

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

JOSEPH PATRICK RUPP, A MINOR,

Respondent-Appellant.

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UNPUBLISHED

November 22, 2005

No. 254229

Livingston Circuit Court

Juvenile Division

LC No. 03-200017-DL

Before: Donofrio, P.J., and Zahra and Kelly, JJ.

PER CURIAM.

Following a bench trial, respondent was adjudicated guilty of one count of gross indecency between male persons, MCL 750.338. The trial court sentenced respondent to six months' wardship. Respondent appeals as of right. We affirm.

**I. Basic Facts and Procedure**

This case arises out of a summer friendship among four boys, one of whom is respondent; the victim and his older brother; and a friend of the older brother. At the time of the offense at issue, the victim was nine and met respondent, then twelve, when respondent and his family moved into the victim's neighborhood in June, 2002. Respondent, the victim, the victim's older brother, and the other boy from the same neighborhood played together at various times throughout the summer. Play was sometimes outside and sometimes inside the boys' homes. Games included tag, hide and seek and video games.

According to testimony from the victim, his brother and the other boy, respondent at various times asked the victim or his older brother to perform sexual acts with respondent or his sister. All requests were declined. The record indicates that no unclothed bodily contact occurred; however, the victim testified that respondent at one time exposed his genitals to the victim and that respondent also pulled the victim's pants down, exposing him.

The circumstances giving rise to the offense here occurred indoors, when the boys were playing video games. The court found that respondent laid himself on top of the victim as the victim was on his stomach, pressed his groin against the victim's rear end, and tried to engage in simulated intercourse. The trial court concluded that respondent had solicited oral sex from the victim on at least one prior occasion and, based on evidence of this prior solicitation as well as

the testimony of the victim and of the neighborhood boy who witnessed the incident, determined that respondent's act of simulated intercourse constituted gross indecency, in violation of MCL 750.338. This appeal followed.

## II. Analysis

### A. Sufficiency of the Evidence

Respondent first asserts that the trial court's finding that respondent committed an act of gross indecency is based on insufficient evidence.<sup>1</sup> We disagree.

This Court reviews a claim of insufficient evidence in a criminal trial de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2003). This Court must view the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could find beyond a reasonable doubt that the essential elements of the crime were established. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005).

MCL 750.338 states in pertinent part: "Any male person who, in public or in private, commits or is a party to the commission of or procures or attempts to procure the commission by any male person of any act of gross indecency with another male person shall be guilty of a felony . . . ." Michigan statutory law does not define "gross indecency."

This Court has expressly declined to craft an all-encompassing definition of gross indecency, choosing instead to decide if an act is grossly indecent on a case-by-case basis. *People v Jones*, 222 Mich App 595, 602; 563 NW2d 719 (1997). The "operative principle" to determine if an act is grossly indecent is "that the activity be sexual in nature." *People v Drake*, 246 Mich App 637, 642; 633 NW2d 469 (2001). "[P]eople can derive sexual gratification from a variety of acts," and we consider the totality of the circumstances to determine if the motivation for behavior is sufficiently sexual to constitute grossly indecent behavior. *Id.* "Procuring or attempting to procure an act of gross indecency with a person under the age of consent" can constitute gross indecency regardless of whether the act occurred in public. *People v Lino*, 447 Mich 567, 578; 527 NW2d 434 (1994).

The victim and an eyewitness both testified that respondent, while lying on top of the victim with his penis against the victim's buttocks, began "humping" the victim. The victim and another witness also testified that before this incident, respondent had asked them to perform oral sex on him. The trial court apparently gave credence to that testimony and concluded that the request for oral sex did not, by itself, amount to gross indecency, but together with the other testimony, it gave a sexual context to the subsequent activity indicating that it was not mere roughhousing or wrestling. The trial court's findings, based on the totality of the circumstances, support its determination that respondent committed an act of gross indecency.

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<sup>1</sup> In his brief on appeal, respondent framed the issue in terms of the verdict being against the great weight of the evidence. In the body of his brief, though, he argued that the evidence was insufficient to support the adjudication. Thus, we will address the issue in that context.

However, respondent argues that the inconsistency of the prosecution witnesses' testimony precludes a finding of guilt. We note that it is not uncommon for young witnesses to provide inconsistent testimony, and we defer to the trial court's judgments regarding the credibility of the witnesses. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

Respondent also notes that he presented two expert witnesses who testified that respondent did not meet the psychological criteria of a child sex offender but the prosecution presented none. However, our Supreme Court has stated that the credibility and competence of expert witnesses should be judged from the same standpoint as any other witness, and a party need not call expert witnesses of its own to contradict the testimony of expert witnesses called by the other party. *People v Vanderhoof*, 71 Mich 158, 173; 39 NW 28 (1888). Furthermore, a trial judge sitting as a finder of fact is "not bound to accept the opinion of the defendant's psychiatrist when inconsistent with other facts and proofs." *People v DuBois*, 9 Mich App 30, 33-34; 155 NW2d 692 (1967). Respondent's expert witnesses merely testified that based on their psychological evaluations of respondent, they found it unlikely that he would have committed an act of gross indecency. The trial court was not required to give more credibility to this testimony than the testimony of other witnesses.

#### B. Constitutionality of MCL 750.388

Respondent next asserts that the gross indecency statute, MCL 750.338, is unconstitutionally vague and overbroad. Respondent failed to challenge the constitutionality of the statute before the trial court, and therefore did not properly preserve the issue for appeal. *People v Sands*, 261 Mich App 158, 160; 680 NW2d 500 (2004). "Unpreserved constitutional issues are reviewed for plain error that affect[s] a [respondent's] substantive rights." *Id.*

"Statutes are presumed to be constitutional unless their unconstitutionality is clearly apparent." *People v. MacLeod*, 254 Mich App 222, 226; 656 NW2d 844 (2002). The party challenging the constitutionality of the statute bears the burden of overcoming this presumption and proving the statute unconstitutional. *Id.*

"In order to pass constitutional muster, a penal statute must define the criminal offense 'with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Lino, supra* at 575, citing *Kolender v Lawson*, 461 US 352, 357; 103 S Ct 1855, 1858; 75 L Ed 2d 903 (1983). A penal statute is unconstitutionally vague if it (1) fails to provide fair notice of what conduct is prohibited, (2) encourages arbitrary and discriminatory enforcement, or (3) is overbroad and infringes on First Amendment freedoms. *Id.* at 575-576.

Because respondent does not claim infringement of his First Amendment rights, his vagueness challenges are examined in light of the facts of this particular case. *Id.* at 575. When determining if a statute is unconstitutionally vague, we consider if the statute's meaning can be fairly ascertained by reference to judicial interpretations, common law, dictionaries, treatises, and commonly accepted meanings of words. *People v Beam*, 244 Mich App 103, 105; 624 NW2d 764 (2001).

Michigan case law indicates that gross indecency occurs even in the absence of oral sex, masturbation, or some other overt sexual act, if the totality of the circumstances indicates the

accused acted so as to derive sexual gratification from the act in question. *Drake, supra* at 642. Furthermore, procuring or attempting to procure such an act with a minor constitutes gross indecency, even if the act did not occur in public. *Lino, supra* at 578. This case law provided respondent with sufficient notice that “humping” the victim, in light of his earlier solicitations of oral sex from the victim, was a sufficient act of sexual gratification with a minor so as to constitute gross indecency. The statute is not unconstitutionally vague in its application under these circumstances.

Likewise, respondent’s claim that the gross indecency statute is unconstitutionally overbroad must be examined in light of the facts of this particular case. *Lueth, supra* at 676-677. Respondent asserts his actions constituted mere wrestling and horseplay, which is not grossly indecent. However, the trial court found that respondent acted in a sexual context, and was not engaging in mere horseplay. Consequently, the trial court’s application of the gross indecency statute in this situation is not unconstitutionally overbroad.

Affirmed.

/s/ Pat M. Donofrio  
/s/ Brian K. Zahra  
/s/ Kirsten Frank Kelly