STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 23, 2001
v	No. 222309 Allegan Circuit Court
PETER LIONEL FENTY, Defendant-Appellant.	LC No. 98-011045-FH

Before: Talbot, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

Defendant was convicted of one count of child sexually abusive activity, MCL 750.145c(2); MSA 28.342a(2), and sentenced to three to twenty years' imprisonment. He appeals by of right. We affirm.

Defendant contends that the trial court abused its discretion by admitting evidence of other acts, specifically, testimony from the victim that he and defendant engaged in sexual acts on one occasion. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). Our Supreme Court has opined that "other acts" evidence is inadmissible if: (i) pursuant to MRE 404(b), the evidence was not admissible for a purpose other than "a character to conduct or propensity theory"; (ii) the evidence was irrelevant under MRE 401 and 402, as enforced through MRE 104(b); or (iii) contrary to MRE 403, the risk of prejudice substantially outweighs the probative value of the evidence. *People v Sabin (After Remand)*, 463 Mich 43, 55; 614 NW2d 888 (2000), quoting *People v VanderVliet*, 444 Mich 52, 75; 508 NW2d 114 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994).

According to the victim's testimony, both the photographs and the sexual acts were part of defendant's plan to get closer to the alleged child pornographer. MRE 404(b)(1) expressly authorizes the introduction of "other acts" evidence where it is offered to prove a "scheme" or "plan." Thus, we believe that the victim's testimony regarding the sexual acts was admissible as

evidence of the same "scheme" or "plan." Along the same lines, we believe that the testimony was relevant to defendant's motive and specific intent[1] at the time the photographs were taken. Indeed, the prosecution suggested that the photographs were perhaps taken because defendant was attempting to entice the victim into sexual activity. Finally, although we are cognizant of the risk of prejudice arising from testimony relating to these particular sexual acts, we do not believe that this risk substantially outweighed the probative value of the evidence. Consequently, the trial court did not abuse its discretion in admitting the evidence.

Defendant also contends that the evidence was insufficient to support his conviction.[2] Our Supreme Court has ruled that the "test for determining the sufficiency of the evidence in a criminal case is whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). The child sexually abusive activity statute prohibits, in pertinent part, the photographing of minors in a state of "erotic nudity." MCL 750.145c; MSA 28.342a. "Erotic nudity" is defined as the "lascivious exhibition of the genital, pubic, or rectal area of any person." MCL 750.145c(1)(d); MSA 28.342a(1)(d). The statute further defines "lascivious" as "wanton, lewd, and lustful and tending to produce voluptuous and lewd emotions." MCL 750.145c(1)(d); MSA 28.342a(1)(d).

Defendant specifically contends that the absence of the photographs prevented the jury from reaching a reasonable conclusion regarding what they depicted. However, the jury was presented with the victim's testimony that the photographs were of his buttocks and penis. Moreover, the victim testified that defendant asked him to ejaculate for the pictures, which he refused to do. It should also be noted that, as conceded by defendant, the alleged purpose of the photographs was to gain favor with a child pornographer. This evidence, viewed in a light most favorable to the prosecution, is sufficient for a reasonable juror to conclude that the photographs both existed and depicted "erotic nudity."

Defendant further contends that the evidence plaintiff presented was insufficient to establish specific intent. Instead, defendant contends that he wanted to use the photographs to catch a child pornographer. MCL 750.145c(2); MSA 28.342a(2) provides that a person who "persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in a child

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[1] Contrary to defendant's assertion on appeal, the issue of specific intent was disputed at trial. In fact, during closing statements, defense counsel questioned whether the prosecution had sufficiently proven specific intent.

[2] Defendant notes that the trial court denied his motion for a directed verdict. The standard of review for a denial of a motion for a directed verdict is the same as that for a challenge to the sufficiency of the evidence, except that the latter considers only that evidence admitted before the motion is made. *People v Lemmon*, 456 Mich 625, 634; 576 NW2d 129 (1998). Although defendant did not directly challenge that ruling, we have considered defendant's challenge to the sufficiency of the evidence using solely the evidence that was presented before the motion was made. We note, however, that additional evidence supporting defendant's conviction was introduced through his own testimony.

sexually abusive activity" is guilty of a felony. The victim testified that defendant encouraged him to disrobe for the photographs. The victim also testified that according to defendant, both he and defendant stood to gain financially from the photographs if their scheme were successful. That defendant stood to gain financially from knowingly allowing a minor to participate in the creation of "erotic nudity" is more than sufficient evidence, viewed in a light most favorable to the prosecution, to establish specific intent. Accordingly, we reject defendant's contention that insufficient evidence was presented in support of his conviction.

Defendant further contends that he was deprived of his constitutional right to effective assistance of counsel where his attorney failed to object to prosecutorial misconduct. A successful claim of ineffective assistance of counsel requires a defendant to show that "(1) the performance of counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different." *People v Nimeth*, 236 Mich App 616, 624-625; 601 NW2d 393 (1999), quoting *People v Plummer*, 229 Mich App 293, 307; 581 NW2d 753 (1998).

Indeed, every defendant is entitled to a fair and impartial trial. *People v LeGrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). Viewing the statements made by the prosecutor in context, we are not persuaded that defendant was deprived of a fair and impartial trial. Rather, the prosecutor was simply presenting an alternate theory of the case—that defendant may have taken the photographs for his own personal use. The prosecutor even cushioned the remark by stating that "[t]he prosecution contends." In the absence of prosecutorial misconduct, defense counsel was under no obligation to object. Consequently, defendant's ineffective assistance of counsel claim must fail.

Defendant also challenges the proportionality of his sentence. We review a sentence for an abuse of discretion. *People v Cain*, 238 Mich App 95, 130; 605 NW2d 28 (1999). To the extent that defendant claims that the legislative sentencing guidelines are relevant to this inquiry, we have ruled otherwise. *People v Oliver*, 242 Mich App 92, 99; 617 NW2d 721 (2000). Nevertheless, a sentence must be proportionate to the circumstances surrounding both the offense and the offender. *Id.* at 98.

We agree that defendant's lack of a prior record and his service to the country and community are positive facts to be considered in sentencing. In addition, the circumstances surrounding this offense are not the most egregious. On the other hand, defendant violated the trust that the community vested in him by taking advantage of a troubled minor. Considering all the circumstances, we find defendant's minimum sentence of three years, in light of the twenty-year statutory maximum sentence, to proportionately reflect the circumstances of both the crime and defendant.

Finally, defendant contends that the trial court impermissibly relied on his refusal to admit guilt in fashioning a sentence[3]. A trial court may not base a sentence "even in part on a defendant's refusal to admit guilt." *People v Yennior*, 399 Mich 892; 282 NW2d 920 (1977). The presentence investigation report noted that incarceration was recommended for defendant because he refused to admit guilt. However, with the exception of commenting that the probation officer put a lot of time and thought into the report and recommendation, the court said nothing on the record that suggested it adopted the rationale of the report. Instead, the trial court opined that defendant needed time for personal reassessment and rehabilitation. Moreover, the trial court suggested that defendant needed an opportunity to consider society's views on the unacceptability of the behavior in which he was adjudged to have engaged. Thus, we do not believe that defendant's sentence constituted an abuse of discretion.

We affirm.

/s/ Michael J. Talbot
/s/ David H. Sawyer
/s/ Jane E. Markey

[3] We would further note that defendant's reliance on *People v Wesley*, 428 Mich 708; 411 NW2d 159 (1987), is somewhat misplaced because our Supreme Court unanimously affirmed the trial court. Although there were four different rationales supporting the decision, every justice agreed that the trial court did not err. Moreover, to the extent that a majority of the justices suggested that there is no real distinction between lack of remorse and refusal to admit guilt, we note that five of the justices also opined that the trial court did not consider remorselessness when it imposed sentence. Thus, the commentary on the absence of a meaningful distinction between the two concepts could fairly be construed as obiter dictum.