STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

TROY ANTHONY BARLOW,
Defendant-Appellant.
_____/

Supreme Court No.

Court of Appeals No. 239038

37th Circuit Court No. 01-2179 FH

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PLAINTIFF-APPELLEE'S BRIEF IN OPPOSITION TO DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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COUNTER-STATEMENT OF APPELLATE JURISDICTION AND GROUNDS FOR APPEAL

Defendant applies for leave to appeal from the September 11, 2003 opinion of the Michigan Court of Appeals affirming his conviction. (See Defendant-Appellant's Appendix A). MCR 7.301(A)(2). Plaintiff-Appellee submits that Defendant-Appellant has not set forth sufficient grounds in his application, pursuant to MCR 7.302(B), and that the instant application should be denied.

COUNTER-STATEMENT OF QUESTIONS

I. WHETHER THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND THAT DEFENDANT WAS GUILTY OF FOURTH-DEGREE CRIMINAL SEXUAL CONDUCT?

Plaintiff-Appellee answers, "Yes."

Defendant-Appellant answers, "No."

The trial court answered, "Yes."

The court of appeals answered, "Yes."

COUNTER-STATEMENT OF FACTS

Ellen Schaeffer (formerly Ellen Howard) was 17 years old at the time of this incident, February 5, 1999. (Jury Trial Transcript of November 14, 2001 page 36 "JT II 36"). She was a junior in high school. Ms. Schaeffer had a best friend, Dawn Marty, whom she described like a sister. The evening of February 5th, Ms. Schaeffer went with Ms. Marty to see a friend of Ms. Marty's. (JT II 36-37). The two girls went to a house on VanBuren Street in Battle Creek. Defendant was one of five to ten people there. (JT II 38-39). Ms. Schaeffer did not know Defendant. (JT II 80). Although people were drinking alcohol and taking controlled substances, Ms. Schaeffer did not consume any then or before she arrived at the house. (JT II 40).

After about an hour, Ms. Schaeffer left the house with her friend and Defendant. Neither Ms. Schaeffer nor Ms. Marty had a romantic interest in Defendant. (JT II 41). Ms. Schaeffer had a boyfriend. (JT II 132). However, Defendant wanted to go home and asked Ms. Marty if she would drive him there. Ms. Marty drove to a market first because Defendant wanted to buy something to drink. Defendant went in the store alone and purchased wine coolers. Ms. Marty drove Defendant to his home. (JT II 42-43). Ms. Schaeffer thought they would just drop Defendant off and leave. (JT II 93). However, they went inside to Defendant's upstairs apartment. Ms. Schaeffer said she went upstairs because it was cold, late, and she lived far away and had no other means to get home. It was sometime before midnight. (JT II 44-45).

Two other men were in the apartment. They both appeared older than Defendant. (JT II 46). Ms. Schaeffer was a little nervous and afraid of Defendant because she did not know them. The other two men made her nervous. Ms. Marty did not appear nervous though. (JT II 47). Defendant had a computer which they looked at for a few minutes. (JT II 48). Ms. Schaeffer drank one-half of a wine cooler that Defendant gave her. Ms. Marty also drank a wine cooler,

though Ms. Schaeffer did not remember Defendant drinking. (JT II 47-48). Ms. Schaeffer, Ms. Marty, and Defendant went in to the bathroom together. Defendant touched Ms. Schaeffer's breasts. Ms. Marty watched as this happened. (JT II 50-51, 153). Ms. Schaeffer did not kiss Defendant and he did not try to kiss her; he just groped at her, under her shirt. (JT II 97, 101, 104). Ms. Schaeffer tried to back up, away from Defendant; but Ms. Marty was in her way, and there was no place to go in the bathroom. (JT II 53). After Defendant tried touching Ms. Marty, she left. Ms. Schaeffer followed shortly after. (JT II 50-52). Though she said she should have, Ms. Schaeffer did not push Ms. Marty aside and leave the room as soon as Defendant touched her. (JT II 50-52). Though she did not think the wine cooler affected her thinking at all, Ms. Schaeffer's mind was not clear because she was afraid. (JT II 53).

Ms. Schaeffer went to the kitchen. (JT II 53). Ms. Marty left the apartment to get food from Burger King. Ms. Schaeffer told Ms. Marty she was afraid and asked to go with her, but Ms. Marty told Ms. Schaeffer to stay there, she would be fine. (JT II 54, 109). Defendant asked Ms. Schaeffer to got back to the bathroom. Afraid what would happen if she said no, Ms. Schaeffer went with Defendant. (JT II 55). Defendant told her to get naked and then go in to the kitchen. She did not want to get undressed, but Ms. Schaeffer was scared and was afraid what would happen if she did not comply. (JT II 56). She did not know what to do. (JT II 113).

After she took off her clothes, she went out in the kitchen where Defendant and the two other men were standing by the counter. She was told to lean over a chair and bend over. (JT II 57). Not knowing these three men, afraid they would hurt or kill her, Ms. Schaeffer said she thought she had no choice and went to the chair and did as she was told. The men were talking. Defendant poked at Ms. Schaeffer's genital area with his finger. (JT II 58). Ms. Schaeffer was mortified, terrified, sobbing. (JT II 59).

They heard Ms. Marty at the door so Defendant told Ms. Schaeffer to go back to the bathroom and get dressed. (JT II 60). After she was dressed, Ms. Marty entered the apartment. Ms. Schaeffer told her they needed to leave right then; but Ms. Marty ignored her, telling her she wanted to stay. Ms. Schaeffer was afraid to leave by herself because it was dark, cold, and they were in a dangerous neighborhood. (JT II 60). Ms. Schaeffer quietly told her friend what happened. (JT II 62). Ms. Marty told Ms. Schaeffer not to worry about it, and they would leave soon. Ms. Schaeffer repeated she wanted to leave now, telling her she had a bad feeling and she was having a panic attack. (JT II 62-63). Ms. Schaeffer suffered from juvenile epilepsy which caused her to black out and have difficulty breathing when she was younger. (JT II 145-146). However, as she testified her epilepsy did not contribute to her difficulty recalling the details of the assault, rather she attributed this to trying to forget about the assault, blocking it out of her mind. (JT II 171).

Ms. Marty left again. The two men left as well though Ms. Schaeffer was not sure where they went. Defendant wanted to show Ms. Schaeffer his bedroom. (JT II 63-64). Ms. Schaeffer and Defendant walked to his bedroom, single file. (JT II 124). She did not want to be there though. (JT II 65). Ms. Schaeffer sat down on the bed, then laid down. Defendant was on top of her, one hand on her shoulder, holding her down, and the other taking off her pants. (JT II 66-67). Defendant pulled her pants and underwear to her ankles. (JT II 68). Ms. Schaeffer told Defendant no two or three times, tried to push him away, but could not because Defendant is a lot bigger and stronger than she. Ms. Schaeffer kept her eyes closed and was mortified, scared. (JT II 69, 126).

She heard a condom wrapper and later saw the wrapper. (JT II 70-71). Ms. Schaeffer felt Defendant put the condom on, but he kept his hand on her shoulder, holding her down. (JT II

169). Ms. Schaeffer said everything went blank, and she could not hear anything after she heard the wrapper opening. She felt the bed beneath her and Defendant on top of her, holding her down while he penetrated her with his penis. (JT II 70-71, 150). Ms. Schaeffer was afraid to move, afraid to make a mistake, afraid she would get hurt or die. (JT II 71). It was difficult to breathe and things felt like they were in slow motion. She got up, pulled up her pants, and saw the condom wrapper next to the bed. (JT II 72).

Ms. Schaeffer ran towards her friend, sliding on her behind down the stairs in order to get around Defendant who had his arms outstretched. (JT II 72-73). Defendant grabbed ahold of Ms. Schaeffer's arm while she pleaded with Ms. Marty not to leave her. (JT II 74). Ms. Marty laughed, telling her she couldn't wait anymore for Ms. Schaeffer. Ms. Schaeffer was extremely upset that her friend would leave her again and laugh at her after she told her she had been raped. (JT II 73-74, 165).

Ms. Marty did leave without Ms. Schaeffer. Defendant asked for Ms. Schaeffer's number, called a taxi for her and gave her five dollars. Ms. Schaeffer gave him a fake number and was surprised Defendant would call her a taxi because the sex was not consensual. (JT II 74-75). Defendant did not behave like anything was wrong though Ms. Schaeffer affirmed the sex was not consensual; she did not kiss him or tell him she wanted sex and she was not attracted to Defendant. (JT II 75).

Ms. Schaeffer called her mother from a party store. (JT II 76). Her main concern was getting home and getting help. Ms. Schaeffer was not afraid to tell her mother and was not afraid of what she would think. Ms. Schaeffer's mother was very upset, but not with her daughter. (JT II 77). She was upset with Ms. Marty and with what happened. (JT II 142). The police were called and came to Ms. Schaeffer's home. After speaking with the police, Ms. Schaeffer was

examined by a sexual assault nurse examiner. (JT II 78, 148).

Ms. Schaeffer sought counseling after the assault. (JT II 80). She tried to forget about the assault since remembering made her miserable and she did not remember everything about the assault. (JT II 156). What Ms. Schaeffer remembered most about that night were three things: the incident in the bathroom, then being naked and poked in the kitchen, then the bedroom and how she felt during these times. (JT II 158).

Officer Perin was dispatched to investigate a sexual assault. (JT II 174). He spoke to Ms. Schaeffer and then proceeded to Defendant's address, but no one answered. (JT II 175-176).

Karen Ray, a registered nurse and sexual assault nurse examiner, (JT II 180-181), examined Ms. Schaeffer at approximately 2:00 a.m., the morning after the assault. (JT II 183). There was no indication Ms. Schaeffer was under the influence of drugs or alcohol. (JT II 185). There was "some diffuse dye uptake like at the 6 o'clock region, the entrance of the vagina." (JT II 188). This indicated there were superficial abrasions which is something seen in a sexual assault victim, indicating a lack of vaginal lubrication or pelvic tilt in order to facilitate entrance of the penis during intercourse. These abrasions could also be the result of consensual sex, though it would indicate it was uncomfortable. (JT II 189-190). The abrasions were recent. (JT II 197). Ms. Ray confirmed that after time, trauma victims, including sexual assault victims, may block out painful or stressful memories as a defense mechanism. (JT II 202).

The parties stipulated that DNA testing was conducted, revealing that the samples taken from Ms. Schaeffer and Defendant matched; and Defendant could not be excluded as a donor to the sample taken. The probability of finding a match with an unrelated individual at random was: 1 in 658.4 quadrillion (Caucasian population), 1 in 25 quadrillion (African-American population), and 1 in 51.1 quadrillion (Hispanic population). (JT III 4).

Defendant testified that he was shocked when he was charged with sexual assault. (JT III 17). According to Defendant after he went to his apartment with Ms. Schaeffer and Ms. Marty, he showed them his computer, then two friends of another tenant asked if they could come up. (JT III 21). Defendant said they all drank and then he called Ms. Schaeffer to the bathroom, they kissed, "it was a mutual thing," then left the bathroom. When asked if Ms. Schaeffer said no when they kissed, Defendant replied, "Not at the time." (JT III 22). Defendant said Ms. Schaeffer didn't even flinch when he touched her breasts. (JT III 23).

Defendant gave Ms. Marty money to go to Burger King to bring back food; and he paid for Ms. Marty's food and Ms. Schaeffer's food. (JT III 24). Defendant was not aware that Ms. Schaeffer wanted to go to Burger King with Ms. Marty. Defendant said he called Ms. Schaeffer in to the bathroom again where they started kissing again. He asked her to get naked, saying it was just a "figure of speech" or a joke, but he did not really think she would get naked. (JT III 25). Defendant thought Ms. Schaeffer was acting "silly" when she came out of the bathroom, and that she acted like it was fun. Defendant admitted he told her to bend over the chair but denied that he poked or prodded her and said they were just having fun and Ms. Schaeffer did not appear upset. (JT III 26). Defendant thought Ms. Schaeffer was "tipsy" but not drunk. (JT III 27).

When her friend started to leave, Defendant said he did not see Ms. Schaeffer talk to her or attempt to go with her. (JT III 28). Defendant denied Ms. Marty left a second time and that Ms. Schaeffer tried to get past him on the stairs as Ms. Marty left. (JT III 33).

After they left, Defendant said Ms. Schaeffer was already in his bedroom. He said they started kissing. Defendant said he took his pants off, and Ms. Schaeffer took her own pants off and after he put on a condom, they had sex. (JT II 29-30). Defendant denied laying a hand on

her inappropriately or holding her down, and he denied that he took her pants off. (JT III 30). Defendant said they were both spontaneously taking their clothes off together, and they were touching each other. (JT II 31). Defendant denied that Ms. Schaeffer ever said no to him. (JT II 32).

The jury found Defendant not guilty of criminal sexual conduct - third degree, sexual penetration using force or coercion, but found him guilty of CSC - fourth degree, sexual conduct using force or coercion. (JT IV 7).

Additional facts will be set forth as they relate to the case at bar.

ARGUMENT

I. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND THAT DEFENDANT WAS GUILTY OF FOURTH-DEGREE CRIMINAL SEXUAL CONDUCT.

Standard of Review:

When reviewing a claim of insufficient evidence to support the conviction, the court views the evidence in the light most favorable to the prosecution and determines whether any rational trier of fact could have found the essential elements of the crime were proven beyond a reasonable doubt. People v Johnson, 460 Mich 720, 723; 597 NW2d 73 (1999) (citing People v Wolfe, 440 Mich 508, 515; 489 NW2d 748 (1992), *modified in* 441 Mich 1201 (1992)).

Material Facts:

The defense attorney asked the trial court for a directed verdict on the CSC - fourth degree charge, claiming there was no testimony that defendant used force or coercion to accomplish the sexual touching. (JT III 57). The prosecutor stated that Defendant touched Ms. Schaeffer against her will in the bathroom when she was terrified. In the kitchen, he told her to take off her clothes, and still afraid of him, she did so. The prosecutor argued that her fear was reasonable in light of the totality of circumstances: Defendant was much larger, stronger than she. Two other strange men were present, so she felt compelled to do Defendant's bidding. (JT III 58).

The trial court denied the motion, stating in part:

> I'm satisfied in the final analysis that there is sufficient evidence on the question or issue of force or coercion as respects. . .criminal sexual conduct fourth degree, that the issue will be determined by the jury. [T]here is actually two incidents suggested in the testimony from which the charge of criminal sexual conduct could be attributed. The first is the incident in the bathroom. And the second is the incident in the kitchen. And in each of those incidents, particularly respecting the incident in the bathroom, the victim's testimony, I'm - - I'm satisfied is sufficient to constitute evidence of force and coercion to send it to the jury. Specifically, she said

> she attempted to move away from and get away from the Defendant in the bathroom and was unable to do so. And that, coupled with the rest of the testimony, suggesting the entire scenario in which she was not voluntarily submitting to contact, I'm satisfied constitutes sufficient force and coercion, both with respect to the incident in the bathroom, and then, subsequently, with respect to the incident in the kitchen. . .

(JT III 58-59).

The prosecutor argued:

> The charge (fourth degree CSC), and that's the contact. The charge is using force or coercion. Whether it's in the bathroom where he gropes her, that's physical force, or whether it's bending over the chair and poking her, and she does that because she is scared, reasonably so based on what had happened to her already. . . .

(JT III 71-72).

Discussion:

Defendant claims that there was insufficient evidence of force or coercion to support the jury's verdict that he committed criminal sexual conduct in the fourth degree. Plaintiff disagrees. There was evidence of both force and coercion. When a defendant sexually touches another, utilizing force or coercion to accomplish the touching, but there is no personal injury, the defendant is guilty of criminal sexual conduct in the fourth degree. People v Petrella, 424 Mich 221, 239 n. 10; 380 NW2d 11 (1985).

The elements of fourth-degree criminal sexual conduct, as applied to this case, are: (1) the defendant intentionally touched the victim's genital or breast area; (2) this touching was done for sexual purposes; (3) force or coercion were used to commit the act. "Force or coercion means that the defendant either used physical force or did something to make [Ms. Schaeffer] reasonably afraid of present or future danger. See Criminal Jury Instructions 2d. 20.13 (Criminal Sexual Conduct in the Fourth Degree); 20.15 (Use of Force or Coercion); (trial court's instructions at JT III 94-95).

In the instant case, though the victim did not recall all the details of the assaults, she did recall sufficient facts to sustain the conviction. This is particularly true when one judges the facts in the light most favorable to the prosecution. See Johnson, *supra*; People v Hampton, 407 Mich 354; 285 NW2d 284 (1979), *cert den* 449 US 885; 101 S Ct 239; 66 L Ed 2d 110 (1980). Ms. Schaeffer, a junior in high school, just met Defendant that evening. He asked her friend to drive him home, and Ms. Schaeffer reasonably assumed they were just dropping him off and did not anticipate spending time there. (JT II 93). It was late and cold on a February evening. (JT II 44-45). Defendant's apartment was not in the best of neighborhoods in Battle Creek, and Ms. Schaeffer did not want to walk the long distance to her home. So, she went upstairs with her friend and Defendant where two older, strange men joined them, adding to Ms. Schaeffer's trepidation since she was outnumbered and could easily have been overpowered by them. As she repeatedly testified, she did not know Defendant or these other two men, all of whom were older than her, and she was fearful they might hurt her.

Defendant "groped" Ms. Schaeffer's breasts, under her shirt, while they were in the bathroom. (JT II 50-51, 153). This fact alone was sufficient to allow the judge to deny Defendant's motion for directed verdict and sufficient for the jury to convict Defendant. Defendant used force to sexually touch Ms. Schaeffer in this manner. When he groped Ms. Schaeffer's breasts, Defendant exhibited force for purposes of fourth-degree criminal sexual conduct. See People v Premo, 213 Mich App 406, 409; 540 NW2d 715 (1995), *lv den* 450 Mich 952; 549 NW2d 560 (1995), *recon den* 549 NW2d 572 (1996) (pinching is an act of physical force under the fourth-degree criminal sexual conduct statute).

Additionally, Ms. Schaeffer tried to back away from Defendant as he did this. They were not kissing or "making out" before Defendant reached out and grabbed Ms. Schaeffer sexually.

Defendant denies that Ms. Schaeffer backed away and indicates they were making out in the bathroom before he grabbed her breasts. However, this was a credibility issue that was left for the jury to determine. On appeal, the court will not interfere with the jury's role in weighing the evidence or making determinations on witness credibility. People v Wolfe, 440 Mich 508, 515; 489 NW2d 748 (1992), *modified in* 441 Mich 1201 (1992).

A second instance of criminal sexual conduct - fourth degree occurred when Defendant told Ms. Schaeffer to get naked and come out in to the kitchen where he poked and prodded her genital area. After her friend left her alone with these men, Defendant asked her to go back to the bathroom. Afraid of what would happen if she said no, she went with Defendant. (JT II 54-55, 109). Defendant told her to come out to the kitchen after she was naked. There, Ms. Schaeffer encountered Defendant and the two other strange men who were standing against the counter, staring and laughing at her. She was told to lean over a chair and bend over. Again, stating she was afraid of getting hurt, she did as she was told. While in this position, Defendant poked at Ms. Schaeffer's genital area. (JT II 57-58). When he heard Ms. Schaeffer's friend coming to the door, Defendant told Ms. Schaeffer to go back to the bathroom and get dressed. (JT II 60).

Defendant coerced Ms. Schaeffer into this prone position where he then used physical force to assault her. On appeal, Defendant argues along the same line as trial counsel did; questioning Ms. Schaeffer's credibility because she did not leave the apartment if she truly was afraid so she must have agreed to Defendant's conduct. While it is difficult not to impose one's own capabilities or where-with-all on to a situation, neither counsel nor the Court should do so for the same basic reasons the appellate court cautions not to judge a trial attorney's trial performance with the benefit of hindsight. See People v Garza, 246 Mich App 251, 255; 631

NW2d 764 (2001), *lv den* 466 Mich 853; 643 NW2d 575 (2002).

