

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CRAIG HAMILTON GONSER,

Defendant-Appellant.

UNPUBLISHED

May 15, 2012

No. 298252

Macomb Circuit Court

LC No. 2008-004833-FH

Before: MURPHY, C.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

Defendant appeals by right his convictions of attempted gross indecency between a male and a female, MCL 750.92; MCL 750.338b, and indecent exposure, MCL 750.335a(2)(c). He also pleaded nolo contendere to the charge of being a sexually delinquent person, MCL 750.10a. Defendant was sentenced to 10 to 25 years' imprisonment for the indecent exposure conviction, predicated on his status as a sexually delinquent person, and 365 days for the attempted gross indecency conviction. We affirm defendant's convictions and sentences, but remand for a technical correction of the judgment of sentence.¹

Defendant's ex-wife testified that she came home from work early to discover defendant sitting at the computer with their twenty-month old daughter standing next to him and looking directly at him. She testified that the computer screen displayed a picture of a fully nude woman. Upon hearing her gasp, defendant stood up and turned around, allowing her to observe that he

¹ The judgment of sentence erroneously indicates that defendant was convicted of two counts of indecent exposure by a sexually delinquent person. It is clear from the verdict form that defendant was acquitted of a charge of gross indecency, MCL 750.338b, was convicted of the lesser included offense of *attempted* gross indecency, MCL 750.92; MCL 750.338b, and was convicted of one count of indecent exposure, MCL 750.335a. He then pleaded nolo contendere to the charge of being a sexually delinquent person, MCL 750.10a. The second count considered by the jury was the offense of attempted gross indecency, upon which defendant was found guilty, not indecent exposure, which was the third count considered by the jury, upon which defendant was also found guilty. The judgment of sentence is to be amended so as to reflect that the conviction on count two was for attempted gross indecency.

was naked from the waist down. Defendant said, “I’m playing with it, do you mind?” A bottle of personal lubricant was on the desk. She testified that defendant had previously used this brand of lubricant to masturbate.

Defendant asserts that the trial court committed evidentiary error by allowing evidence of prior consistent statements made by his ex-wife, that the evidence offered at trial was insufficient to support his conviction for attempted gross indecency, that the gross indecency statute is unconstitutional as applied to defendant, and that the trial court erred in departing from the sentencing guidelines. We address each of these arguments in turn.

I. ALLEGED EVIDENTIARY ERROR

Defendant argues that the trial court erred in allowing the prosecution to introduce prior consistent statements made by his ex-wife. The first challenged statement was made by the ex-wife to Yvonne Gillespie, a couple’s counselor, during a counseling session on the day of the incident. The other challenged statements were testified to by Detective Sam Grammatico, who referenced a prior consistent witness statement made by defendant’s ex-wife to police along with her testimony at the preliminary examination. We review a trial court’s decision to admit or exclude evidence for an abuse of discretion. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). We review de novo preliminary questions of law associated with a decision to admit or exclude evidence, such as whether a rule of evidence precludes admission. *Id.* While the argument concerning Gillespie’s testimony was preserved below, there was no objection to Grammatico’s testimony about prior consistent statements. We review unpreserved evidentiary issues for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The admission of a prior consistent statement of a witness through a third party is appropriate if the requirements of MRE 801(d)(1)(B) are satisfied. *People v Jones*, 240 Mich App 704, 706; 613 NW2d 411 (2000). MRE 801(d)(1)(B) provides that a statement is not hearsay if “[t]he declarant testifies at the trial . . . and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant’s testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.” In *Jones*, 240 Mich App at 707, this Court stated that the party offering the prior consistent statement must establish four elements:

“(1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant’s testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant’s challenged in-court testimony; and, (4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose.” [Citation omitted.]

The declarant, defendant's ex-wife,² testified at trial, she was subject to cross-examination, and the prior statements were indeed consistent with the ex-wife's in-court testimony. Furthermore, defense counsel, in his opening statement, expressly charged fabrication and improper motive relative to the allegations and claims made by defendant's ex-wife. The issue therefore becomes whether the statements were made prior to the time that the supposed motive to falsify arose.

