STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 22, 2008
v	No. 276765 Wayne Circuit Court
ALEJANDRO GUTIERREZ, Defendant-Appellant.	LC No. 06-011354

Before: Servitto, P.J., and Cavanagh and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction of aggravated indecent exposure, MCL 750.335a(2)(b). The trial court sentenced defendant to two years' probation, 11 months of which is to be served in jail. The trial court also indicated that defendant was required to register as a sex offender, pursuant to the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq.*, "IF REQUIRED BY LAW[.]" We affirm defendant's conviction and remand for amendment of the judgment of sentence.

I. Basic Facts

Defendant was seen walking in an alley toward a childcare center where 20 children ranging from one to five years of age were playing in the yard. Two employees of the center saw defendant approach the fence, pull down his pants, expose his penis, and masturbate. Following a bench trial, the trial court found that defendant had pulled his pants down near the fence of the childcare center, faced the children who were in the yard, exposed his genitals, and masturbated before them.

II. Analysis

Defendant argues that the trial court erred in requiring him to register as a sex offender. We disagree. We review de novo issues regarding the construction and application of the SORA. *People v Golba*, 273 Mich App 603, 605; 729 NW2d 916 (2007).

When construing a statute, our primary goal is "'to discern and give effect to the Legislature's intent.'" *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006), quoting *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999). We examine the plain language of

the statute, and where it is unambiguous, "we presume that the Legislature intended the meaning clearly expressed" and enforce the statute as written. *Id.*

An individual who is convicted of a "listed offense" after October 1, 1995, is required to register as a sex offender. MCL 28.723(1)(a); *Golba, supra* at 605. A violation of MCL 750.335a(2)(b) is a listed offense if the offender was previously convicted of violating that section. MCL 28.722(e)(*iii*). The parties agree that defendant's conviction for aggravated indecent exposure does not constitute a listed offense under this subsection because he has no prior convictions under MCL 750.335a. However, the catchall provision in MCL 28.722(e)(*xi*) provides that "[a]ny other violation of a law of this state or a local ordinance of a municipality that by its nature constitutes a sexual offense against an individual who is less than 18 years of age" is a listed offense. MCL 28.722(e)(*xi*); *Golba, supra* at 605. This Court has explained:

> the plain language of the SORA catchall provision at issue requires the simultaneous existence of three conditions before a person must register as a sex offender: (1) the defendant must have been convicted of a state-law violation or a municipal-ordinance violation, (2) the violation must, "by its nature," constitute a "sexual offense," and (3) the victim of the violation must be under 18 years of age. [*Id.* at 607.]

Regarding the first element, defendant does not dispute that he was convicted of the state-law violation of aggravated indecent exposure, MCL 750.335a(2)(b). This Court has held that the second element of the catchall provision requires '"that conduct violating a state criminal law or municipal ordinance [have] inherent qualities pertaining to or involving sex. . . ."' *Golba, supra* at 608, quoting *People v Meyers*, 250 Mich App 637, 647-648; 649 NW2d 123 (2002). We must therefore assess the conduct underlying defendant's conviction. *Golba, supra* at 609-610. MCL 750.335a(2)(b) prohibits one from fondling his genitals, pubic area, or buttocks, while knowingly making an open or indecent exposure of his person. *Random House Webster's College Dictionary* (1997) defines the term "fondle" as "to molest sexually by touching, stroking, etc." Aggravated indecent exposure therefore includes criminal conduct that is by definition sexual in nature, and the conduct at issue included defendant masturbating in front of 20 children. Accordingly, defendant's conduct was by its nature a sexual offense, thereby satisfying the second element of MCL 28.722(e)(*xi*). See *Golba, supra* at 607. With respect to the third element of the catchall provision, the children to whom defendant exposed himself were all substantially below 18 years old. *Id.* at 605. Because defendant's violation satisfies the elements of MCL 28.722(e)(*xi*), we conclude that it is a listed offense requiring registration as a sex offender pursuant to MCL 28.723(1)(a).

