

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD MICHAEL KOWALSKI,

Defendant-Appellant.

UNPUBLISHED

April 27, 2010

No. 288855

Lenawee Circuit Court

LC No. 08-013500-FH

Before: M. J. KELLY, P.J., and TALBOT and WILDER, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for accosting a child for immoral purposes, MCL 750.145a, and using a computer to accost a child for immoral purposes, MCL 750.145d(1)(a). The trial court sentenced defendant to six months' jail and five years' probation for the accosting a child for immoral purposes conviction and five years' probation for the using a computer to accost a child for immoral purposes conviction. On appeal, we conclude that the trial court erred when it failed to properly instruct the jury on the elements of accosting a child for immoral purposes. For that reason, we reverse and remand for a new trial.

Defendant argues that the jury instructions did not apprise the jury of the actus reus element of the crime of accosting a child for immoral purposes. Defendant contends that the trial court's instruction failed to inform the jury that the prosecution needed to prove that defendant had to accost, entice, solicit, or encourage a child or a person defendant believed to be a child to participate in an immoral act.

We review claims of instructional error de novo. *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). Generally, jury instructions must fairly present the issues to be tried and sufficiently protect a defendant's rights. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). The instructions must include all elements of the charged offenses, and must not exclude relevant issues, defenses, and theories if supported by the evidence. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). "If the jury instructions, taken as a whole, sufficiently protect a defendant's rights, reversal is not required." *People v Huffman*, 266 Mich App 354, 371-372; 702 NW2d 621 (2005).

In order to be found guilty of accosting a child for immoral purposes, it must be proved that the defendant acted in the manner prohibited under MCL 750.145a (the actus reus) and did so with the requisite intent (the mens rea). Thus, in this case, the prosecutor had to prove that

defendant took actions that amounted to accosting, enticing, soliciting or encouraging a child 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, and that he did so with the intent to induce, force, or encourage the child to commit, engage in, or submit to the those acts. *Id.*

After the close of proofs, the trial court instructed the jury as follows on the elements of accosting a minor for an immoral purpose:

The defendant is charged with accosting a child for immoral purposes. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt. First, that the defendant believed he was engaging with a child under the age of 16 years. Second, that the defendant has then the intent to induce that person who he believed to be under 16 years to commit an immoral act or an act of sexual intercourse or an act of gross indecency or other acts of depravity or delinquency or did encourage said person to engage in one of those acts.

The trial court's instructions omitted any mention that the jury must find that defendant actually accosted, enticed, or solicited the victim to engage in the prohibited acts. This omission is significant and was not remedied anywhere else in the instructions. Without having instructed the jury on the nature of the acts prohibited under MCL 750.145a—that is, the actus reus of the offense—the trial court's instructions did not fairly present the issues to be tried. Because the instructional error involves a missing element, the error is subject to nonstructural constitutional harmless error analysis. *People v Duncan*, 462 Mich 47, 54; 610 NW2d 551 (2000). Therefore, the error will warrant relief unless it was harmless beyond a reasonable doubt. *People v Anderson (After Remand)*, 446 Mich 392, 404-406; 521 NW2d 538 (1994).

The prosecutor clearly presented sufficient evidence from which a jury could conclude that defendant engaged in the conduct proscribed under the statute and that he did so with the requisite bad intent. However, we cannot conclude that the instructional error was harmless beyond a reasonable doubt. Without having been instructed on the actus reus element, there is no way to tell whether the jury would have reached the same verdict. Indeed, as instructed, the jury might have concluded that it could find defendant guilty of accosting a child for an immoral purpose if he had the requisite intent to induce the person he thought was a child to commit a prohibited act even though the defendant's communications to the child did not themselves amount to accosting, enticing, soliciting, or encouraging the prohibited acts. Consequently, we conclude that defendant is entitled to a new trial on the charge of accosting a minor for an immoral purpose. Further, because defendant's conviction for using a computer to accost a child for immoral purposes required the jury to first find defendant guilty of accosting a child for immoral purposes, defendant is also entitled to a new trial on that charge.

Because we conclude that the instructional error warrants reversal, we decline to address defendant's remaining claims of error.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder