

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN LYSOGORSKI,

Defendant-Appellant.

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UNPUBLISHED

May 12, 2009

No. 283930

Wayne Circuit Court

LC No. 07-011901-FH

Before: Borrello, P.J., and Murphy and M.J. Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of using the computer or the Internet to communicate with another to commit a crime, MCL 750.145d(2)(f), and child sexually abusive activity, MCL 750.145c(2). He was sentenced to concurrent prison terms of 3 to 20 years for each conviction. He appeals as of right. For the reasons set forth in this opinion, we affirm defendant's convictions, but vacate his sentences and remand for resentencing. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Over a period of six to seven hours for five- to six-days, defendant exchanged electronic messages with a police officer using the screen names "lando-c" and "punk boi xp." The contact was first initiated by defendant through a social website, the rules of which required that members must be 18 years or older to join. The profile for lando-c, created a year before the offense, stated his age as 18 years. In the exchanges with defendant, however, lando-c repeatedly stated that he was 14 years old. The parties discussed engaging in sexual activity, including a proposed exchange of oral and anal sex for a cell phone. On June 20, 2007, the parties arranged a meeting at a pharmacy to engage in sexual activity. The police apprehended defendant at the site. At the time of his arrest, defendant stated that he did not understand why he was being arrested because he was there to shop. Later, however, he conversed with the police for over two hours. The conversation was recorded, but not admitted as evidence.

Defendant testified that because the user agreement for the website indicated that no one under age 18 could participate, he assumed that everyone with whom he chatted had to be 18 years or older. He thought that lando-c lied when he said his age was 14. He also thought that the photograph associated with the profile depicted someone over the age of 18. He testified that during his interview with the police, he told them 71 times of his belief that lando-c was at least 18 years old.

On appeal, defendant contends that the trial court abused its discretion by denying his request to admit the entire recording of his conversation with the police. He contends that he was prejudiced because the jury was not allowed to hear the “best evidence of his demeanor” as he “tearfully and repeatedly” stated his belief that Lando-C was at least 18 years old. Defendant relies on MRE 106, which states:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

This Court reviews preserved claims of evidentiary error for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

The rule allows an “adverse party” to introduce a part of a writing or recorded statement after a party has introduced a writing or record statement or part thereof. Therefore, we focus on the extent to which the prosecutor, not defense counsel, introduced a recorded statement or part thereof. Defendant refers to the prosecutor; (1) eliciting the interviewing officer’s testimony that, during the interview, defendant did not deny that he was the person who engaged in the chats; (2) asking defendant on cross-examination, “You told Corporal Liczbinski during your interview with him that you would never do anything with someone under 16; correct?”<sup>1</sup>; and (3) asking defendant if he told Liczbinski that he “consciously ignored” the fact that Lando-C said he was 14 years old.<sup>2</sup>

Defendant assumes that by eliciting information about the interview, the prosecutor introduced the recorded statement for purposes of MRE 106, but he does not offer any authority in support of this position. The cases he cites predate the adoption of the rules of evidence and therefore do not address MRE 106. Even if we were to agree with defendant on this point, he has not shown that “fairness” required that “any other part” of the recorded statement be considered, much less that the entire recorded statement should have been admitted. In this case, the prosecutor did not introduce excerpts of the recorded statement that were misleading and required fuller examination of the context in which statements were made. Cf. *People v Badour*, 167 Mich App 186, 190-191; 421 NW2d 624 (1988), rev’d on other grounds sub nom *People v Beckley*, 434 Mich 691; 456 NW2d 391 (1990). Under the circumstances, the trial court’s refusal to admit the recording of defendant’s interview in its entirety did not violate MRE 106.

Defendant also argues that the trial court erred in scoring 15 points for offense variable (OV) 10, MCL 777.40(1)(a), of the sentencing guidelines. Fifteen points are to be scored for OV 10 when a defendant exploits a vulnerable victim and predatory conduct is involved. MCL 777.40(1)(b). “Predatory conduct” is defined as “preoffense conduct directed at a victim for the primary purpose of victimization.” MCL 777.40(3)(a). Defendant argues that he did not engage

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<sup>1</sup> Defendant did not answer this question.

<sup>2</sup> Defendant testified that he could not recall the exact words of the conversation.

in predatory conduct, inasmuch as there was no evidence that he engaged in any “preoffense conduct” at all.

*People v Russell*, 281 Mich App 610; 760 NW2d 841 (2008), lv pending, is controlling on this issue and supports defendant’s position that OV 10 was improperly scored. As in *Russell*, defendant’s communications with lando-c on the Internet constituted the offenses themselves; there was no preoffense conduct before the communications that would constitute predatory conduct. *Id.* at 615-616 n 2. Furthermore, regardless of whether lando-c seemed to be a “vulnerable” victim, he was actually an adult law enforcement officer. *Id.* at 616. Therefore, the trial court erred by scoring 15 points for OV 10. The scoring error reduces defendant’s total offense variable score from 15 to 0 points, thereby placing him in OV level I (0 to 9 points) instead of OV level II (10 to 24 points), and reducing his guidelines range from 30 to 50 months to 10 to 24 months. Because the scoring error affects the appropriate guidelines range, defendant is entitled to resentencing. *People v Francisco*, 474 Mich 82, 92; 711 NW2d 44 (2006).

We affirm defendant’s convictions, but vacate his sentences and remand for resentencing. We do not retain jurisdiction.

/s/ Stephen L. Borrello

/s/ William B. Murphy

/s/ Michael J. Kelly