We first examine Gillespie's testimony regarding the prior consistent statement made the day of the criminal acts. The trial court noted the unusual nature of the history between the parties. They were involved in a years-long relationship marked by periods of break ups and reconciliations as well as disputes over custody and parenting time. The court ultimately concluded that the parties were attempting to reconcile at the time the statement was made to Gillespie and that, accordingly, there would have been no incentive to fabricate at that time. We conclude that the trial court's decision to admit this testimony did not fall outside the range of principled outcomes. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008) (defining an abuse of discretion). The record shows that defendant and his ex-wife moved back in together in November 2003 and did not separate or resume their custody/parenting time dispute until after the alleged incident. Defendant's ex-wife testified that she made the statement on the night of the incident. Defendant did not present evidence of any event or occurrence after November 2003 and before the statement was made that would have given rise to a renewal of hostilities other than the masturbation incident itself. The very incident alleged to have been fabricated could not also have provided the motive for fabrication.

With respect to Detective Grammatico's testimony that the ex-wife's witness statement and preliminary examination testimony "corresponded" to her trial testimony, we find that any assumed error in allowing the testimony did not affect defendant's substantial rights; there was no prejudice. *Carines*, 460 Mich at 763. Given the admissibility of Gillespie's testimony regarding the prior consistent statement, and considering that consistent remarks at the preliminary examination and in a witness statement to police added little to the prosecutor's case, especially when we are assuming that the ex-wife was motivated to lie at those times, the challenged testimony did not affect the outcome of the lower court proceedings. In further support of our conclusion, we note that Grammatico admitted on cross-examination that he had no way of knowing if defendant's ex-wife was lying, and he admitted to having uncovered no independent corroboration of her testimony. Moreover, any assumed error did not result "in the conviction of an actually innocent defendant," nor did it seriously affect the integrity, fairness, or public reputation of the proceedings independent of defendant's innocence. *Id.*

II. SUFFICIENCY OF THE EVIDENCE

Defendant next argues that the evidence offered at trial was insufficient to support his conviction for attempted gross indecency, MCL 750.92; MCL 750.338b. We review claims of insufficient evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). When ascertaining whether sufficient evidence was presented at trial to support a conviction, this

² The "declarant" is a person who makes a statement." MRE 801(b).

Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), 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 witnesses. *Id.* at 514-515. Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime. *Carines*, 460 Mich at 757. All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). MCL 750.338b provides in relevant part:

Any male person who, in public or in private, commits or is a party to the commission of any act of gross indecency with a female person shall be guilty of a felony, punishable as provided in this section. . . . Any person convicted of a felony as provided in this section shall be punished by imprisonment in the state prison for not more than 5 years, or by a fine of not more than \$2,500.00, or if such person was at the time of the said offense a sexually delinquent person, may be punishable by imprisonment in the state prison for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life.

In *People v Thousand*, 465 Mich 149, 164; 631 NW2d 694 (2001), our Supreme Court, after quoting the "attempt" statute, MCL 750.92, observed:

Under our statute, . . . an "attempt" consists of (1) an attempt to commit an offense prohibited by law, and (2) any act towards the commission of the intended offense. We have further explained the elements of attempt under our statute as including "an intent to do an act or to bring about certain consequences which would in law amount to a crime; and . . . an act in furtherance of that intent which, as it is most commonly put, goes beyond mere preparation." [Citations omitted; second omission in original.]

Until the Michigan Legislature provides a workable definition of gross indecency, malleable enough to protect and not infringe upon the rights of the public, courts must decide on a case by case basis whether an act is grossly indecent, as did the Supreme Court in *People v Lino*, 447 Mich 567; 527 NW2d 434 (1994). *People v Drake*, 246 Mich App 637, 641-642; 633 NW2d 469 (2001), quoting *People v Jones*, 222 Mich App 595, 602; 563 NW2d 719 (1997). "There is Michigan case law . . . holding that . . . masturbation in the presence of a minor, regardless of whether the conduct is performed in public, is a grossly indecent act." *People v Bono (On Remand)*, 249 Mich App 115, 123-124; 641 NW2d 278 (2002).

