

STATE OF MICHIGAN
IN THE COURT OF APPEALS

THE PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff/Appellee,

-vs-

L.C. No. 93-63014
Docket No. 172928

DANIEL ARTHUR TURNER,

Defendant/Appellant.

APPELLANT'S BRIEF ON APPEAL

NO ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUES

I

Whether or not the Defendant was denied a fair trial and due process of law under the Sixth Amendment to the United States Constitution, and the Constitution of the State of Michigan because counsel was ineffective in failing to raise the insanity defense or diminished capacity when it was clear from the facts of the case, and defense knew or should have known, that the defense of diminished capacity or insanity was appropriate, and would have resulted in a more favorable outcome to the Defendant?

The Defendant says that the answer is, "Yes".

The People would contend that the answer is, "No".

II

Whether or not the Defendant was denied a fair trial because of improper arguments by the prosecutor designed to elicit unnecessary sympathy to the victim?

The Defendant says that the answer is, "Yes".

The People would contend that the answer is, "No".

III

Whether or not the sentence imposed in this case is fair and proportionate?

The Defendant says that the answer is, "No".

The People would contend that the answer is, "Yes".

STATEMENT OF FACTS

The Defendant was charged with one count of Kidnapping and Criminal Sexual Conduct in the First Degree. After a jury trial, the Defendant was convicted as charged.

This is a rather bizarre case wherein it was alleged that the Defendant dragged the young child into his apartment. (TR:487) Once in the apartment, the Defendant disrobed the child, (TR:49), and committed various sexual acts with respect to the child, (TR:50, 51) The most striking aspect of this case is that when this incident is alleged to have happened, the Defendant was cross-dressed in female clothing including make-up, such as lipstick and the like. (TR:348) The Defendant was dressed in women's clothing when he was arrested. (TR:348) There were photographs found of the Defendant in drag. (TR:535) Also found were fake breasts, female underwear, and other female artifacts were found in the Defendant's apartment and introduced into evidence, Indeed, the Court was so impressed by the bizarre artifacts related to the Defendant's cross-dressing, that he suggested the following at (TR:507):

"Turn them over to the museum."

Despite all of the evidence demonstrating that the Defendant's mental state was skewed severely from the norm, defense counsel failed to investigate, raise the issues, or develop the issue of the Defendant's mental illness or mental capacity to commit the crime at issue. The Defendant contends that it is clear from the record that such a

defense would have been appropriate, and it is equally clear that no tactical reason existed for not asserting this defense in these circumstances since the evidence of the Defendant's participation in some sexual misconduct with the child was overwhelming. (TR:483)

The Defendant also contends that he did not receive a fair trial because the prosecutor in closing arguments made blatant appeals to the jurors sympathy for the victim. (TR:797)

"Defense counsel, despite his protest to the contrary, is trying to call Lakeysha Cage a liar. There was an Indian poet who once said, "Each child born today is God's expression of hope for the future."

The Defendant was sentence to 30-50 years incarceration. (ST:41) The sentence guidelines provide for a sentence range of 15-30 years. Although the sentence was at the extreme high end of the guidelines, the Defendant contends that never the less, the sentence considering his circumstances is disproportionate.

It is on account of these facts and the issues arising therefrom, that your Defendant contends that he has been denied a fair trial and sentenced unfairly. On that account, he brings this appeal asking the Court to reverse his conviction, or remand this case to the trial Court for a hearing on the effectiveness of counsel and/or for resentencing in accordance with the points and authorities set forth below.

LAW AND ARGUMENT

ISSUE I

Whether or not the Defendant was denied a fair trial and due process of law under the Sixth Amendment to the United States Constitution, and the Constitutions of the State of Michigan because counsel was ineffective in failing to raise the insanity defense or diminished capacity when it was clear from the facts of the case, and defense knew or should have known, that the defense of diminished capacity or insanity was appropriate, and would have resulted in a more favorable outcome to the Defendant?

The Defendant says that the answer is, "Yes".

The People would contend that the answer is, "No".

Because of the Defendant's bizarre behavior and the female artifacts in his possession during the alleged sexual assault, the Defendant's right to advance the defense of diminished capacity was more than appropriate, but necessary under the facts of this case. The physical evidence, fake breasts (TR:507), and photographs (TR:535), as well as the method of the assault (TR:50, 51), put the Defendant's attorney on notice of the appropriateness of the defense. His failure to investigate, and develop the defense under these circumstances, is a violation of the Defendant's right to counsel under the Sixth Amendment to the United States Constitution. People v Nyberg, 140 Mich. App. 160; 362 NW2d 748 (1984).

The Defendant at sentence (ST:21), described his mental condition as follos:

"I am a life long sufferer of Severe Gender Dysthoria, and "Dysthoria" is the key-word there, meaning, I don't like it at all, an innate condition commonly referred to as transsexual, which is a psych physiological disturbance between the sexuality of the mind and the body.

A symptom of--Gender Dysthoria is not a disorder. It's gender dysthoria. It's an extremely strong idiopathic sense of total inappropriateness of and a frank repugnance towards my own genitalia, to the extend of any stimulation to my genitalia, especially a morbid penal erection, is a gruesome psychiological disturbance of my gender identity and of my gender sex role.

