STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 12, 2004
v	No. 242766 Wayne Circuit Court
ALAN R. HARRIS, Defendant-Appellant.	LC No. 00-009199

Before: Cavanagh, P.J., and Fitzgerald and Meter, JJ.

PER CURIAM.

Defendant was convicted by a jury of child sexually abusive activity, MCL 750.145c(2), and sentenced to 1-1/2 to twenty years' imprisonment. He appeals as of right. We affirm.

A Wayne County Sheriff's deputy, assigned to the Internet Crime Unit, was patrolling the Internet on May 19, 2000, when he entered a chat room for men looking for younger women or discussions about sexual relations between fathers and daughters. The deputy used the name "Prom Queen 2003" and was kicked out of the chat room because the monitor suspected that the user was too young to be in that room. Shortly thereafter, "Prom Queen 2003" received a message from defendant, who used the name "ARH2." After "Prom Queen 2003" informed defendant that "she" was fourteen years old, defendant and "Prom Queen 2003" continued to engage in a one-on-one online chat, and exchanged pictures.[1] During their conversation, they discussed sexual matters and having sexual relations. They also made plans to meet at a restaurant. When defendant appeared at the restaurant at the prearranged time, he was arrested.

I

Defendant first argues that the evidence was insufficient to convict him of child sexually abusive activity because "Prom Queen 2003" was in reality an adult. We disagree.

An appellate court's review of the sufficiency of the evidence to sustain a conviction should not turn on whether there was any evidence to support the conviction, but whether there was sufficient evidence to justify a rational trier of fact in finding the defendant guilty beyond a

[1] The deputy sent defendant a decoy photograph of a female.

reasonable doubt. *People v Wolfe*, 440 Mich 508, 513; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The evidence must be reviewed in a light most favorable to the prosecution. *Id*. at 514-515.

At the time of the charged offense, MCL 750.145c(2) provided:[2]

> 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, or a person who arranges for, produces, makes, or finances, or a person who attempts or prepares or conspires to arrange for, produce, make, or finance any child sexually abusive activity or child sexually abusive material is guilty of a felony, punishable by imprisonment for not more than 20 years, or a fine of not more than $100,000.00, or both, if that person knows, has reason to know, or should reasonably be expected to know that the child is a child, or that person has not taken reasonable precautions to determine the age of the child.

An argument similar to the argument made in this case was raised and rejected by this Court in *People v Thousand*, 241 Mich App 102; 614 NW2d 674 (2000), aff'd in part, rev'd in part on other grounds 465 Mich 149 (2001). In that case, an adult sheriff's deputy posed as a fourteen-year-old girl named "Bekka" and began chatting with the defendant online. The trial court ruled that because an actual child was not involved, it was legally impossible for the defendant to have committed the charged offenses, i.e., child sexually abusive activity, solicitation to commit third-degree criminal sexual conduct, and attempted distribution of obscene material to a minor. *Id*. at 104-105. On appeal, this Court held that the two later offenses required the involvement of an actual minor, but that child sexually abusive activity did not. *Id.* at 109-115. The Court observed that the child sexually abusive activity statute, MCL 750.145c(2), required only mere preparation to establish a violation, not actual abusive activity. *Thousand, supra* at 114-115. Therefore, for purposes of determining the defendant's guilt, it did not matter that "Bekka" was actually an adult, not a fourteen-year-old girl. *Id*. at 115. We therefore reject defendant's claim that he could not be convicted of child sexually abusive activity because the sheriff's deputy who identified himself as "Prom Queen 2003" was not an actual child.

Defendant further argues that a conviction for child sexually abusive activity was improper because, while the evidence may have shown that he believed that "Prom Queen 2003" was a child, he could not have actually known that the individual was a child. We disagree. The child sexually abusive activity statute provides that a violation may be established where the defendant has reason to know or should reasonably expect that the individual involved was a child. Accordingly, the prosecution was not required to prove that defendant actually knew that "Prom Queen 2003" was a child.

[2] The statute was amended by 2002 PA 629, effective March 31, 2003. Because the charged offense occurred in 2000, the amended statute does not apply to this case.

In this case, "Prom Queen 2003" was identified as being fourteen years old and living with her mother. Defendant urged "Prom Queen 2003" not to tell her mother about what was going on and suggested ways to avoid drawing suspicion when they arranged to meet. Viewed most favorably to the prosecution, the evidence was sufficient to prove that defendant expected to meet an underage girl who lived with her mother. Further, the sexually explicit conversation between defendant and "Prom Queen 2003" was sufficient to prove that defendant intended to meet with "Prom Queen 2003" for the purpose of engaging in proscribed sexual activity. Thus, sufficient evidence was presented to support defendant's conviction.[3]

II

Next, defendant argues that the trial court erroneously instructed the jury on the elements of child sexually abusive activity. Although defense counsel did not object to the trial court's instructions on the record, counsel submitted a proposed instruction on the elements of this offense, which the trial court declined to give. We conclude that this was sufficient to preserve this issue for our review.[4]

With regard to the elements of child sexually abusive activity, the trial court instructed:

> [*THE COURT:*] . . . The Defendant is charged with a crime of child sexually abusive activity. To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt.
>
> First, that the Defendant attempted or prepared for child sexually abusive activity and that term will be defined for you. Second, that the Defendant intended to engage in sexual intercourse, masturbation and/or sexually [sic, sexual] excitement. *Third, that the Defendant believed the intended victim was a child or believed it to be a child.* [Emphasis added.]

Defendant argues that the trial court erroneously defined the third element by reference to what defendant "believed." As discussed in part I, *supra*, MCL 750.145c(2) provides that a person is guilty of child sexually abusive activity "if that person knows, has reason to know, or should reasonably be expected to know that the child is a child, or that person has not taken reasonable precautions to determine the age of the child." Defendant argues that the trial court should have instructed the jury consistent with this language.

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[3] In support of his argument that MCL 750.145c(2) does not extend to offenses involving police decoys, defendant additionally relies on an amendment of MCL 750.145d(1)(a). The amendment makes it clear that an actual child victim is not a necessary element of the crime of soliciting via the Internet conduct proscribed by MCL 750.145c. We do not view the amendment as supportive of an interpretation of MCL 750.145c(2) as precluding a conviction under that statute where an actual child is not involved.

[4] Defendant alternatively asserts that, to the extent this issue is deemed unpreserved, defense counsel was ineffective for failing to object to the trial court's instructions. Because we have concluded that this issue was preserved, we reject defendant's claim that counsel was ineffective is this regard.

To the extent the trial court's instructions did not perfectly comport with MCL 750.145c, reversal is not required. The trial court instructed the jury that it could only convict defendant if it found that he believed the intended victim was a child. The instruction given was actually more favorable to defendant than the instruction defendant contends should have been given. The court's instruction required the jury to find that defendant subjectively believed that the intended victim was a child. In contrast, the language of MCL 750.145c(2) allows a person to be convicted of that offense if he has reason to know or should reasonably have been expected to know that the intended victim is a child. Because the court's substitution of the term "believed" for "knew" did not lessen or change the prosecutor's burden in proving the elements of the offense, reversal is not warranted. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994).

III

Defendant argues that the trial court erroneously admitted evidence of photographs and logs of computer chats unrelated to this offense, contrary to MRE 404(b). The photos and computer chat logs were seized from defendant's computers. We review the trial court's decision for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). An abuse of discretion occurs when the result is so "palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but [the] defiance [of it] . . ." *Id.* (citations omitted). "[A] trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion." *Id.*

MRE 404(b) prohibits evidence of other bad acts by a defendant unless the evidence is offered to prove something other than the defendant's bad character and the probative value of the evidence is not substantially outweighed by its prejudicial effect. MRE 404(b). The logic behind this rule is that a jury may not convict a defendant because he is a bad person. *People v Crawford*, 458 Mich 376, 384; 582 NW2d 785 (1998). Evidence of other crimes, wrongs, or acts is admissible under MRE 404(b) if it is (1) offered for a proper purpose, i.e., not to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice, MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). The trial court, upon request, may provide the jury with a limiting instruction concerning the evidence. *Id*. at 75; see also *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

The principal contested issue at trial concerned defendant's intent. In his police interview, defendant denied arranging to meet with "Prom Queen 2003" for the purpose of sexual activity. Rather, he claimed that it was his intent to talk to her in order to convince her not to meet strangers over the Internet. The prosecutor offered the photos (nude photographs of apparent underage children) and computer chats (of conversations concerning sexual activity with children) that were seized from defendant's computers to prove defendant's intent to meet with "Prom Queen 2003" for the purpose of sexual activity. Thus, the evidence was offered for a proper purpose under MRE 404(b) and was relevant to a contested issue at trial.

The closer question is whether the probative value of the evidence was substantially outweighed by its prejudicial effect. While the evidence was prejudicial to defendant, we cannot say that it was unfairly prejudicial. The evidence disproved defendant's claim that he only had

altruistic intentions when he arranged to meet with "Prom Queen 2003." Defendant's intent was the principal contested issue for the jury to decide. Moreover, the trial court gave a cautionary instruction explaining the limited purpose of the evidence, thereby minimizing the potential for unfair prejudice. The trial court did not abuse its discretion in admitting this evidence.

IV

Defendant additionally argues in a pro se supplemental brief that he should not have been charged with violating MCL 750.145c(2) where there was no evidence that an actual child victim was involved or that he intended to produce sexually explicit visual material. We find no merit to these arguments.

First, as discussed in part I, *supra*, it was not necessary that an actual child victim be involved in order to establish a violation of MCL 750.145c(2). *Thousand, supra*.

Second, we reject defendant's suggestion that MCL 750.145c is limited to conduct involving the production of sexually abusive visual material. Defendant relies on *People v Ward*, 206 Mich App 38, 42-43; 520 NW2d 363 (1994), wherein this Court observed that "[t]he purpose of the statute is to combat the use of children in pornographic movies and photographs, and to prohibit the production and distribution of child pornography." But the Court in *Ward* also observed that the statute "focuses on protecting children from sexual exploitation, assaultive or otherwise." *Id.*

Furthermore, former MCL 750.145c(1)(h) [now MCL 750.145c(1)(k)] defined "[c]hild sexually abusive activity" as "a child engaging in a listed sexual act." Former MCL 750.145c(1)(e) [now MCL 750.145c(1)(g)] defined "[l]isted sexual act" as "sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, or erotic nudity." Amongst the conduct expressly proscribed by MCL 750.145c is "arrang[ing] for . . . any child sexually abusive activity *or* child sexually abusive material" (emphasis added). Thus, contrary to what defendant argues, the statute is not limited to conduct involving the production of sexually abusive visual material.

Defendant also relies on *People v Coleman*, 350 Mich 268, 278-279; 86 NW2d 281 (1957), and *People v Burton*, 252 Mich App 130, 141, 147; 651 NW2d 143 (2002), to argue that a person who merely prepares to commit a crime cannot be convicted. Those decisions are distinguishable because the defendants in those cases were charged with attempts alone. In contrast, MCL 750.145c(2) specifically prohibits a person from arranging for child sexually abusive activity.

For these reasons, we reject this claim of error.

V

Lastly, defendant argues that trial counsel was ineffective. To establish ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). The defendant must overcome the presumption that the challenged action might be

considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, the defendant must show that there was a reasonable probability that, but for his counsel's error, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996). The burden is on the defendant to produce factual support for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

As an initial matter, we reject defendant's suggestion that he did not receive the effective assistance of appellate counsel because his appellate attorney did not independently pursue each of the alleged errors committed by trial counsel. Because defendant has had the opportunity to present each of these arguments in this appeal and because, as discussed below, we conclude that defendant has not demonstrated that trial counsel was ineffective, it necessarily follows that defendant has not established that appellate counsel was ineffective for failing to raise the same issues in the first instance. *People v Hurst*, 205 Mich App 634, 642; 517 NW2d 858 (1994).

Defendant argues that trial counsel was ineffective because he did not have a trial strategy two weeks before trial. Defendant has not provided evidentiary support for this claim. Moreover, even if counsel was not prepared two weeks before trial, this does not establish that he was unprepared at the time of trial.