A previous panel of this Court, in response to the prosecution's interlocutory appeal, issued an opinion in the case at bar holding as follows:

The case law . . . demands that we consider the totality of the circumstances in each particular case when determining whether an act of gross indecency has been committed. In doing so, and in contemplating a proper jury instruction to accompany our conclusion, we hold that if the prosecution proves beyond a reasonable doubt that an adult man masturbated or continued to

masturbate in the presence of a two-year-old female child, or a female child of approximately that age, such as defendant's daughter, knowing that the child was present and knowing that she could observe the act of masturbation, he has committed an act of gross indecency with a female in violation of MCL 750.338b. Under these circumstances, there is no need for the prosecutor to additionally prove that a defendant involved the child for the purpose of facilitating sexual arousal, as may occur with a pedophile. Simply stated, it is grossly indecent for a grown man to knowingly masturbate in front of a two-year-old girl, whether she is his child or another person's child, regardless of whether the child's presence was used to facilitate sexual arousal. Our instruction goes beyond CJI2d 20.31, adding a "knowledge" element under the charges brought in this case and given the circumstances. . . . The trial court is to instruct the jury in accordance with this ruling. [*People v Gonser*, unpublished opinion per curiam of the Court of Appeals, decided July 21, 2009 (Docket No. 289971), slip op at 4.]

While there may be some flexibility with respect to the law of the case doctrine in criminal cases relative to judging the soundness or correctness of a legal determination, we deem it appropriate to invoke the doctrine here, given that the earlier panel's ruling concerned the elements of the crime and jury instructions, the crux of the case, which matters should not be revisited after a trial was conducted pursuant to the panel's directives. *People v Herrera (On Remand)*, 204 Mich App 333, 340-341; 514 NW2d 543 (1994) (discussing the law of the case doctrine in criminal cases). Moreover, we agree with the prior panel's ruling.

Here, defendant's ex-wife testified that defendant made the statement, "I'm playing with it, do you mind?" and that she understood this statement to mean defendant was masturbating. She asserted that she witnessed pornography on defendant's computer. She further testified that there was a bottle of personal lubricant present, that normally it was stored elsewhere, and that defendant had used the lubricant to masturbate in the past. Finally, she testified that defendant was naked from the waist down. In *People v Vronko*, 228 Mich App 649, 655; 579 NW2d 138 (1998), this Court found that the witness's testimony that the defendant had bare legs, was moving his hand in his crotch, and that it looked like something was in his hand was sufficient to infer that he was masturbating, despite the fact that no one witnessed his exposed penis. Here, defendant's exposed genitals, the presence of pornography and lubricant, and defendant's own statement suffice to support the conclusion that defendant engaged in acts in furtherance or toward the commission of gross indecency by way of masturbation in front of his daughter.

Defendant's ex-wife testified that their daughter was standing next to the chair defendant was sitting in, was holding the chair, and was looking directly at defendant. This evidence, taken in the light most favorable to the prosecution, is sufficient to enable a rational jury to conclude that defendant knew that his daughter was present and that she observed him masturbating.

Although defendant attacks his ex-wife's credibility, the jury apparently found her testimony credible. We shall not interfere with the factfinder's role of determining the weight of the evidence or the credibility of the witnesses. *Wolfe*, 440 Mich at 514-515. It is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich

417, 428; 646 NW2d 158 (2002). The inferences drawn by the jury were supported by sufficient evidence.

III. VAGUENESS

Defendant also argues that the gross indecency statute, MCL 750.338b, is unconstitutionally vague as applied to his conduct in the instant case. Statutes are presumed to be constitutional. *People v Harper*, 479 Mich 599, 621; 739 NW2d 523 (2007). Courts should “exercise the power to declare a law unconstitutional with extreme caution” and only exercise that power if a statute’s unconstitutionality is clearly apparent. *Id.*, quoting *Phillips v Mirac, Inc.*, 470 Mich 415, 422; 685 NW2d 174 (2004). The party challenging the constitutionality of a statute has the burden of rebutting the presumption of constitutionality. *People v Sadows*, 283 Mich App 65, 67; 768 NW2d 93 (2009). In addressing a vagueness challenge to MCL 750.338 (a separate gross indecency statute), the Supreme Court in *Lino*, 447 Mich at 575-576, stated:

In order to pass constitutional muster, a penal statute must define the criminal offense “with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” Vagueness challenges that do not implicate First Amendment freedoms are examined in light of the facts of each particular case. When making a vagueness determination, a court must also take into consideration any judicial constructions of the statute.

