STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRENT MICHAEL WEEKS,

Defendant-Appellant.

UNPUBLISHED
May 12, 2000

No. 210836
Eaton Circuit Court
LC No. 97-020174 FH

Before: Doctoroff, P.J., and O'Connell and Wilder, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of child sexually abusive activity, MCL 750.145c(2); MSA 28.342a(2). He was sentenced to two concurrent terms of ninety to two hundred months' imprisonment. He appeals as of right. We affirm.

Defendant first argues that the trial court, following a hearing held pursuant to *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965), erred in ruling that a written statement that he executed at the conclusion of a pre-arrest police interview was voluntary. We disagree. When reviewing a trial court's determination of voluntariness, this Court must examine the entire record and make an independent determination. *People v Sexton*, 458 Mich 43, 68; 580 NW2d 404 (1998). Deference is given to the trial court's assessment of the weight of the evidence and credibility of the witnesses, and the trial court's findings will not be reversed unless they are clearly erroneous. *Id.* A finding is clearly erroneous if it leaves this Court with a definite and firm conviction that a mistake has been made. *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997).

Whether a statement is voluntary is determined by examining police conduct. *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997). In determining voluntariness, the court should consider all the circumstances, including: the duration of the defendant's detention and questioning; the age, education, intelligence and experience of the defendant; whether the arraignment was unnecessarily delayed; the defendant's mental and physical state; whether the defendant was threatened or abused; and any promises of leniency. *Sexton*, *supra* at 66; *Givans*, *supra* at 121. No single factor is determinative. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Coercion can be physical or psychological. *People v DeLisle*, 183 Mich App 713, 721; 455 NW2d 401 (1990).

At the *Walker* hearing, Detective Daniel Prueter testified that he interviewed defendant for approximately forty-five minutes to one hour, in a room measuring approximately eight feet by ten feet, with windows, in a sheriff's department substation. Defendant came to the interview voluntarily after Prueter contacted him by telephone. Defendant was not under arrest, and Prueter told him that he was free to leave. Prueter did not observe defendant to be under the influence of alcohol or drugs or to be deprived of sleep or nourishment, and denied making promises to defendant or using any force on him. He never told defendant that if he cooperated things would go easier on him, but did tell him that he needed to be honest with himself so that he and the child involved could seek or get proper help. Prueter told defendant that this case was going to the prosecutor's office, and added that if defendant was found guilty or pleaded guilty to the charges, the trial court might authorize some type of therapy after the fact. Prueter described his own demeanor during the course of the interview as "congenial" and denied raising his voice in anger, but made it clear that he believed defendant was lying at one point. He testified that he did not know defendant's education, intelligence or age, and averred that he did not promise defendant that either defendant or the child would get counseling if defendant gave a statement.

Family Independence Agency employee Cheryl Pitcher testified at the *Walker* hearing that she was present at the interview but did not ask questions. She testified that the interview lasted a little over one hour. She further testified that she did not believe that Prueter ever became angry with defendant, but that Prueter continued to encourage defendant to tell the truth so that he could get the help he needed. She did not recall Prueter having told defendant that if he cooperated with the investigation he could get counseling or therapy, but remembered Prueter saying that if defendant were truthful with him the child "could get the counseling that she needed as well." She related that defendant did not appear to be confused by the questioning, denied that Prueter had indicated that, if defendant was untruthful, he would impair the child's ability to get the counseling or therapy she needed, denied that any threats or promises were made to induce defendant to give a statement, claimed that defendant did not appear to be under the influence of drugs or alcohol, and added that he appeared to understand the questions. Defendant did not testify at the hearing.

Reviewing the evidence presented at the *Walker* hearing in light of the standards enunciated above, we concur with the trial court's analysis and conclusion that defendant's statement was voluntary. The *Walker* hearing testimony revealed no improper conduct on the part of the police. The testimony indicated that defendant voluntarily came to the interview, that defendant was not under arrest and was free to leave, that the interview lasted approximately one hour, and that defendant was not deprived of food or sleep. The testimony further indicated that defendant did not appear to be under the influence of drugs or alcohol during the interview, and that defendant did not appear to be confused by the questioning. Although the testimony indicated that Detective Prueter urged defendant to tell the truth so that the child involved could get the proper help and told defendant that the court might authorize counseling for him if he was found guilty of the charges, there were no promises of counseling or leniency. After reviewing the totality of the circumstances surrounding defendant's statement, we conclude that the trial court properly determined that defendant's statement was voluntary.

