case, the second-degree child abuse cannot constitute the "other felony" in MCL 750.520b(1)(c), and the trial court abused its discretion in denying defendant's motion to quash on this ground. See *Miller*, 288 Mich App at 209.

Next, defendant argues that the trial court erred in not granting his motion to dismiss on double-jeopardy grounds. However, defendant concedes that this appeal is controlled by the

[1] The prosecution's interpretation of the statutory language would automatically elevate every CSC-III charge to CSC-I. This cannot be the intent of the legislature.

statutory construction issue discussed above. Because we agree with defendant that the trial court erred in not granting his motion to dismiss on the other-felony ground, we need not address this issue further.

Finally, the prosecution contends in Docket No. 342953 that the trial court erred in granting defendant's motion to quash on the basis of affinity. We disagree.

MCL 750.520b(1)(a)(*ii*) provides that a person is guilty of CSC-I if he engaged in sexual penetration with a person who "is at least 13 but less than 16 years of age" and the "actor is related to the victim by blood or affinity to the fourth degree." In this case, there is no dispute that the child was 15 years old at the time of the alleged sexual assault or that the child and defendant are not related by blood. The issue to be resolved is whether a stepniece and stepuncle are related by affinity. We conclude they are not.

The definition of "affinity" in our courts has developed over time, but the definition has ultimately returned to that first established in *Bliss v Callie Bros Co*, 149 Mich 601; 113 NW 317 (1907). In that case, the Michigan Supreme Court defined "affinity" in the context of judicial disqualification as

> the relation existing in consequence of marriage between each of the married persons and the blood relatives of the other, and the degrees of affinity are computed in the same way as those of consanguinity or kindred. A husband is related, by affinity, to all the blood relatives of his wife, and the wife is related, by affinity, to all blood relatives of the husband. *Id*. at 608.

In *People v Armstrong*, 212 Mich App 121, 126; 536 NW2d 789 (1995), this Court concluded that *Bliss* did not provide "conclusive guidance concerning whether the Legislature intended the term 'affinity' to encompass stepbrothers and stepsisters." Thus, we employed the dictionary definition of affinity, which was broader than the definition established in *Bliss*. See *Armstrong*, 212 Mich App at 128 (defining affinity simply "as a relationship by marriage or by ties other than those of blood") (quotation marks and citation omitted). However, in *Lewis v Farmers Ins Exch*, 315 Mich App 202, 214-215; 888 NW2d 916 (2016), a case involving a claim for personal protection insurance benefits, this Court held that the definition of affinity in *Bliss* controlled. This Court concluded that the Supreme Court's reliance on *Bliss* in *People v Zajaczkowsi*, 493 Mich 6, 13-14; 825 NW2d 554 (2012), demonstrated that the *Bliss* definition remained "the commonly understood meaning of affinity under Michigan law." *Lewis*, 315 Mich App at 214. Therefore, the definition established in *Bliss* applied "without the limiting language emphasized by the *Armstrong* Court." *Lewis*, 315 Mich App at 214.

Under the definition of affinity in *Bliss*, the child and defendant in this case are not related by affinity because the child is not a blood relative of defendant's wife. See *Bliss*, 149 Mich at 608. Considering this Court's acceptance of the *Bliss* definition of affinity in *Lewis*, 315

Mich App at 214, the trial court did not err when it concluded that the child and defendant were not related by affinity. See *Miller*, 288 Mich App at 209.

Reversed in part and affirmed in part. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ David H. Sawyer
/s/ Thomas C. Cameron