Even while sleeping this bothers me, in the middle of my sleep, to realize that I have such a physical manifestation of my own body.

This is quite true of most, if not all, transsexuals. As I said, dysthoria is the key-word.

Although my sexual orientation is, relatively speaking, lesbian, since I have no erotic or emotional attraction to men, I have been 100% asexual during the past 6 years.

Because of my own impotence, plus the risk of aids, I have chosen to abstain from sex and all sexual activities until I can fully and safely enjoy myself in a sexual act. Hence, I am actually in life an asexual person.

Keep in mind, in talking with abnormal and unusual lifestyles, stereo types are tricky, unreliable, and quite untrue. Transgenderism, at its roots, is not an issue of vanity or sexual desires. It is the issue of being comfortable with one's self and within society."

The defense was appraised of his condition and should have complied with the diminished capacity requirements set

forth in Statute, MCLA 768.20a. The definition of legal insanity, found at MCLA 768.21a, to wit; "that a person lacks substantial capacity to either appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law", is applicable to him. As indicated, the Defendant's defense in this case was clearly forcible, Nyberg, supra. Furthermore, it has been held that even if there had been a Forensic Center determination that the Defendant was competent to stand trial, that under the certain circumstances, and the Defendant contends that this is one, that this in itself would not have sufficient to protect his rights under the Sixth Amendment. People v Snyder, 108 Mich. 754; 310 NW2d 868 (1981).

Where defense counsel was aware of Defendant's psychiatric history and its bearing on the charged offense, and failed to arrange for a competency hearing, or investigate and consider the "possibility" of an insanity defense, counsel's failure to appropriately proceed amounted to ineffective assistance of counsel. People v McDonnell, 91 Mich. App. 458; 283 NW2d 773 (1979).

The facts, clearly apparent before defense counsel, revealed that the only reasonable defense under the facts of this case was diminished capacity and that the same was appropriate under the holding of People v Mangiapane, 85 Mich. App. 379; 271 NW2d 240 (1978). Accordingly, the Defendant contends that he was denied effective assistance of counsel guaranteed by the Sixth Amendment to the United

States Constitution under the holding of People v Tommolino,
187 Mich. App. 14; 466 NW2d 315 (1991).

ISSUE II

Whether or not the Defendant was denied
a fair trial because of improper
arguments by the prosecutor designed to
elicit unnecessary sympathy to the
victim?

The Defendant says that the answer is,
"Yes".

The People would contend that the answer
is, "No".

Although this case involved a young child, so that
reverence is to the youth of the victim were unavoidable,
the Defendant contends that the prosecutor went to far in
this case. The appeals to the sympathy for the victim,
(TR:797), among others, is especially egregious. On account
of these remarks eliciting sympathy for the victim, the
Defendant contends that his conviction should be reversed
under the holding of People v Dalessandro, 165 Mich. App.
569; 419 NW2d 609 (1988).

ISSUE III

Whether or not the sentence imposed in
this case is fair and proportionate?

The Defendant says that the answer is,
"No".

The People would contend that the answer
is, "Yes".

Generally, crimes against young victims and other
helpless persons tend to at once, evoke emotions of sympathy
for the victim and indignation against the perpetrator. The

Defendant contends that his exceptionally long sentence resulted from that kind of emotionality. The record reveals, that sympathy and indignation against the Defendant was a constant theme of the prosecutor.

"Where a given case does not present a combination of circumstances placing the offender in either the most serious or least threatening class respect to the particular crime, then the Court is not justified in imposing the maximum or minimum penalty, respectively." People v Milbourn, 435 Mich. 630; 461 NW2d 1 (1990). The trial Judge seemed to have acknowledged that the Defendant may have been suffering from some disorder. (ST:36) He further took note of the fact that the Defendant had no prior record. (ST:39) However, the Court imposed a higher sentence suggesting that the Defendant was a, "a dangerous sexual predator, not someone who would be helped by merely treating a disorder, because that will never guarantee anywhere close to what needs to be guaranteed, that is this won't happen again." This type of consideration is held to have been improper and to require resentencing under the authority of People v McKernan, 185 Mich. App. 780; 462 NW2d 843 (1990). There was simply no basis for the Court to conclude that the Defendant was likely to repeat this type of offense.

SUMMARY

After a jury trial, the Defendant was convicted as charged of Kidnapping and CSC I. The Defendant was

sentenced at the maximum possible level allowed by the guidelines.

The Defendant contends that he did not receive a fair trial because his lawyer failed to investigate and develop the only reasonable defense in the circumstances, diminished capacity.

The Defendant's right to a fair trial was prejudiced because the prosecutor intentionally appealed to the sympathy of the jurors towards the victim.

The sentence was inappropriately long because the Court considered the likelihood of the Defendant again committing the same offense.

RELIEF REQUESTED

The Defendant/Appellant prays this Honorable Court reverse his conviction or remand this case to the trial Court for a hearing to determine the effectiveness and/or for resentencing.

/s/

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Dated: September 26, 1994