S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 18, 2010
v	No. 286551 Macomb Circuit Court
RICHARD BROWER, Defendant-Appellant.	LC No. 2007-002377-FH

Before: SHAPIRO, P.J., and JANSEN and BECKERING, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of accosting or enticing a child for immoral purposes, MCL 750.145a, and creating or manufacturing child sexually abusive material, MCL 750.145c(2). Defendant was sentenced to prison terms of 2 to 4 years for the accosting-or-enticing conviction and 2 ½ to 20 years for the creating-or-manufacturing conviction. We affirm.

Defendant first argues that there was no evidence that he accosted, enticed, or solicited the victim "to participate in the child sexually abusive activity."[1] We disagree.

In considering a challenge to the sufficiency of the evidence, we must "view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). "This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of the witnesses. Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime." *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007) (citation omitted).

[1] It should be noted that, as is clear from the plain wording of MCL 750.145a, defendant appears to misconstrue the statute. MCL 750.145a requires accosting, enticing, soliciting, or encouragement in reference to "an immoral act," "an act of sexual intercourse," "an act of gross indecency," or "any other act of depravity or delinquency . . . ." In contrast, the creation of "child sexually abusive activity" is addressed by MCL 750.145c.

As noted by the prosecutor on appeal, there are few published cases interpreting the elements of MCL 750.145a. When construing a statute, our primary goal is to ascertain and give effect to the intent of the Legislature. If the statutory language is clear and unambiguous, we assume that the Legislature intended its plain meaning and the statute is enforced as written. *People v Wilkens*, 267 Mich App 728, 736; 705 NW2d 728 (2005). When construing a statute, this Court may consult a dictionary to discern the meaning of undefined terms. *People v Caban*, 275 Mich App 419, 422; 738 NW2d 297 (2007).

According to *Random House Webster's College Dictionary* (2001), the verb "accost" means to "confront boldly," or "to approach with a greeting, question, or remark." The verb "entice" means to "lead on by exciting hope or desire; allure; tempt; inveigle." The verb "solicit" means to "to try to obtain by earnest plea or application" and "to seek to influence or incite to action, esp. unlawful or wrong action." Finally, the verb "encourage," means to "to stimulate by guidance, approval, etc." or "to promote, foster." With respect to the statutory phrase "an immoral act," *Random House Webster's College Dictionary* (2001) defines "immoral" as "violating moral principles" or "licentious; lascivious." "Licentious," in turn, is defined variously as "sexually unrestrained" and "going beyond customary or proper bounds or limits." "Lascivious" means "inclined to lustfulness; wanton; lewd," "arousing sexual desire," or "indicting sexual interest or expressive of lust or lewdness."

In this case, the victim, age 12 at the time of the incident, admitted that she had expressed an interest in modeling to her mother, Elizabeth Brower, and to defendant, her stepfather. She testified that at some point, defendant approached her while she was in her bedroom and asked her if she wanted to be a model, to which she answered, "yes." Defendant first suggested poses and took the victim's photograph while she was wearing a leotard. Defendant then requested that she remove the leotard, and later her bra, and continued taking pictures of her. Photographs taken by defendant, which are contained in the lower court record, show the victim wearing only her panties, posing with a stuffed animal covering her breasts. In another photo taken by defendant, the victim is again depicted wearing only her panties, posing on her hands and knees, and looking over her shoulder toward the camera. One image created by defendant, known as 1-N, depicted the victim's face on a nude, prepubescent body in a similar position.

Defendant admitted that he researched modeling sites and asked the victim if she "still want[ed] to do this modeling and do these photos," although in another version of events, he claimed that the victim asked him when they were going to take the photos and he then agreed to take them. Defendant further admitted that he "suggested a couple of the poses" and asked the victim to take off her leotard in an effort to be "competitive" with the other girls he had seen on the New Faces modeling website. Although defendant denied that the victim posed without her bra and the victim's testimony on this issue became somewhat confused during cross-examination, Elizabeth's statement to police indicated that defendant had asked the victim to remove her bra. Indeed, defendant admits that no bra is visible in the photos.

We have no difficulty concluding that there was sufficient evidence to prove that defendant "accost[ed]," "entice[d]," "solicit[ed]," or "encourage[d]" the victim "to commit an immoral act" or "to submit to . . . an act of gross indecency, or to any other act of depravity or delinquency" within the meaning of MCL 750.145a. The evidence established that defendant did not only "accost" the victim by approaching her and asking whether she wanted him to take the pictures of her, but that he also enticed the victim (led her on by exciting hope or desire in

her modeling career), solicited the victim (sought to influence her participation in the action of posing topless), and encouraged the victim (guided her) to remove her clothing and pose in the photographs at issue. See *Random House Webster's College Dictionary* (2001). Furthermore, given that the victim was only 12 years old and defendant's own stepdaughter, defendant's act of encouraging the victim to pose in the topless photographs went "beyond customary or proper bounds or limits," and it can hardly be disputed that the photographs were "expressive of lust or lewdness." See *id*. Despite defendant's protestations to the contrary, we hold that there was sufficient evidence for a reasonable jury to find beyond a reasonable doubt that defendant solicited, accosted, enticed, or encouraged the victim for immoral purposes. See 750.145a.

Defendant argues that if we uphold his conviction of accosting-or-enticing in this case, we will essentially be permitting the prosecution in every case involving a completed child sexually abusive activity to bring two separate charges—one under MCL 750.145a, and another under MCL 750.145c(2). Although he does not clearly explain why, defendant asserts that this would somehow be improper. However, contrary to defendant's assertions, it is *not* the case that a defendant may be charged under both MCL 750.145a and MCL 750.145c(2) in *every* case involving a completed child sexually abusive activity. MCL 750.145a requires the prosecution to prove accosting, soliciting, enticing, or encouragement in conjunction with an immoral act. In contrast, a conviction under MCL 750.145c(2) does not necessarily require proof of accosting, enticing, or encouragement. Instead, MCL 750.145c(2) requires only that the prosecution prove, under certain circumstances, that a defendant has "arrange[d] for, produce[d], ma[de], or finance[d], or . . . attempt[ed] or prepare[d] or conspire[d] to arrange for, produce, make, or finance any child sexually abusive activity or child sexually abusive material . . . ." Thus, a defendant may be properly convicted under MCL 750.145c(2) if he has produced, made, financed, or arranged for child sexually abusive material, even if he has never actually accosted, induced, enticed, or encouraged a minor to participate in the creation of the material.

It is true, as defendant acknowledges, that the two statutes share many similarities and that in some cases a defendant's conduct might violate both MCL 750.145a and MCL 750.145c(2). But defendant does not explain why he believes it would be improper to charge and convict such a defendant separately under both statutes. We note that charging and convicting such a defendant under both MCL 750.145a and MCL 750.145c(2) would not violate double jeopardy principles because each offense contains an element that the other does not. *People v Smith*, 478 Mich 292, 302; 733 NW2d 351 (2007); see also *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932). Nor do we perceive any other reason why a defendant, in the appropriate case and under the requisite circumstances, could not lawfully be charged and convicted under both MCL 750.145a and MCL 750.145c(2). We will not search for authority to sustain or reject defendant's poorly developed position on this issue. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001).[2]

[2] We note that defendant has not challenged his conviction of creating or manufacturing child sexually abusive material under MCL 750.145c(2). Accordingly, the question whether there was sufficient evidence to support defendant's conviction under MCL 750.145c(2) is not before us, and we do not consider it.

Defendant next argues on appeal that certain of the trial court's evidentiary rulings violated his right to present a defense. We disagree.

We review de novo whether a defendant has been denied the constitutional right to present a defense. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). It is axiomatic that "[a] criminal defendant has a state and federal constitutional right to present a defense." *Id*. at 326; see also US Const, Ams VI & XIV; Const 1963, art 1, § 13. However, the defendant "must still comply with 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984), quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). State rules of evidence and procedure do not abridge an accused's right to present a defense so long as they are not arbitrary or disproportionate to the purposes they are designed to serve. *People v Unger*, 278 Mich App 210, 250; 749 NW2d 272 (2008). Regarding specific evidentiary decisions, "[t]he decision whether to admit evidence is within a trial court's discretion," and will be reversed on appeal "only where there has been an abuse of discretion." *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

Defendant argues that the trial court erred by refusing to admit photos of other girls from the New Faces website. The issue first arose during Elizabeth's testimony. Elizabeth had seen the website and defense counsel sought to ask her if the other photos on the site were comparable to the photos taken of the victim (except 1-N). Counsel argued that because the prosecution claimed that the photographs were "lewd and lascivious . . . they have to be compared to something else." The trial court disagreed, stating, "we have no testimony regarding the type of site, no proof or testimony regarding the ages of the people whose pictures are depicted on there, we don't know who posted those pictures, and we don't know the circumstances under which those photos of other individuals were posted." Defense counsel again raised the issue during defendant's testimony, asking the court to admit exhibits showing photographs from the various websites that defendant investigated in order to get his ideas. The court similarly ruled that the photographs from the websites were not admissible, using the same reasoning. Defendant now contends that the photographs from the websites were admissible as demonstrative evidence. He asserts that, as a result of the trial court's decision to disallow their admission, the jury could not decide for itself whether the photographs defendant took were lewd and lascivious. We are not persuaded by defendant's argument.

"Demonstrative evidence" is "[p]hysical evidence that one can see and inspect (such as a model or photograph) and that, while of probative value and usu[ally] offered to clarify testimony, does not play a direct part in the incident in question." Black's Law Dictionary (7th ed). "Demonstrative evidence is admissible when it aids the fact-finder in reaching a conclusion on a matter that is material to the case." *People v Bulmer*, 256 Mich App 33, 35; 662 NW2d 117 (2003). "As with all evidence, to be admissible . . . demonstrative evidence . . . must satisfy traditional requirements for relevance and probative value in light of policy considerations for advancing the administration of justice. Beyond general principles of admissibility, the case law of this state has established no specific criteria for reviewing the propriety of a trial court's decision to admit demonstrative evidence." *People v Castillo*, 230 Mich App 442, 444; 584 NW2d 606 (1998) (citations omitted); see also MRE 401-403.

The issue, then, was whether the photos and printouts from the New Faces website were relevant and probative. MRE 401 provides that "relevant evidence" is "evidence having any

tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Generally, all relevant evidence is admissible, unless otherwise provided by law, and evidence that is not relevant is not admissible. MRE 402; *People v Fletcher*, 260 Mich App 531, 553; 679 NW2d 127 (2004). Pursuant to MRE 403, however, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

At issue in this case, as discussed previously, was whether defendant enticed or encouraged the victim, his 12-year-old stepdaughter, to pose topless in sexually suggestive photographs. We agree with the trial court that regardless of whether defendant saw other photos allegedly depicting topless 12-year-olds on the New Faces website or any other website, he had no proof (1) that the girls were indeed 12 years old, or (2) that they were not also lewd and lascivious photos taken for immoral purposes. We also note that the photo the victim ultimately uploaded to the site was a shot of her face, and not one of the topless, sexually suggestive photos that had been taken by defendant. We conclude that the photographic evidence from the New Faces website, consisting of photographs of other individuals not at issue here, was neither relevant nor probative of a material issue in the case.

Furthermore, even if it was somehow erroneous to exclude these photographs, reversal would not be warranted because both Elizabeth and defendant testified that they had looked at the websites and that the photographs taken of the victim showed the same types of clothing and poses as the website photographs. Indeed, defendant claimed that he photographed the victim in such a way that she would be "competitive" with the other girls depicted on the New Faces website. The jury was thus fully able to consider defendant's argument that his actions were consistent with what he had seen on the New Faces website and other similar websites. We perceive no error requiring reversal in this regard.

Defendant further argues that he was denied his right to present a defense when the trial court ruled that the prosecution would be entitled to cross-examine defense expert, Dr. Patrick Ryan, on the subject of defendant's prior conviction of furnishing obscenity to minors. Counsel informed the court that the defense expert, Dr. Ryan, was going to testify that

> he saw [defendant], that he examined him pursuant to the court order [entered in a related child-protective proceeding]. [Defendant] was examined for that purpose, and [Dr. Ryan] found Mr. Brower not to be a pederast or have any of those psychiatrically observable and psychologically observable characteristics. He wasn't a child molester, had none of those characteristic[s].

Thus, according to defense counsel, Dr. Ryan was prepared to testify that defendant was neither a pederast *nor a child molester*.

Prior to trial, the trial court ruled that the prosecution could raise defendant's previous conviction of furnishing obscenity to minors during the cross-examination of Dr. Ryan, specifically for the purpose of impeaching Dr. Ryan's conclusions that defendant was neither a pederast nor a child molester. Because of this ruling, the defense chose not to introduce the testimony of Dr. Ryan at trial.

Defendant now contends that his prior conviction of furnishing obscenity to minors merely "involved children finding old copies of *Playboy* magazine that defendant had thrown out." He therefore suggests that evidence of the prior conviction "would not [have] undermine[d] Dr. Ryan's opinion that defendant was not a pederast" since "it is generally known that *Playboy* does not contain images of anal intercourse between a man and a boy."[3] The problem with defendant's argument is that he focuses solely on Dr. Ryan's proffered testimony that he was not a pederast, entirely ignoring Dr. Ryan's additional opinion that defendant "had none of th[e] characteristic[s]" of a "child molester." It may be true, as defendant has argued, that his previous conviction of furnishing heterosexual obscenity to minors "would not [have] undermine[d] Dr. Ryan's opinion that defendant was not a pederast." But evidence of defendant's previous conviction may well have undermined Dr. Ryan's additional opinion that defendant "had none of th[e] characteristic[s]" of a "child molester."

"MRE 404(a)(1) 'allows a criminal defendant an absolute right to introduce evidence of his character to prove that he could not have committed the crime.'" *People v George*, 213 Mich App 632, 634; 540 NW2d 487 (1995), quoting *People v Whitfield*, 425 Mich 116, 130; 388 NW2d 206 (1986). However, "[o]nce a defendant has placed his character in issue, it is proper for the prosecution to introduce evidence that the defendant's character is not as impeccable as is claimed." *People v Leonard*, 224 Mich App 569, 594; 569 NW2d 663 (1997). Moreover, it is well settled that during the cross-examination of a character witness, "inquiry is allowable into reports of relevant specific instances of conduct." MRE 405(a). For these reasons, the trial court did not err by concluding that, if Dr. Ryan testified, the prosecution would be entitled to cross-examine him concerning defendant's prior conviction of furnishing obscene material to minors. By putting Dr. Ryan on the stand, defendant would have placed his character in issue, and would have effectively opened the door to such questioning by the prosecution on cross-examination. See *Leonard*, 224 Mich App at 594.

In addition, we note that if Dr. Ryan had testified, he would have done so as an expert witness. "Under MRE 703, the 'facts or data in the particular case upon which an expert bases an opinion or inference' must be in evidence," *People v Yost*, 278 Mich App 341, 362; 749 NW2d 753 (2008), and "[t]he expert may . . . be required to disclose the[se] underlying facts or data on cross-examination," MRE 705. If Dr. Ryan had testified that, in his expert opinion, defendant was not a child molester, the prosecution would have been entitled to ask on cross-examination whether Dr. Ryan's opinion took into account the fact that defendant had previously furnished obscene material to minors. See *id.*

The trial court correctly ruled that, if Dr. Ryan were to testify that defendant was not a child molester, the prosecution would be entitled to cross-examine Dr. Ryan concerning defendant's previous conviction of furnishing obscenity to minors. Although the court's evidentiary ruling on this issue apparently convinced the defense not to call Dr. Ryan as a witness, it did not deprive defendant of his constitutional right to present a defense.

[3] A pederast is one who engages in pederasty, i.e., "[a]nal intercourse between a man and a boy." Black's Law Dictionary (7th ed).

Defendant also argues that the trial court erred by denying his motion for a mistrial because the prosecution's failure to turn over potentially exculpatory evidence was prejudicial to his right to a fair trial. We disagree. We review for an abuse of discretion a trial court's decision on a motion for a mistrial. *People v Bauder*, 269 Mich App 174, 194; 712 NW2d 506 (2005).