Defendant also claims that counsel was ineffective for not moving to have Paula Werme, an attorney licensed in New Hampshire but not admitted to practice in Michigan, admitted to appear pro hac vice at trial. The record indicates that Werme was allowed to assist defense counsel at trial, but the trial court understood that she would not be conducting any examination of witnesses or presenting any argument. It is not apparent from the record that Werme ever contemplated playing a more active role at trial. If it was her intent to do so, she failed to make this known to the court during the discussions concerning the scope of her participation at trial. Therefore, the record does not support defendant's claim that trial counsel was ineffective for not moving for Werme's admission to appear on defendant's behalf. Moreover, a defendant is not denied the effective assistance of counsel where he is denied the right to be represented by a second attorney of choice. *People v Fett*, 469 Mich 907; 670 NW2d 224 (2003).

We agree with defendant that trial counsel was deficient to the extent that he failed to provide timely notice of his intent to call Cheryl Fregolle as an expert witness. However, defendant has failed to show that he was prejudiced by this error. In declining to allow defendant to present Fregolle as a witness, the trial court identified additional bases for excluding her testimony, apart from the untimely notice. Specifically, the court concluded that Fregolle was not qualified as an expert in the area for which she was offered, and further, that her proposed testimony was beyond that permitted by an expert. Because the record indicates that the court would have excluded her testimony even if proper notice had been given, defendant has failed to show that he was prejudiced by counsel's error.

Next, defendant asserts that his attorney was not familiar with the Rules of Evidence. Because defendant has not supported this claim with appropriate citations to the record showing that trial court was not familiar with evidentiary rules, we deem this issue waived. "[A] [d]efendant may not leave it to this Court to search for a factual basis to sustain or reject his position." *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001), quoting *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990).

Defendant also argues that his attorney was ineffective because he did not initially know how to access the discovery material that was provided by the prosecutor on computer disks. To the extent defendant characterizes this issue as involving counsel's failure to pursue an appropriate remedy for a discovery violation, we agree that no violation was established, inasmuch as the information was provided to counsel. Although counsel initially had trouble accessing the information from the computer disks, this problem was later resolved and counsel was able to access the information. Defendant has shown that trial counsel was ineffective in this regard.

Relying on an affidavit from Werme, defendant also claims that defense counsel was ineffective because he did not know how to coherently object. In her affidavit, Werme stated that defense counsel did not know how to "think on his feet" or recall proper grounds for objecting to evidence. Werme provided general conclusions about trial counsel's performance, but failed to identify specific instances of deficient performance. Werme's vague and generalized allegations about trial counsel's performance are insufficient to demonstrate that trial counsel's performance fell below an objective standard of reasonableness, or that the outcome of the trial was thereby affected.

Defendant additionally argues that trial counsel should have requested a forensic examination of defendant's computer. Defendant does not explain how a forensic examiner could have assisted the defense. Therefore, we find no merit to this argument.

Defendant also argues that trial counsel failed to conduct sufficient legal research into the history behind MCL 750.145c, on the theory that the statute is intended only to prosecute those involved in the production of child pornography. As previously discussed, MCL 750.145c is not limited to activity only involving the production of pornography. Defendant has failed to show that counsel was ineffective for this reason.

Next, defendant argues that his attorney was ineffective for not immediately withdrawing when defendant asked him to do so. The record does not factually support this claim. After the jury returned its verdict, defendant informed the court that he wanted to terminate his retained attorney and obtain appointed counsel. The court advised defendant that he could discharge his attorney, but until substitute counsel entered an appearance, retained counsel would remain defendant's attorney. There is no basis on this record for concluding that defendant is entitled to relief due to ineffective assistance of counsel.

Defendant next argues that trial counsel was ineffective for not giving the closing statement prepared by Werme. In her affidavit, Werme averred that defense counsel gave a "ridiculous" closing argument, but she did not explain in what way the argument was either ridiculous or erroneous, or how it prejudiced defendant. Similarly, on appeal, defendant does not explain the basis for his claim that defense counsel's closing argument was improper or prejudicial. Therefore, we consider this issue waived. *Traylor, supra*.

Finally, defendant appears to argue that trial counsel was ineffective for permitting him to use a list of questions and answers when testifying. With regard to this matter, defendant has failed to show that counsel's conduct affected the outcome of the case.

In sum, defendant has not shown that he is entitled to appellate relief due to ineffective assistance of counsel.

Affirmed.

/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter