

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD BROWER,

Defendant-Appellant.

UNPUBLISHED

May 18, 2010

No. 286551

Macomb Circuit Court

LC No. 2007-002377-FH

Before: SHAPIRO, P.J., and JANSEN and BECKERING, JJ.

SHAPIRO, P.J. (*concurring*).

I concur in the result and much of the analysis in the majority opinion. However, I do not think that the majority opinion adequately addresses the question whether the encouraged actions met the statutory requirements of MCL 750.145a. As I read the record, the prosecution did not dispute that the body in the sole nude photo was not that of defendant's daughter. Thus, the jury could not properly have convicted defendant of having enticed his daughter into committing an immoral act on the basis of that photo, even though the photo did properly serve as the basis for the creating and manufacturing conviction under MCL 750.145(c)(2).

Of the thirteen photos that were of the defendant's daughter, none depicted her in a manner that would constitute "erotic nudity" as defined in MCL 750.145c. The photos are not clearly described in the testimony, although it seems that the two photos on which the prosecutor relied showed the defendant's daughter wearing only panties and covering her breast area with a stuffed animal. While photos of this type of a 12-year-old girl are disturbing and improper, I question whether in the context of this case at least they constitute "an immoral act" or "an act of gross indecency" as the statute requires. In addition, the phrases "immoral act" and "act of gross indecency" do not provide for an objective standard for the jury to apply. Although there is no challenge to the constitutionality of the statute as applied in this case, the question of sufficiency has been raised. It is significant that the jury sought guidance on this question by sending a note during deliberations asking if the trial court could provide clarification as to what constituted an immoral act or act of gross indecency.

Nevertheless, I concur in the affirmance because, in response to the jury's request for further instructions, the defense did not seek a dismissal of any of the charges and stipulated that

an appropriate response to the jury was that they should “use your common sense.” Apparently the jurors’ common sense informed them that participation in the photos constituted an immoral act or an act of gross indecency.

/s/ Douglas B. Shapiro