At a pretrial conference on November 26, 2007, defense counsel requested that the police give him a "mirror image" of a hard drive that was seized pursuant to a search warrant. The prosecution explained that the police had only a forensic copy of the hard drive, but that it would check into the matter and then, if possible, and on the condition that defendant submit a hard drive of greater or equal size, furnish a forensic copy of the hard drive to the defense. Defense counsel raised the issue once more at a subsequent pretrial conference on March 3, 2008, again agreeing to provide the prosecutor with a blank hard drive.

At the close of testimony on the fourth day of trial, defense counsel informed the trial court that he had never received "a complete copy of the mirror image of the hard drive that was on Elizabeth Brower's computer. What I got was an encoded version from the authorities, which I cannot read except at the cost of purchasing a $3,500 program . . . ." As a result, counsel asserted that he had not been able to look at the information contained on the hard drive.

Counsel contended that the defense had been prejudiced because, had he been able to look at Elizabeth's hard drive, "I would have found the image of a nude body that fit exactly on that face of [the victim], and that would have shown that she was never nude and that the image was constructed out of an adult . . . ." Counsel further claimed that the police had "illegally wiped" the hard drive, and that the prosecution should accordingly "shoulder that responsibility." Defendant moved for a mistrial on these grounds. The prosecution then explained its position, pointing out that defense counsel had been invited to the office to view whatever computer files he wished to see. The prosecution noted that defense counsel had rejected this offer. On these facts, the trial court remarked that defense counsel should have asked for an adjournment when the problem first arose, and furthermore that defendant was not prejudiced because he still had time to look at the contents of the hard drive.

On appeal, defendant raises the same arguments with respect to this issue as he did in his motion for a mistrial. Like the trial court, we find his position to be without merit. It is true the prosecution is obligated to turn over to the defense any exculpatory evidence in its possession. MCR 6.201(B)(1); *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). But defendant, himself, testified that he could not remember where he had gotten the image that he used to create 1-N. A detective searched Elizabeth's hard drive for the photograph but was not able to find it. And there was no other evidence that such an image was, in fact, ever on Elizabeth's hard drive in the first instance. There is simply no basis to conclude that the prosecution failed to turn over actual exculpatory evidence that it had in its possession.

This case would seem to fall under *Arizona v Youngblood*, 488 US 51; 109 S Ct 333; 102 L Ed 2d 281 (1988), rather than *Brady*. In *Youngblood*, 488 US at 58, the United States Supreme Court observed that the Due Process Clause does not impose on the government "an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution." Instead, the *Youngblood* Court held that the failure to preserve evidence that may be *potentially* useful or *potentially* exculpatory does not amount to a denial of due process absent a showing of bad faith on the part of the

government. *Id*. Here, defendant has shown no bad faith on the part of the police or the prosecution. Indeed, the record establishes that the prosecution offered to turn over a forensic copy of the hard drive and to allow defense counsel to view whichever computer files he wanted to see. Furthermore, based on the trial court's own remarks, it is clear that defense counsel could have requested an adjournment to have more time to obtain the desired computer files. Nevertheless, he did not do so. We perceive no error in the trial court's denial of defendant's motion for a mistrial. Defendant's right to a fair trial was not prejudiced.

Defendant next argues that the trial court erred by refusing the jury's request for a further clarification of the first and third elements of accosting or enticing a child for immoral purposes under MCL 750.145a. The record indicates that after receiving the jury's request, the trial court told the jurors to use their common sense. The record further indicates that defense counsel did not object to the court's remarks. Because defendant's attorney agreed to this course of action, and had no objection to the original instruction itself, defendant has waived appellate review of this issue. *People v Chapo*, 283 Mich App 360, 372-373; 770 NW2d 68 (2009); *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

Lastly, defendant argues that the cumulative effect of the trial court's errors requires reversal of his convictions. We disagree. "'The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of the errors alone would not merit reversal, but the cumulative effect of the errors must undermine the confidence in the reliability of the verdict before a new trial is granted. Absent a establishment of errors, there can be no cumulative effect of errors meriting reversal.'" *People v Brown*, 279 Mich App 116, 146; 755 NW2d 664 (2008) (citations omitted). Defendant's argument must fail because, as in *Brown*, there are no individual errors that could produce a cumulative effect in this case. *Id.*

Affirmed.

/s/ Kathleen Jansen
/s/ Jane M. Beckering