STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 4, 2007
v	No. 269836 Washtenaw Circuit Court
MELVIN WILLIS, Defendant-Appellant.	LC No. 04-002107-FH

Before: Donofrio, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant was convicted by jury of two counts of accosting a child for an immoral purpose, MCL 750.145a, for having asked two young sisters with whom he was acquainted to "suck his nipples." Defendant was sentenced to serve 1 to 4 years in prison and appeals as of right. Because we conclude that MCL 750.145a is not unconstitutionally vague, that defendant's rights were adequately protected by the instructions given the jury, that defendant was not denied his right to present a defense, and that the trial court's reasons for departing from the intermediate sanction recommended by the sentencing guidelines were both substantial and compelling, we affirm.

I. Constitutional Challenge of MCL 750.145a

Defendant first claims that his conviction is invalid because the statute under which he was convicted is unconstitutionally vague and overbroad. The constitutionality of a statute is a question of law that this Court reviews de novo. *People v Piper*, 223 Mich App 642, 645; 567 NW2d 483 (1997). Statutes are presumed constitutional and "[a] party challenging the constitutionality of a statute has the burden of proving its unconstitutionality." *People v Sands*, 261 Mich App 158, 160-161, 680 NW2d 500 (2004).

A statute may be challenged for vagueness on the grounds that it does not provide fair notice of the conduct proscribed, or that it is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether the law has been violated. *People v Hill*, 269 Mich App 505, 524; 715 NW2d 301 (2006). The constitutionality of a statute may also be challenged on the ground that it is overbroad and impinges on First Amendment freedoms. See *People v Hayes*, 421 Mich 271, 283; 364 NW2d 635 (1984); *Hill*, *supra*. Here, defendant challenges the constitutionality of MCL 750.145a on each of these three grounds.

A. Vagueness

In arguing that MCL 750.145a is unconstitutionally vague, defendant asserts that certain phrases in the statute could be ascribed different meanings depending upon the moral beliefs of the trier of fact. To evaluate this challenge, we must examine the entire text of the statute and give the words of the statute their ordinary meanings. *Hill*, *supra* at 524. MCL 750.145a provides, in pertinent part, that

> [a] person who accosts, entices, or solicits a child less than 16 years of age, regardless of whether the person knows the individual is a child or knows the actual age of the child, or an individual whom he or she believes is a child less than 16 years of age with the intent to induce or force that child or individual to commit an immoral act, to submit to an act of sexual intercourse or an act of gross indecency, or to any other act of depravity or delinquency, or who encourages a child less than 16 years of age, regardless of whether the person knows the individual is a child or knows the actual age of the child, or an individual whom he or she believes is a child less than 16 years of age to engage in any of those acts is guilty of a felony . . . .

Defendant argues that terms such as "immoral act" and "depravity" violate due process and are therefore unconstitutionally vague because they could be defined to include legal acts by persons of certain religious or ethical beliefs. Thus, defendant argues, the statute does not provide fair notice of the conduct proscribed and provides unfettered discretion to the trier of fact in determining whether the statute has been violated. On the facts of this case, we do not agree. See *People v Lino*, 447 Mich 567, 575; 527 NW2d 434 (1994) (vagueness challenges that do not involve First Amendment freedoms must be examined in light of the facts of the particular case).

1. Fair Notice

To afford constitutionally fair and proper notice, a statute must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or required. *Sands*, *supra* at 161; see also *People v Noble*, 238 Mich App 647, 652; 608 NW2d 123 (1999). Thus, a statute cannot use terms that require persons of common intelligence to guess at its meaning and differ as to its application. *Sands*, *supra*. However, to pass constitutional muster a statute need not define an offense with mathematical certainty. See *Grievance Administrator v Fieger*, 476 Mich 231, 255; 719 NW2d 123 (2006). Rather, a statute is sufficiently definite if its meaning can be fairly ascertained by reference to judicial interpretations, the common law, agency rules, dictionaries, treatises, or the commonly accepted meanings of the words. *Hill*, *supra* at 525.

When read in the context of the statute, the challenged terms provide a person of ordinary intelligence a reasonable opportunity to know what is prohibited. *Sands*, *supra* at 161. Defendant argues, *inter alia*, that because drinking certain beverages, for instance, is an "immoral act" for a person of the Mormon faith because it is contrary to church doctrine, a statute that includes this term would encompass this legal act. However, as the prosecutor notes, defendant's reading of the statute fails to consider the challenged terms in context. Sandwiched between the phrases cited by defendant is an express prohibition against accosting, enticing, or soliciting a child "to submit to an act of sexual intercourse or an act of gross indecency." MCL 750.145a. Read in this context, the terms cited by defendant are fairly ascertainable by persons

of ordinary intelligence as reasonably encompassing conduct of a sexual nature between an adult and a child under the age of 16. Indeed, in *Lino, supra* at 576, our Supreme Court, without explicitly defining "gross indecency," stated that the defendant in that case could not "plausibly claim that he could not have known his conduct was prohibited." Although the defendant in *Lino* solicited minors for purposes of engaging in conduct designed to sexually arouse his codefendant, see *id.* at 573-574, and defendant in the instant case argues on appeal that his request was not necessarily sexual in nature, the circumstances testified to by complainants suggest otherwise. According to the complainant's testimony, defendant pulled the girls onto his bed with him while raising his shirt and asking them to suck his nipples. We conclude that defendant should have known that the act he requested of the children could reasonably be construed as immoral, or an act of gross indecency or depravity, as in *Lino*. Accordingly, the statute did not fail to provide him fair notice that the charged conduct was prohibited.

2. Unfettered Discretion

Nor did the statute give the jurors in this matter unstructured and unlimited discretion to determine whether it was violated. To adequately limit the discretion of the trier of fact in its application, a statute must provide standards for enforcing and administering the law sufficient to ensure that enforcement is not arbitrary or discriminatory. See *People v Boomer*, 250 Mich App 534, 539-540, 655 NW2d 255 (2002), quoting *Grayned v City of Rockford*, 408 US 104, 108-109; 92 S Ct 2294; 33 L Ed 2d 222 (1972). As already discussed, it is apparent that the statute limits its application to sexually oriented conduct with minors. Moreover, it is well settled that the inclusion of a scienter requirement serves to prevent arbitrary, and thus unconstitutional, enforcement or application of a statute. See *People v Tombs*, 260 Mich App 201, 220, 679 NW2d 77 (2003). MCL 750.145a plainly provides for such limits by requiring that the trier of fact find an "intent to induce or force" the child or individual to engage in the prohibited conduct.

3. Overbreadth

Defendant also argues that the statute is facially overbroad because it could proscribe conduct constitutionally protected under the First Amendment. However, defendant does not cite any instances of this or any similar statute being applied to the conduct set forth in his hypothetical example. The mere fact that one can conceive of an impermissible application of a statute is not sufficient to render it overbroad; rather, "'there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds.'" *People v Rogers*, 249 Mich App 77, 96; 641 NW2d 595 (2001), quoting *Los Angeles City Council v Taxpayers for Vincent*, 466 US 789, 801; 104 S Ct 2118; 80 L.Ed.2d 772 (1984). The constitutional framework underlying defendant's challenge simply is not sufficiently developed to persuade us that there is a realistic danger that the statute is unconstitutionally overbroad.

II. Jury Instructions

Defendant next argues that his due process rights were violated because the trial court included terms in the jury instructions which were vague, had no common meaning, and which encompassed conduct not at issue in the case.

This Court reviews a claim of instructional error de novo. *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002). In doing so, we examine the instructions given the jury in their entirety to determine whether the trial court committed error requiring reversal. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). Even if somewhat imperfect, instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights. *Id*.

In challenging the instructions given by the trial court, defendant first argues that the inclusion of the terms "accosted, enticed, solicited, or encouraged," and "gross indecency or an act of depravity or delinquency," as elements of the offense was error, as these terms were not defined by the instruction and have no common meaning. However, "accosted," "enticed," "solicited," and "encouraged" are part of common English. These words are not so unusual as to require special explanation by the trial court, and defendant has not proven otherwise. Thus, this claim lacks merit. See *People v Martin*, 271 Mich App 280, 352; 721 NW2d 815 (2006) (no error warranting reversal in trial court's failure to define a term "generally familiar to lay persons" and "susceptible of ordinary comprehension"). Further, as already discussed, whatever meaning might be attributed to the term "depravity," or for that matter "gross indecency" or "delinquency," the terms reasonably encompassed the acts in which defendant requested the complainants to participate. Accordingly, we conclude that the instructions fairly presented the issues for trial and sufficiently protected defendant's rights under the facts of this case.

Defendant additionally argues that the trial court's instruction was inappropriate insofar as it referenced "gross indecency," because this term refers to a sexual act in a public place. However, in *Lino*, *supra* at 578, our Supreme Court indicated that an act of gross indecency may be found "*regardless of whether the conduct is performed in public*." (Emphasis added). Based on the foregoing precedent, it was not in error for the trial court to include the term "gross indecency" in its instructions to the jury.

III. Right to Present a Defense

Defendant next contends that he was deprived of his constitutional right to present a defense when the trial court refused to reopen the proofs to allow the jury to hear testimony from a witness who had been subpoenaed to appear during the trial, but arrived after the close of proofs and closing arguments. Defense counsel stated that the witness, Brenda Roszkowski, had originally been subpoenaed to impeach the complainants' testimony at the preliminary examination that they lived in the same apartment complex as defendant and prosecution witness Nsombi Clairborne. The day after she was scheduled to appear, however, counsel was apparently made aware that Roszkowski had "newly discovered" information that would contradict a portion of Clairborne's testimony. Roszkowski claimed that she had a conversation with Clairborne soon after the incident in which Clairborne commented that "she thought it was funny that both of the young ladies had 20 dollars" when they were at her apartment. Clairborne testified at trial that she did not see money on the person of either of the complainants while they were in her apartment.

After hearing Roszkowski's testimony and questioning her under oath, the trial court denied defendant's request to admit her testimony before the jury, stating that the evidence was not newly discovered, and thus untimely. "More importantly," the trial court concluded, defendant sought merely to impeach a prosecution witness on a collateral matter.

Defendant argues on appeal that the issue of whether the girls stole his money was not a collateral matter but rather the key to his defense, which he was denied the opportunity to present by the trial court's ruling on Roszkowski's testimony. Generally, this Court reviews a trial court's decision on a motion to reopen proofs for an abuse of discretion. *People v Collier*, 168 Mich App 687, 694; 425 NW2d 118 (1988). However, we review de novo the question whether a defendant was denied his constitutional right to present a defense. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

Defendant argues that his defense centered on his claim that the complainants fabricated the story about defendant's illegal conduct to detract attention from their theft. Therefore, defendant argues, it was essential that Roszkowski be permitted to testify in order to corroborate his story and contradict Clairborne's testimony that she did not see the girls with money. Our review of the record, however, shows that one of the complainants plainly testified at trial that defendant gave both her and her sister twenty dollars. Accordingly, the jury possessed all the information necessary to evaluate defendant's claim that the complainant's stole money from his apartment, as it was essentially undisputed that the complainants had the money. Defendant was not, therefore, denied his constitutional right to present a defense as a result of the trial court's decision not to reopen the proofs.

IV. Sentencing Guidelines Departure

Finally, defendant claims that the trial court erred in departing from the sentencing guidelines by sentencing defendant to prison after scoring him within an intermediate sanction cell. We disagree.

The guidelines recommended a minimum term range of zero to 17 months. Pursuant to MCL 769.34(4)(a), because the upper limit of the recommended minimum sentence range was 18 months or less, the trial court was required to impose a jail term not to exceed 12 months unless it stated on the record that a substantial and compelling reason existed to commit defendant to the Department of Corrections. The trial court stated that it departed from the guidelines for the following reasons:

> [T]he guidelines do not sufficiently take into account the depravity of the defendant's conduct. [T]his is not simply a- - a solicitation from afar. This was a confrontation in a bedroom where the defendant . . . lifted up his shirt and then asked these young girls to suck on his nipples. Also I take into account the fact that . . . the defendant subsequently, and very publicly, blamed the children and accused them of a crime [in] what I find was an effort to cover his own . . . misconduct.

Our Supreme Court has stated that "substantial and compelling reasons" justifying departure from the sentencing guidelines are those that "keenly or irresistibly grab our attention, and we should recognize them as being of considerable worth in deciding the length of a sentence." *People v Babcock*, 469 Mich 247, 257; 666 NW2d 231 (2003) (citations and quotation marks omitted). The Court has additionally noted that "the Legislature intended substantial and compelling reasons to exist only in exceptional cases." *Id.* Further, a court may not depart from the guidelines based "on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds

from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b). The determination that substantial and compelling factors merited departure from the guidelines is reviewed for an abuse of discretion. *Babcock, supra* at 264-265.

Defendant first argues that the trial court erroneously departed based on its perception that the guidelines did not take the depravity of defendant's conduct into account because "depravity" is an element of the offense and had thus presumably already been fully considered by the guidelines. We conclude, however, that the trial court reasonably viewed the depravity of defendant's conduct as inadequately accounted for by the guidelines. MCL 769.34(3)(b). While the general depravity of soliciting a child for an immoral purpose may have been accounted for by the guidelines, the additional degeneracy of doing so in the confines of one's bedroom while exposing one's nipples and asking the children involved to "suck" them was not. This is a factor that keenly grabs our attention.

The trial court's second reason for departing from the sentence was that defendant "very publicly" accused the complainants of a crime in an effort to cover his misconduct. This also keenly grabs our attention. "Blaming the victim" is not an element of MCL 750.145a and is not contemplated by the sentencing guidelines for this offense. Falsely accusing the young victims of committing theft and fabricating the charged crimes is reasonably viewed as egregious conduct.

Accordingly, defendant has not established an abuse of discretion in the trial court's upward departure from the sentencing guidelines.

Affirmed.

/s/ Pat M. Donofrio
/s/ Joel P. Hoekstra
/s/ Jane E. Markey