STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 23, 2007
v	No. 264889 Oakland Circuit Court
MICHAEL LEE PHILLIPS, Defendant-Appellant.	LC No. 2005-201614-FH

Before: Saad, P.J., and Cavanagh and Schuette, JJ.

PER CURIAM.

A jury convicted defendant of child sexually abusive activity, MCL 750.145c(2), and using the Internet to commit child sexually abusive activity, MCL 750.145d(2)(f). The trial court sentenced defendant to concurrent prison terms of 50 months to 20 years for each conviction. We affirm.

I. Child Sexually Abusive Activity Statute

Defendant contends that he should not have been convicted under MCL 750.145c because it does not apply to his charged conduct.[1] This Court's decision in *People v Adkins*, 272 Mich App 37; 724 NW2d 710 (2006), is dispositive of this issue. In *Adkins*, the defendant initiated a sexually explicit Internet dialogue with an undercover police officer posing as a 14-year-old boy. *Id*. at 38. The defendant also arranged to meet the "boy" to engage in sexual activity. *Id*. This Court ruled that § 145c clearly and unambiguously imposes criminal liability on three distinct groups of persons, and that specifically held that included within the third group is "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." *Id.* at 40-41. This Court held that the defendant's conduct fell squarely within the definition of the third group of persons on whom § 145c(2) imposes criminal liability. *Id.* at 42.

[1] Defendant concedes that he did not preserve this issue by raising it before the trial court. In light of this failure, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Here, defendant initiated a sexually explicit Internet dialogue with an undercover police officer posing as a 14-year old girl, and arranged to meet the perceived 14-year-old girl for the purpose of engaging in sexual contact. As in *Adkins*, § 145c(2) clearly applies to defendant's conduct.[2]

II. Entrapment

Defendant further claims that the police entrapped him. Defendant did not raise this issue before trial and never requested an evidentiary hearing. Accordingly, we consider this issue unpreserved and limit our review to plain error affecting defendant's substantial rights. *Carines*, *supra*.

As our Supreme Court explained in *People v Johnson*, 466 Mich 491, 498; 647 NW2d 480 (2002), entrapment occurs "if either (1) the police engaged in impermissible conduct that would induce a law-abiding person to commit a crime in similar circumstances, or (2) the police engaged in conduct so reprehensible that it cannot be tolerated." Importantly, however, if "law enforcement officials present nothing more than an opportunity to commit the crime, entrapment does not exist." *Id*. Defendant asserts that the police department was involved in a "fishing expedition" and chose him "at random" as a target. See *People v Juillet*, 439 Mich 34, 57; 475 NW2d 786 (1991).

The record reflects that the undercover officer did not randomly target chatroom participants. Rather, the officer waited for someone to initiate contact with him. Although the officer identified himself as a 14-year-old girl, he did not initiate any of the discussions about sexual activity or "offer" to engage in sexual activity. Instead, it was defendant who initiated the sexually explicit conversation, directed the conversation, inquired about the subject's sexual experience and preferences, and ultimately suggested a meeting for the purpose of sexual activity. The officer merely responded to defendant's requests and invitations. See *People v Williams*, 196 Mich App 656; 493 NW2d 507 (1992). Under these circumstances, the officer's conduct cannot be classified as a "fishing expedition".[3]

III. Sentencing

[2] We also reject defendant's argument that the prosecutor abused his charging discretion because other statutes also apply to defendant's conduct. The prosecutor has broad charging discretion and may bring any charges supported by the evidence. *People v Nichols*, 262 Mich App 408, 415; 686 NW2d 502 (2004). Even if applicable, a prosecutor is not required to charge a lesser offense. *Id*. Here, the evidence supported charging defendant under MCL 750.145c and the prosecutor clearly did not abuse his charging discretion.

[3] Defendant also claims that the police lacked procedural guidelines for conducting Internet sting operations and that this led to his entrapment. Defendant fails to cite any authority to support this argument and, therefore, this issue is not properly presented to this Court. *People v Harlan*, 258 Mich App 137, 140; 669 NW2d 872 (2003). Further, defendant's claim is meritless because the record shows that the officer did nothing more than present defendant with the opportunity to commit the crime and this does not amount to entrapment.

Defendant maintains that the trial court incorrectly scored offense variable 10 at ten points.[4] We disagree. A sentencing court has discretion to determine the number of points to be scored provided there is evidence on the record which adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Ten points under OV 10 is appropriate if "[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." MCL 777.40(1)(b). Here, evidence established that defendant exploited the victim's perceived youth. See *People v Johnson*, 474 Mich 96, 103; 712 NW2d 703 (2006). Further, the fact that defendant was actually communicating with an undercover police officer, and not a 14-year-old girl, is not a basis for concluding that OV 10 is inapplicable.[5]

IV. Ineffective Assistance of Counsel

Defendant further asserts that his lawyer was ineffective for failing to request a continuance in order to produce his expert witness, Matthew Rosenberg.[6] The record reflects that counsel made several requests for additional time to locate and produce Rosenberg for trial. The trial judge accommodated those requests, but warned counsel that he intended to proceed with trial if Rosenberg did not appear. Thereafter, Rosenberg failed to appear for trial. Defendant has not demonstrated a reasonable probability that the trial court would have granted an additional request for a continuance. Further, Rosenberg had no personal knowledge of the circumstances of the offense and defendant presented several witnesses who testified about defendant's good character. Defendant has not overcome the presumption that counsel

[4] The record does not support the prosecutor's assertion that OV 10 was scored at 15 points.

[5] We also reject defendant's claim that he must be resentenced because a jury did not decide the factual findings to support his sentence, contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Moreover, our Supreme Court has held that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Accordingly, defendant's argument is without merit.

[6] Because defendant did not raise this issue in a motion for a new trial or request for an evidentiary hearing under *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), this Court's review is limited to mistakes apparent from the record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). To establish ineffective assistance of counsel, defendant must satisfy the two-part test articulated in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). First, defendant must show that counsel's performance was deficient, which requires a showing that counsel made an error so serious that counsel was not performing as the "counsel" guaranteed by the Sixth Amendment. *Id.* at 600. In so doing, defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* Second, defendant must show that the deficient performance prejudiced his defense. *Id.* To demonstrate prejudice, defendant must show a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.*

reasonably decided not to delay the jury's deliberations so that the testimony of the favorable witnesses would remain fresh in their minds.

Defendant also claims that defense counsel was ineffective for failing to offer Rosenberg's report at sentencing. Though the report states that defendant is not likely to engage in future sex crimes and that defendant does not show signs of pedophilia, it also states that he shows signs of some form of fetishism and that he is sexually compulsive. At sentencing, defense counsel chose to submit a sentencing memorandum and numerous letters of support rather than the report. Defendant has not overcome the presumption that counsel reasonably chose to avoid offering any evidence of sexual deviancy, and instead sought to portray defendant in a more positive light through the letters of support.

Finally, defendant argues that defense counsel was ineffective for failing to exclude evidence of a prior accusation of sexual misconduct. During his direct examination, defendant testified that he was never accused of improper conduct toward any of his students. During defendant's cross-examination, the prosecutor introduced evidence that a student accused defendant of inappropriate physical contact. The evidence was clearly related to defendant's direct examination testimony and defendant has not shown that it was otherwise inadmissible. Further, it is not apparent from the record that defense counsel was aware of the prior incident. Accordingly, defendant has failed to sustain his claim of ineffective assistance of counsel.

Affirmed.

/s/ Henry William Saad
/s/ Mark J. Cavanagh
/s/ Bill Schuette