

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEAN ROBERT HAMBLIN,

Defendant-Appellant.

UNPUBLISHED
October 12, 1999

Nos. 208098;209830
Jackson Circuit Court
LC No. 97-080217

Before: Murphy, P.J., and Gage and Wilder, JJ.

PER CURIAM.

In Docket No. 208098 of this consolidated appeal, defendant appeals as of right his conviction, following a jury trial, of two counts of child sexually abusive activity, MCL 750.145c(2); MSA 28.342a(2). In Docket No. 209830, defendant appeals as of right his subsequent conviction as an habitual offender, second offense, MCL 769.10; MSA 28.1082, entered after a bench trial. The trial court sentenced defendant to eight to twenty years' imprisonment. We affirm.

This case arose after a photo finishing company employee discovered nude photographs of eight and nine year-old brothers. The photographs display the boys' erect penises. Defendant theorized at trial that he was an artist and the photographs constituted legitimate art.

Defendant first contends that the child sexually abusive activity statute's prohibition of "erotic nudity" is unconstitutionally overbroad and vague. The constitutionality of a statute represents a question of law that we review de novo. *People v Jensen (On Remand)*, 231 Mich App 439, 444; 586 NW2d 748 (1998). We have previously rejected this same constitutional challenge. *People v Heim*, 206 Mich App 439; 522 NW2d 675 (1994); *People v Gezelman (On Rehearing)*, 202 Mich App 172; 507 NW2d 744 (1993).¹ Because defendant presents no compelling argument undermining our prior analyses, we rely on these prior decisions in concluding that the statute is neither unconstitutionally vague nor overbroad.

Defendant next argues that defense counsel's failure to impeach the victims' older brother, who testified that defendant had engaged in repeated sexual contact with him, by utilizing the older brother's prior inconsistent statements to police constituted ineffective assistance of counsel. Effective assistance

of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Leonard*, 224 Mich App 569, 592; 569 NW2d 663 (1997). To establish ineffective assistance of counsel, the defendant must show that counsel's performance was deficient under an objective standard of reasonableness and that the representation so prejudiced the defendant that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

A review of the lower court record does not establish that defense counsel's conduct with respect to the victims' older brother was objectively unreasonable. A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999). In questioning the victims' brother, defense counsel apparently intended to place before the jury the fact that the victims' family harbored no ill will toward defendant after the pictures were brought to their attention. In response to defense counsel's questioning, the victims' brother testified that his family moved from Michigan, eventually spending some time in Bowling Green, Kentucky, where defendant was residing. According to the victims' brother, his parents were not angry at defendant, and the victims and the rest of the family in fact resided for some time in a mobile home on defendant's Kentucky property. Defense counsel's efforts to illustrate to the jury the victims' family's lack of animosity toward defendant backfired when the questioning continued.

Defense counsel: And during that period of time, did you and [defendant] have any arguments?

Victims' brother: No, sir.

Defense counsel: [Defendant] touch you improperly?

Victims' brother: Yes, sir, he did.

Defense counsel: I'm sorry, what?

Victims' brother: Yes, sir.

Defense counsel: He did?

Victims' brother: Yes, sir.

Defense counsel: Where, in Kentucky?

Victims' brother: Yes, sir

No prior indication existed that defendant had either inappropriately touched or photographed the victims' brother; as defendant points out in his argument on appeal, the victims' brother denied in two separate statements to police that defendant had ever engaged in such conduct.

Although the prosecutor in cross-examining the victims' brother delved into more detail regarding defendant's inappropriate touchings, we cannot now in hindsight conclude that defense counsel's failure to further attempt to impeach the victim's brother with his prior inconsistent statements qualifies as ineffective assistance. *Rice, supra* at 445. The record reveals that this was dramatic testimony. Although defense counsel's decision did not ultimately result in defendant's acquittal, we will not second guess defense counsel's choice not to delve further into the matter on reexamination, leaving the testimony as it was instead of emphasizing it. *Id.*

Even assuming that defense counsel's handling of the victims' brother's testimony was objectively unreasonable, it did not ultimately prejudice defendant. To find prejudice, a court must conclude that there is "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Pickens, supra* at 312, quoting *Strickland v Washington*, 466 US 668, 695; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Based on our review of the other evidence presented in this case, including and especially the photographs defendant took of the victims, we find no reasonable probability that the jury would have reached a different verdict absent defense counsel's alleged error.

Lastly, defendant maintains that the trial court violated his due process rights in sentencing him as an habitual offender when the prosecutor never filed a supplemental information charging defendant as an habitual offender, as required by MCL 769.13; MSA 28.1085, in effect at the time of the offense. Whether the prosecutor's actions satisfied statutory requirements constitutes a question of law that we review de novo. *People v Connor*, 209 Mich App 419, 423; 531 NW2d 734 (1995).

Due process generally requires reasonable notice of the charge and an opportunity to be heard. *In re Oliver*, 333 US 257, 273; 68 S Ct 499; 92 L Ed 682 (1948); *People v Eason*, 435 Mich 228, 233; 458 NW2d 17 (1990). Defendant acknowledges that the prosecutor included a third habitual offender notice within the information that charged him with the two counts of child sexually abusive activity. Defendant does not argue that he was denied reasonable notice of the habitual offender charge, its bases, or an opportunity to be heard, or that he was otherwise prejudiced in any way. Because it is unnecessary to file a supplemental information where the charged enhancement and the defendant's previous convictions are fully detailed in the original information, *In re Brazel*, 293 Mich 632, 639-641; 292 NW 664 (1940); *People v Morgan*, 85 Mich App 353, 357; 271 NW2d 233 (1978), we conclude that defendant's argument is without merit.

Affirmed.

/s/ William B. Murphy

/s/ Hilda R. Gage

/s/ Kurtis T. Wilder

¹ We note that the Legislature in 1994, subsequent to defendant's actions in the instant case, altered the statutory definition of "erotic nudity." This Court recently upheld the constitutionality of the post-

amendment MCL 750.145c; MSA 28.342a. *People v Riggs*, ___ Mich App ___; ___ NW2d ___
(Docket No. 212440, issued 9/17/99), slip op at 4-6.