[T]here are at least three ways a penal statute may be found unconstitutionally vague: (1) failure to provide fair notice of what conduct is prohibited, (2) encouragement of arbitrary and discriminatory enforcement, or (3) being overbroad and impinging on First Amendment freedoms. [Citations omitted.]

A statute need not define an offense with “mathematical certainty.” *Grievance Administrator v Fieger*, 476 Mich 231, 255; 719 NW2d 123 (2006). A statute “is sufficiently definite if its meaning can fairly be ascertained by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words.” *Lueth*, 253 Mich App at 676.

In *Lino*, our Supreme Court rejected a vagueness challenge from two defendants, one (*Lino*) was charged with gross indecency between males for performing the act of fellatio in a public place, and one (*Brashier*) was charged with “procuring or attempting to procure the commission of an act of gross indecency between the male minor victim and another male (the codefendant).” *Lino*, 447 Mich at 571-574. *Brashier* was accused of orchestrating the physical and verbal abuse of his codefendant by minors while the codefendant masturbated. *Id.* at 574. Our Supreme Court held that *Lino* had fair notice that public fellatio was prohibited by numerous previous decisions holding that public fellatio was within the scope of the gross indecency statute. *Id.* at 576. As for defendant *Brashier*, our Supreme Court held that he could not “plausibly claim that he could not have known his conduct was prohibited.” *Id.* Although no Michigan cases directly addressed *Brashier*’s behavior, the Court noted that the United States Supreme Court had held that, although “the existence of previous applications of a particular

statute to one set of facts forecloses lack-of-fair-warning challenges to subsequent prosecutions of factually identical conduct,” such a previous application is not a “prerequisite to a statute’s withstanding constitutional attack.” *Id.* at 577, quoting *Rose v Locke*, 423 US 48, 51; 96 S Ct 243; 46 L Ed 2d 185 (1975). The Court concluded that defendant Brashier was “on notice that sexual activities involving persons under the age of consent could constitute the statutory crime of gross indecency.” *Lino*, 447 Mich at 578. Here, ordinary people would understand and would be on fair notice that masturbation by a grown man in front of a two-year-old girl, including a daughter, in a private place constitutes the crime of gross indecency, where the man knows that the child is present and can view the act of masturbation.

Defendant’s arguments concerning the vagueness of the gross indecency statute involve hypothetical situations not before this Court. When a vagueness challenge does not implicate First Amendment rights, “the constitutionality of the statute in question must be examined in light of the particular facts at hand without concern for the hypothetical rights of others.” *Vronko*, 228 Mich App at 652; see also *Lino*, 447 Mich at 575. “The proper inquiry is not whether the statute may be susceptible to impermissible interpretations, but whether the statute is vague as applied to the conduct allegedly proscribed in this case.” *Vronko*, 228 Mich App at 652.

Additionally, the inclusion of a knowledge requirement assists in avoiding a vagueness problem. *Posters ‘N’ Things, LTD v United States*, 511 US 513, 526; 114 S Ct 1747; 128 L Ed 2d 539 (1994). The previous *Gonser* panel interpreted the gross indecency statute, MCL 750.338b, so as to avoid criminalizing innocent conduct. The panel added “knowledge” as an element of the charge, requiring that an adult defendant know that a child is present and can observe the act of masturbation. *Gonser*, slip op at 4. This interpretation suffices to render the statute constitutional in its application to defendant. It provides the sort of “minimal guidelines” to law enforcement necessary to prevent a standardless sweep that allows the police, prosecutors, and juries to pursue personal predilections. *Kolender v Lawson*, 461 US 352, 358; 103 S Ct 1855; 75 L Ed 2d 903 (1983). We therefore decline to find the gross indecency statute, MCL 750.338b, unconstitutionally vague as applied to defendant in this case.

IV. SENTENCING

Defendant asserts that the trial court failed to make an appropriate ruling on his objection to the prosecution’s evidence of a prior uncharged act at sentencing before relying on the act in sentencing defendant above the guidelines. In particular, the act was a brutal 1994 sexual assault for which another person was convicted and served nine plus years in prison, although it was ultimately determined through DNA evidence that defendant had committed the crime. Defendant was not prosecuted because the statute of limitations had elapsed.