Defendant maintains that, if the Legislature had intended that the first offense of aggravated indecent exposure require registration where the victim was less than 18 years old, it would have listed MCL 750.335a(2)(b) in MCL 28.722(e)(*iii*) with the phrase, "if the victim is an individual less than 18 years of age," as it did in many other listed offenses. See, e.g., MCL 28.722(e)(*ii*), (e)(*v*), (e)(*vi*), and (e)(*viii*). We are not persuaded. The Legislature's failure to add such a phrase to MCL 28.722(e)(*iii*) merely demonstrates its intention to require registration for subsequent aggravated indecent exposure convictions under MCL 750.335a, regardless of the victim's age.

Defendant also maintains that the Legislature did not intend the catchall provision of MCL 28.722(e)(*xi*) to apply to first offenses of aggravated indecent exposure because it limited MCL 28.722(e)(*iii*) to violations where the defendant has previously been convicted under MCL 750.335a. The Legislature is presumed to enact laws in harmony with existing laws. *People v Rahilly*, 247 Mich App 108, 112; 635 NW2d 227 (2001). "The omission of a provision from one part of a statute that is included in another part of a statute must be construed as intentional." *Id.* Therefore, if two statutes "relate to the same subject or share a common purpose", they are "in pari materia and must be interpreted together." *Id.* When subsection (e)(*iii*) was added in 2005, the catchall provision of subsection (e)(*xi*) was already in existence as subsection (e)(*x*). See 2005 PA 301. Therefore, the Legislature's omission of a first aggravated indecent exposure offense against victims less than 18 years old from subsection (e)(*iii*) must be construed as intentional. *Rahilly*, *supra* at 112. Further, such an addition to MCL 28.722(e)(*iii*) would have constituted surplusage, which is a construction we must avoid. *Id.*

Defendant also contends that the trial court failed to comply with MCL 769.1(13), which provides:

> If the defendant is sentenced for an offense other than a listed offense as defined in section 2(d)(*i*) to (*ix*) and (*xi*) to (*xiii*) of the [SORA], the court shall determine if the offense is a violation of a law of this state or a local ordinance of a municipality of this state that by its nature constitutes a sexual offense against an individual who is less than 18 years of age. If so, the conviction is for a listed offense as defined in section 2(d)(*x*) of the sex offenders registration act, 1994 PA 295, MCL 28.722, and the court shall include the basis for that determination on the record and include the determination in the judgment of sentence.[1] [See also *Golba*, *supra* at 606.]

Defendant was sentenced for an offense pursuant to the catchall provision of MCL 28.722(e)(*xi*). Therefore, the trial court was required to make a determination regarding whether the offense was a violation that, by its nature, constitutes a sexual offense against a victim less than 18 years of age and include the basis for that determination on the record. The trial court found that defendant pulled down his pants, intentionally faced the children, made an open and indecent exposure of his genitals, and masturbated in front of the children. The trial court did not specifically state that defendant's offense constituted a sexual offense against a victim less than 18 years of age or state that these findings were the basis for that determination. However, its findings were sufficient to serve as that basis, and, as we have determined, *supra*, the offense of aggravated indecent exposure necessarily includes conduct that is sexual in nature.

At sentencing, the trial court stated:

[1] MCL 769.1(13) references MCL 28.722(d)(*x*), the catchall provision, which was renumbered as MCL 28.722(e)(*xi*) by amendments in 2002 and 2005. *People v Golba*, 273 Mich App 603, 605-606 nn 1-2; 729 NW2d 916 (2007).

> If it is determined by law that you are required to register under the Michigan Sex Offender [sic] Registration Act, you'll have to do that. Based on the representation that has been made to me, it falls outside that requirement. So if the law does not require it, then obviously you shouldn't do that.

Similarly, the judgment of sentence provides, "IF REQUIRED BY LAW MUST REGISTER AS SEX OFFENDER." The trial court failed to include a determination regarding whether defendant's conviction was a violation that, by its nature, constitutes a sexual offense against a victim less than 18 years of age. We therefore remand for amendment of the judgment of sentence to reflect that defendant's conviction is a violation of a state law that constitutes a sexual offense against individuals less than 18 years of age.

We affirm defendant's conviction and remand for amendment of the judgment of sentence. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly