# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ADRIAN DAVID DENAVA,

Defendant-Appellant.

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UNPUBLISHED
February 3, 1998

No. 185460
Macomb Circuit Court
LC No. 94-000269-FH

Before: Griffin, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant was convicted by a jury of child sexually abusive activity, to wit: producing child sexually abusive material, MCL 750.145c(2); MSA 28.342a(2), and was sentenced to five years' probation with the first year to be served in the county jail. He now appeals as of right. We affirm.

First, defendant claims that the evidence presented at trial was insufficient to support his conviction. We disagree. The statute under which defendant was convicted provides in pertinent part:

> A person who persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material . . . is guilty of a felony . . . . [MCL 750.145c(2); MSA 28.342a(2).]

A "child" is defined in the statute as "a person who is less than 18 years of age." MCL 750.145c(1)(a); MSA 28.342a(1)(a). "Child sexually abusive activity" means a child engaging in, among other things, "erotic fondling" or "passive sexual involvement." MCL 750.145c(1)(e) and (h); MSA 28.342a(1)(e) and (h). "Erotic fondling" is defined as follows:

> (c) "Erotic fondling" means touching a person's clothed or unclothed genitals, pubic area, buttocks, or, if the person is female, breasts, or if the person is a child, the developing or undeveloped breast area, for the purpose of real or simulated overt sexual gratification or stimulation of 1 or more of the persons involved. Erotic fondling does not include physical contact, even if affectionate, that is not for the purpose of real

or simulated overt sexual gratification or stimulation of 1 or more of the persons involved. [MCL 750.145c(1)(c); MSA 28.342a(1)(c)]

"Passive sexual involvement" is defined in the statute as follows:

> (g) "Passive sexual involvement" means an act, real or simulated, that exposes another person to or draws another person's attention to an act of . . . erotic fondling . . . because of viewing any of these acts or because of the proximity of the act to that person, for the purpose of real or simulated overt sexual gratification or stimulation of 1 or more of the persons involved. [MCL 750.145c(1)(g); MSA 28.342a(1)(g).]

"Child sexually abusive material" includes, among other things, any photographic image of the child engaging in a listed sexual act such as erotic fondling or passive sexual involvement. MCL 750.145c(1)(i); MSA 28.342a(1)(i). See also *People v Smith*, 205 Mich App 69, 71-72; 517 NW2d 255 (1994). At the time this offense was committed, the applicable statute also indicated that child sexually abusive material "does not include material that has primary literary, artistic, educational, political, or scientific value or that which the average person applying contemporary community standards would find does not appeal to prurient interests." This portion of § (1)(i) was deleted in the 1994 amendments to the statute.

Viewing the evidence presented at trial in a light most favorable to the prosecution, *People v Wolfe*, 440 Mich 508, 516 n 6; 489 NW2d 748 (1992), amended on other grounds 440 Mich 1201 (1992), we believe a rational trier of fact could have found that defendant caused the victim to engage in a child sexually abusive activity in the form of either erotic fondling or passive sexual involvement for the purpose of producing photographs of the victim engaged in erotic fondling.

There is no dispute that the victim, defendant's daughter, was a five-year-old child at the relevant time. There is also no dispute that it was defendant's idea to take the photographs at issue. The victim indicated that defendant told her to remove her clothing before the photographs were taken and that defendant was also naked during the photo session. The photographs were introduced into evidence at trial. In some of the photographs it appears that the victim's bare buttocks are pressed up against defendant's genitalia. The victim testified at trial that, in fact, her buttocks were pressed up against defendant's genitalia while the photographs were shot and that his genitalia felt "hard." Another photograph shows the victim lying naked on top of defendant who is also naked. The victim told police that defendant's private part was hard when she was laying on top of him. Evidence was presented which indicated that defendant told the victim not to smile while the photographs were being taken, that defendant and the victim were wet during the photo session, that defendant was pulling the victim's hair during the photo session, and that after the photographs were taken, defendant told the victim not to tell anyone about them. The victim testified that she did not like having the photographs taken because they were "bad."

It could be inferred from the evidence presented at trial that photographs were made while defendant was pressed against the victim's buttocks for the purpose of sexual gratification or stimulation. Although defendant claims that the photographs were taken in an attempt to launch a

modeling career for himself and the victim, any question of defendant's intent while engaging in child sexually abusive activity is to be left to the jury, and the jury may rely on circumstantial evidence and the reasonable inferences drawn therefrom. *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988). Moreover, the prosecutor produced sufficient evidence to indicate that the photographs lacked *primary* artistic value. Even though there was conflicting evidence on this point, the jury was entitled to believe the testimony of the prosecutor's expert and conclude that the photographs did not have primary artistic value. *Id.*

Next, defendant argues that the child sexually abusive activity statute is unconstitutional in that it is vague and overbroad. This Court has already rejected claims that the statute is vague or overbroad. See *People v Heim*, 206 Mich App 439, 441-442; 522 NW2d 675 (1994); *People v Gezelman (On Rehearing)*, 202 Mich App 172, 174; 507 NW2d 744 (1993). Although the *Heim* and *Gezelman* decisions construed the erotic nudity portion of the statute, we believe that the reasoning set forth in those decisions applies with equal force in this case. Therefore, we reject defendant's claim that the child sexually abusive activity statute is vague or overbroad.

Defendant next argues that because investigators subjected the victim to a suggestive interviewing technique, the trial court should have suppressed her testimony. After reviewing the record, we conclude that there is no evidence that any suggestions were made to the victim or that the interviewers furnished information to her. The fact that almost all of the victim's statements to investigators were confirmed by subsequent interviews with co-defendant Padilla and defendant and by the photographs themselves indicates that the victim's statements were not coached. The investigators taking the victim's statement were trained in interviewing child witnesses. The victim was not interrogated after a long delay. In fact, the interrogation took place two to three weeks after the photographs were shot. Although the interviewers were authority figures, defendant does not claim, and there is no indication in the record, that the victim was intimidated by them. There is also no indication in the record that the interviewers vilified or criticized defendant in front of the victim. Nor does it appear that questions were posed in a leading manner. Further, the victim was not subjected to repeated interviews. She volunteered information at the first interview which was almost wholly subsequently substantiated by co-defendant Padilla, defendant and the photographs themselves. Lastly, there is no indication that the interviewers threatened the victim or cajoled a statement from her. Thus, the record is completely devoid of evidence to substantiate defendant's claim that the victim was subjected to a suggestive interviewing technique. See *Idaho v Wright*, 497 US 805; 110 S Ct 3139; 111 L Ed 2d 638 (1990); *People v Michael M*, 618 NYS2d 171 (1994); *State v Michaels*, 136 NJ 299; 642 A2d 1372, 1377 (1994). Therefore, the trial court did not abuse its discretion in refusing to suppress the victim's testimony on this basis. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). Moreover, because there is such a total lack of evidence to indicate that the victim was subjected to suggestion during the interview, no hearing on this issue was warranted.[1]

Next, defendant claims that the trial court committed error requiring reversal in refusing to allow him to present the surrebuttal testimony of Carl Toth. We disagree. Toth's testimony did not address a theory presented by the prosecutor on rebuttal, but instead directly addressed a claim raised by defendant in his case in chief that the photographs had primary artistic value. Therefore, the trial court

did not abuse its discretion in denying defendant's request to present Toth's testimony on surrebuttal. *People v Figgures,* 451 Mich 390, 399; 547 NW2d 673 (1996). In any event, any error in this regard was harmless in light of the fact that defendant had already presented expert testimony to indicate that the photographs had primary artistic value, an essential issue in the case. Toth's testimony would only have been that the photographs had "some" artistic value, not that they had primary artistic value. *People v Robinson,* 386 Mich 551, 563; 194 NW2d 709 (1972); *People v Ullah,* 216 Mich App 669, 676; 550 NW2d 568 (1996).

Next, contrary to defendant's position, we conclude that the prosecutorial remarks challenged by defendant were not improper and were in no way so prejudicial as to deprive him of a fair trial. *People v Minor,* 213 Mich App 682, 689; 541 NW2d 576 (1995).

Defendant next claims that the trial court erred in refusing to give an instruction that required the jury to unanimously find either erotic fondling or passive sexual involvement because such an instruction was required by *People v Cooks,* 446 Mich 503; 521 NW2d 275 (1994). In *Cooks,* the defendant was charged with one count of first-degree criminal sexual conduct, but testimony elicited from the complainant at trial referred to three incidents of sexual penetration. "Although the jury was instructed in general terms that its verdict must be unanimous, [the] defendant's conviction of second-degree criminal sexual conduct was vacated by the Court of Appeals because the trial court refused to instruct the jurors that unanimous agreement about a specific act of penetration is required for conviction." *Cooks, supra,* 446 Mich 505-506. The Supreme Court, in reversing the Court of Appeals, held that:

> when the state offers evidence of multiple acts by a defendant, each of which would satisfy the actus reus element of a single charged offense, the trial court is required to instruct the jury that it must unanimously agree on the same specific act if the acts are materially distinct or if there is reason to believe the jurors may be confused or disagree about the factual basis of the defendant's guilt. When neither of these factors is present, as in the case at bar, a general instruction to the jury that its verdict must be unanimous does not deprive the defendant of his right to a unanimous verdict. [*Cooks, supra,* 446 Mich 530.]

The instant case is distinguishable from *Cooks*. Here, it was the prosecutor's theory that the same conduct, the acts leading up to and surrounding the production of the photographs, constituted child sexually abusive activity in the form of either erotic fondling or passive sexual involvement. Unlike in the *Cooks* case, here there were no multiple acts alleged. The same conduct, the acts surrounding the production of the photographs, simply satisfied two distinct portions of the child sexually abusive activity statute. Because multiple acts were not alleged, it was unnecessary for the trial court to instruct the jury that it must unanimously agree on the same specific act.[2] *Cooks, supra,* 446 Mich 530. The trial court, therefore, did not err in denying defendant's requested jury instruction. The jury was given the general unanimity instruction. Under the dictates of *Cooks,* that instruction was sufficient.

Lastly, defendant claims that the trial judge abused his discretion in the manner in which he refused the jurors' request for a copy of the transcript of the trial testimony. Although given an opportunity to do so, defendant did not object to the trial judge's response to the jury. Under these

circumstances, this issue is not preserved for appellate review. A party may not harbor error at trial and assert it as a basis for reversal on appeal. *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995).[3]

Affirmed.

/s/ Richard Allen Griffin
/s/ David H. Sawyer
/s/ Peter D. O'Connell

[1] Further, in light of our conclusion that there was a total lack of evidence to indicate that the victim had been coached into giving answers which incriminated defendant, we reject defendant's claim that the prosecuting attorney assigned to this case should have been disqualified so that he could call her as a witness to show that the victim was coached. Additionally, because we have already determined that there was absolutely no evidence that the interviewers used suggestive interviewing techniques or coached the victim, the trial court did not abuse its discretion in refusing to order a psychological evaluation to determine whether the victim was coached. *People v Graham*, 173 Mich App 473, 477; 434 NW2d 165 (1988).

[2] Even if evidence of multiple acts was presented at trial, certainly there is no indication that the acts were materially distinct. It was the taking and development of the photographs as a whole which the prosecutor claimed amounted to the production of child sexually abusive material. Moreover, there is no reason to believe the jurors may have been confused about or disagreed over the factual basis of defendant's guilt. *Cooks, supra*, 446 Mich 530.

[3] We recognize that the Supreme Court in *People v Howe*, 392 Mich 670, 678; 221 NW2d 350 (1974), indicates that counsel's failure to object is "irrelevant." We believe the case at bar is distinguishable, however, because in *Howe* the Court emphasized the fact that the trial judge immediately stated his resolution of the matter when he informed counsel of the jury's request. In the case at bar, there is no indication that the trial judge "bypassed the adversary function of defendant's counsel." *Id.* Rather, it appears that counsel had a full opportunity to give the trial court any input or make any objections desired. Accordingly, we view the lack of an objection to waive the issue.