In People v Premo, 213 Mich App 406; 540 NW2d 715 (1995), *lv den* 450 Mich 952; 549 NW2d 560 (1995), *recon den* 549 NW2d 572 (1996), the Court discussed the meaning of coercion as contemplated by the fourth-degree criminal sexual conduct statute. "Coercion may be actual, direct, or positive, as well as where physical force is used to compel act against one's will, or implied, legal or constructive, as where one party is constrained by subjugation to other to do what his free will would refuse." Premo, *supra* at 410-411 (quoting Black's Law Dictionary, 5th ed., 234).

People v McGill, 131 Mich App 465; 346 NW2d 572 (1984), is more similar to the case at bar than Defendant imagines. In McGill, the victim was fearful of Defendant because she found herself in a remote location, where she was isolated from help. Although the McGill victim was only 13, Ms. Schaeffer was only 17, and just a junior in high school because she was held back earlier in her education. Regardless of their ages, a woman of any age may be subjected to a forceful or coercive sexual advance; both girls were put in situations where they were fearful of the perpetrator, thought there was no help available, and were subjected to unwanted sexual contact.

The fact is Ms. Schaeffer found herself in a walk-up apartment, late on a winter's night, in an unsafe neighborhood far from her home, with three older, strange men after her friend left her there. Defendant groped her and then told her to get naked and come out to the kitchen where all three men were. Defendant even testified he thought Ms. Schaeffer was timid: "She appeared timid, you know, kind of just being there, but not scared." (JT III 37).

Just looking to Defendant's own testimony, it strains the imagination to believe that Ms. Schaeffer, a timid girl who was "kind of just being there", suddenly decided to strip in front

of three strange men while they looked on and laughed at her and that this was fun for her. It was reasonable for the jury to find Defendant's version of events incredible. There was sufficient evidence that Defendant committed criminal sexual conduct by touching Ms. Schaeffer for sexual gratification through force and coercion. Defendant's request for relief should be denied.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff-Appellee prays that this Honorable Court deny Defendant-Appellant's Application for Leave To Appeal and deny his request for relief.

Respectfully submitted,

JOHN A. HALLACY (P42351)
Calhoun County Prosecuting Attorney

DATED: November 13, 2003.

By: _____
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PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF CALHOUN)

Georgia Cordrey, being first duly sworn, deposes and states:

That she is employed as a legal secretary by the Calhoun County Prosecutor's Office.

That on November 14, 2003, she served a photocopy of Plaintiff-Appellee's Brief in Opposition to Defendant-Appellant's Application for Leave To Appeal and a photocopy of the Proof of Service upon:

MR DOUGLAS W BAKER
ASSISTANT DEFENDER
645 GRISWOLD 3300 PENOBSCOT BLDG
DETROIT MI 48226-4281

by mailing, by first-class mail with postage fully prepaid, a photocopy of each of said documents enclosed in an envelope and addressed to Douglas W. Baker, Assistant Defender, Appellate Defense Attorney, at his address of record.

Further deponent saith not.

Georgia Cordrey
Georgia Cordrey - Deponent

Subscribed and sworn to before me this 14th day of November, 2003.
Shirley E. Lawrence
Notary Public, Calhoun County, Mich.
My commission expires: 11-18-04

THE OFFICE OF
JOHN HALLACY
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November 14, 2003

Clerk of the Supreme Court
925 West Ottawa
PO Box 30052
Lansing, MI 48909

RE: **PEOPLE V TROY ANTHONY BARLOW**
Supreme Court No.
Court of Appeals No. 239038
37th Circuit Court No. 01-2179 FH

Dear Clerk:

Enclosed for filing are an original and seven (7) copies of each of the following documents: Plaintiff-Appellee's Brief in Opposition to Defendant-Appellant's Application for Leave To Appeal and a Proof of Service regarding the mailing of a photocopy of each of said documents under copy of this letter to Douglas W. Baker, Assistant Defender, Attorney for Defendant-Appellant, pursuant to the terms of said Proof of Service.

Your cooperation in this matter is appreciated.

Sincerely,

Georgia G. Cordrey

Georgia G. Cordrey
Appeals Secretary

Enclosures

cc: Douglas W. Baker, Assistant Defender, Attorney for Defendant-Appellant

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