Defendant pleaded nolo contendere to the charge of being a sexually delinquent person pursuant to a *Cobbs*³ agreement under which he was not to be sentenced to a minimum term of

³ *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

more than ten years in prison. In *People v Wiley*, 472 Mich 153, 154; 693 NW2d 800 (2005), our Supreme Court stated:

We hold that a sentence that exceeds the sentencing guidelines satisfies the requirements of MCL 769.34(3)[articulation of reasons for departure] when the record confirms that the sentence was imposed as part of a valid plea agreement. Under such circumstances, the statute does not require the specific articulation of additional “substantial and compelling” reasons by the sentencing court.

Furthermore, a defendant waives appellate review of a sentence that exceeds the guidelines by understandingly and voluntarily entering into a plea agreement to accept that specific sentence. In that respect, this case is similar to *People v Cobbs*, 443 Mich 276, 285; 505 NW2d 208 (1993), in which this Court stated that a defendant who pleads guilty with knowledge of the sentence will not be entitled to appellate relief on the basis that the sentence is disproportionate. [Citations omitted.]

Here, defendant was sentenced to a minimum sentence of ten years. Therefore, we find that defendant has waived appellate review of the proportionality of his sentence. Because the sentence was imposed in conformance with a valid plea agreement, the trial court was not required to articulate specific substantial and compelling reasons for departing from the guidelines range. We note that the trial court first acknowledged that it did not need to articulate substantial and compelling reasons for departure, but then proceeded to find that there were indeed ample reasons for departure given the litany of charged and uncharged offenses committed by defendant over the years. Resentencing is unwarranted.

Defendant argues that consideration of the 1994 sexual assault was the primary basis for the trial court to impose the ten-year minimum sentence and conceivably the court would have imposed a shorter minimum sentence absent contemplation of the 1994 assault. Defendant maintains that it was improper to consider the sexual assault prior to actually ruling on defendant’s challenge or objections to the accuracy of the allegation that defendant committed the assault. The record reflects that DNA recovered from a cigarette butt under the victim’s nail and from nylons found tied to a bed matched defendant’s DNA. While defendant pointed to a police letter indicating potential issues with respect to the chain of custody and corruption of the evidence that was later tested for DNA, the court agreed with the prosecutor that defendant failed to present any evidence that the possible degradation or corruption of the DNA-related evidence would cause an inaccurate DNA match to defendant. The trial court found that there was no evidence challenging the validity of the DNA testing performed by the Michigan State Police. The court stated, “I can’t ignore the forensic evidence that points to you as being the person who committed that horrible, horrible offense.” Contrary to defendant’s assertion, the trial court addressed his challenge and objections and soundly rejected them. A sentencing court may consider the facts underlying uncharged offenses, *People v Coulter (After Remand)*, 205 Mich App 453, 456; 517 NW2d 827 (1994), and there existed a preponderance of evidence showing

that defendant was involved in the 1994 sexual assault;⁴ there was no clear error in the court's fact-finding. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).

Defendant's final argument is that the trial court impermissibly allowed a person who was not a victim under the William Van Regenmorter Crime Victim's Rights Act, MCL 780.751 *et seq.*, to speak at the sentencing. The trial court permitted the man wrongfully convicted for the 1994 sexual assault to speak. A trial court has broad discretion in allowing persons, including non-victims, to speak at sentencing. *People v Albert*, 207 Mich App 73, 74; 523 NW2d 825 (1994). A trial court does not abuse its discretion in permitting a non-victim to speak unless actual bias or prejudice on the part of the sentencing court results from those statements. *Id.* A review of the record reveals no such prejudice. The trial court based its departure on proof that defendant committed a brutal sexual assault in 1994, not the statements of the person wrongfully imprisoned for the crime.

Affirmed but remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Cynthia Diane Stephens
/s/ Michael J. Riordan

⁴ The DNA report indicated that the DNA found on the cigarette butt conclusively matched defendant to the item in that only one person in 191.9 quadrillion people could have that particular DNA profile.