Defendant next contends that the child sexually abusive activity statute is facially overbroad and vague. We disagree. The constitutionality of a statute is a question of law that is reviewed de novo on appeal. *People v Jensen (On Remand)*, 231 Mich App 439, 444; 586 NW2d 748 (1998). Statutes are presumed to be constitutional and are construed so unless their unconstitutionality is clearly apparent. *People v Hayes*, 421 Mich 271, 285; 364 NW2d 635 (1984). The party challenging the law has the burden of rebutting the presumption. *Lansing v Hartsuff*, 213 Mich App 338, 343-344; 539 NW2d 781 (1995).

"The doctrine of overbreadth is primarily applied to First Amendment cases where an overbroad statute prohibits constitutionally protected conduct." *People v Cavaiani*, 172 Mich App 706, 711; 432 NW2d 409 (1988). The overbreadth of a statute must be real and substantial and must be judged in relation to the statute's plainly legitimate sweep where conduct and not merely speech is involved. *Id.* at 711-712; *Jensen, supra* at 444, 447. "An overbroad statute is one which is likely to 'chill' constitutionally protected behavior." *People v Hicks*, 149 Mich App 737, 742; 386 NW2d 657 (1986), citing *Broadrick v Oklahoma*, 413 US 601; 93 S Ct 2908; 37 L Ed 2d 830 (1973). However, a person generally lacks standing to challenge overbreadth where his own conduct is clearly within the contemplation of the statute, even if there is some marginal application that might infringe on First Amendment activities. *Broadrick, supra* at 610; *Cavaiani, supra* at 713.

The statute proscribing child sexually abusive activity, MCL 750.145c(2); MSA 28.342a(2), provides:

> A person who persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material, or a person who arranges for, produces, makes, or finances, or a person who attempts or prepares or conspires to arrange for, produce, make, or finance any child sexually abusive activity or child sexually abusive material is guilty of a felony, punishable by imprisonment for not more than 20 years, or a fine of not more than $100,000.00, or both, if that person knows, has reason to know, or should reasonably be expected to know that the child is a child, or that person has not taken reasonable precautions to determine the age of the child.

The statute defines "child sexually abusive activity" as "a child engaging in a listed sexual act." MCL 750.145c(h); MSA 28.342a(h). The listed sexual act at issue is "erotic nudity," which the statute defines as "the lascivious exhibition of the genital, pubic, or rectal area of any person." MCL 750.145c(d); MSA 28.342a(d). The statute further provides that "[a]s used in this subdivision, 'lascivious' means wanton, lewd, and lustful and tending to produce voluptuous or lewd emotions." MCL 750.145c(d); MSA 28.342a(d).

Defendant contends that the statute's use of the term "erotic" renders the statute overbroad because the term "erotic" "covers any actions expressive of love." However, the term erotic nudity is given a specific definition in the statute. Moreover, the statutory definition of erotic nudity does not encompass the depiction of all child nudity, but only depictions that are "lascivious," as that term is defined in the statute. See *People v Gezelman (On Rehearing)*, 202 Mich App 172, 174; 507

NW2d 744 (1993) (addressing the definition of erotic nudity before the 1994 amendment). Thus, the statute does not prohibit protected conduct. Furthermore, Detective Prueter testified that defendant told him that he was sexually aroused by naked young girls, that he became sexually aroused when he posed the victim for the photographs, and that he would "masturbate from time to time" after looking at the photographs. On the basis of these admissions by defendant, we conclude that his conduct was clearly within the contemplation of the statute, and reject defendant's overbreadth challenge. *Broadrick, supra, Cavaiani, supra.*

Defendant next challenges the constitutionality of MCL 750.145c(2); MSA 28.342a(2) on the ground that it fails to provide fair notice of the conduct proscribed. In testing a statute challenged as unconstitutionally vague, the entire text of the statute should be examined, and its words should be given their ordinary meanings. *People v Piper,* 223 Mich App 642, 645; 567 NW2d 483 (1997). To give fair notice, a statute must define the crime "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *People v Lino,* 447 Mich 567, 575-576; 527 NW2d 434 (1994). A statute cannot use terms that require persons of common intelligence to guess at its meaning and differ regarding its application. *People v Capriccioso,* 207 Mich App 100, 102; 523 NW2d 846 (1994). 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. *Lino, supra* at 575. A defendant has standing to raise a vagueness challenge only if the statute is vague as applied to his conduct. *Cavaiani, supra* at 714. Furthermore, reversal is not required if the statute can be narrowly construed to render it sufficiently definite to avoid vagueness and the defendant's conduct falls within the conduct proscribed by the properly construed statute. *Id.*

Here, the statute at issue is not unconstitutionally vague. The statutory language clearly provides fair notice that photographing a young child's lewdly posed genitals for purposes of the photographer's sexual gratification is a prohibited act. The language used to prohibit the act is not so vague that a person of common intelligence must necessarily guess at its meaning. *Capriccioso, supra.* Certainly, it is clear from the language of the statute that taking photographs of a nude young girl with her genitals exposed for the purpose of sexual arousal is prohibited. We therefore conclude that defendant is not entitled to reversal on the ground that the statute at issue is unconstitutionally vague.

Next, defendant contends that his right to a fair trial and his right to present evidence in his favor were violated when the trial court excluded the testimony of his expert witness. We disagree. The admissibility of an expert's testimony is in the trial court's discretion and will not be reversed on appeal absent an abuse of that discretion. *People v Ray,* 191 Mich App 706, 707; 479 NW2d 1 (1991). An abuse of discretion will be found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v Murray,* 234 Mich App 46, 52; 593 NW2d 690 (1999).

Defendant sought to call as an expert witness at trial Peter Glendinning, a professor of art at Michigan State University specializing in photography. After Glendinning took the stand briefly, defense counsel asked the trial court to qualify him as an expert in photography, but plaintiff objected, apparently on the ground that there existed no relevant issues about which Glendinning could validly

testify. Defense counsel contended that Glendinning could "lend some expertise in [terms] of the process of making art and make an opinion whether or not this in his opinion is art and what . . . making art entails." The court initially decided to let Glendinning testify, but then granted plaintiff's request that an offer of proof be made. The offer of proof was not made on the record. While off the record, the trial court apparently decided that Glendinning would not be allowed to testify, and subsequently stated:

> All right. I . . . have considerable concern with Dr. Glendinning and what areas he was going to testify to and in effect I felt invade the [province] of the jury with what I anticipated his testimony was going to be and in light of that I did indicate that you indicated, [defense counsel], that I don't feel under those circumstances that his testimony is necessary in this case and would assist the jury to understand evidence or determine a fact in issue in this particular case.

The trial court did not abuse its discretion by excluding Glendinning's proposed testimony. Given the current language of the statutory definition of "erotic nudity," no relevant issue existed regarding which Glendinning possessed specialized knowledge designed to aid the jury in understanding the evidence or determining a fact in issue. MRE 702. While Glendinning may have been prepared to discuss what, in his opinion, is "art," when an expert opinion is offered on a matter equally within the scope of a jury's common knowledge, it is error to permit the expert to give his own opinion or interpretation of the facts because it invades the province of the jury. *People v Drossart*, 99 Mich App 66, 80; 297 NW2d 863 (1980). Because there were no facts in evidence that required examination and analysis by an expert, and because there existed no knowledge in a particular area that belonged more to Glendinning than to the jurors, defendant did not discharge his burden of showing that Glendinning possessed specialized knowledge that would aid the jury in understanding the evidence or determining a fact in issue. *People v Smith*, 425 Mich 98, 112; 387 NW2d 814 (1986). Therefore, the trial court did not abuse its discretion is excluding Glendinning's testimony.

Finally, defendant argues that his sentences are disproportionate to the offenses and the offender and therefore constitute an abuse of the sentencing court's discretion. We disagree. Appellate review of a sentence is limited to whether the sentencing court abused its discretion. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

The statute proscribing child sexually abusive activity, MCL 750.145c; MSA 28.342a, provides for a maximum prison term of twenty years. Defendant concedes that the sentencing guidelines do not apply to his sentences. The record discloses that the trial court reviewed a number of factors bearing upon defendant's sentences and weighed them in the light of the sentencing objectives of deterrence, punishment, protection of society, and rehabilitation. *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972). Our review of the court's analysis convinces us that defendant's concurrent sentences of ninety to two hundred months each are proportionate to the offenses and the offender. *Milbourn, supra* at 635-636. The trial court therefore did not

abuse its discretion in sentencing defendant.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder