STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 3, 2002
v	No. 229036 Wayne Circuit Court
HOK CHEUNG CHOW, Defendant-Appellant.	LC No. 99-000948

Before: White, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of child sexually abusive activity, MCL 750.145c(2), and was sentenced to a term of six months to twenty years' imprisonment. Defendant appeals as of right, and we affirm.

I

Defendant first argues that his trial counsel's failure to move to quash the information with regard to the child sexually abusive activity charge deprived him of his state and federal constitutional right to effective assistance of counsel. We disagree.

To establish ineffective assistance of counsel defendant must show that counsel's representation fell below an objective standard of reasonableness and that the representation so prejudiced defendant as to deny him a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Defendant asserts that counsel was ineffective in failing to file a motion to quash based on *People v Thousand*, 241 Mich App 102, 104; 614 NW2d 674 (2000), rev'd in part on other grounds 465 Mich 149; 631 NW2d 694 (2001). Defendant relies on an excerpt from *Thousand* stating:

> If the child sexually abusive activity statute merely punished actually engaging in child sexually abuse activity,… we would likely have to conclude that this again presented a case of legal impossibility.

Defendant's argument seems to be based on the assumption that he was charged with the offense of attempted child sexual abuse activity. Defendant was not, however, so charged. He was

charged with the completed offense, and was alleged to have committed that offense by attempting or preparing for child sexual abuse activity.

MCL 750.145c(2) proscribes preparing to arrange for child sexually abusive activity. It provides, in pertinent part:

> (2) …a person who attempts or prepares or conspires to arrange for…any child sexually abusive activity … is guilty of a felony . . . . [MCL 750.145c(2).]

"Child sexually abusive activity" means "a child engaging in a listed sexual act." MCL 750.145c(1)(h). Thus, the statute proscribes preparing to arrange for a child to engage in a listed sexual act.

In *Thousand, supra*, as in this case, an undercover officer posed as a young girl on the Internet. During their internet chats, the defendant made sexual comments to the fictitious girl, e-mailed "her" a picture of his penis, told her that he wanted to take her to his home so that they could have sexual activity, and arranged to meet her at a restaurant in Detroit. When the defendant arrived as planned, he was arrested.

Although the trial court in *Thousand* granted the defendant's motion to quash the information and dismiss the case, concluding that it was a legal impossibility for the defendant to have committed child sexually abusive activity, this Court reversed that part of the trial court's decision. *Thousand, supra*. In doing so, this Court stated:

> If the child sexually abusive activity statute merely punished actually engaging in child sexually abusive activity and, therefore, defendant was charged with attempted child sexually abusive activity, we would likely have to conclude that this again presented a case of legal impossibility….
>
> However, the child sexually abusive activity statute is not so narrowly drawn. [*Id.*, 114-115.]

This Court concluded that a person may violate the statute by preparing for any child sexually abusive activity. *Id.*, 115. It noted the definition of "preparation" in Black's Law Dictionary of "devising or arranging means or measures necessary" for the commission of a criminal offense. *Id*. Next, it concluded that the defendant in *Thousand* was preparing to arrange for child sexually abusive activity when he chatted with and enticed a person whom he believed was a child, even though that person was actually an adult. *Id*., 115-116.

We reject defendant's argument that the trial court would have granted his motion to quash the amended information on the basis of *Thousand.* Because the child sexually abusive activity statute proscribes preparation for child sexually abusive activity, defendant was properly charged with the completed offense, and there was no issue of impossibility. Defense counsel was not ineffective for failing to raise a frivolous motion. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

II

Defendant also argues that the child sexually abusive activity statute is unconstitutional as being void for vagueness and facially overbroad.

One may challenge a statute for vagueness on three grounds: (1) it is overbroad and impinges on First Amendment freedoms; (2) it does not provide fair notice of the conduct proscribed; or (3) it is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether an offense has been committed. *People v Heim*, 206 Mich App 439, 441; 522 NW2d 675 (1994). Here, defendant focuses on the preparation aspect of the statute and claims that the statute fails to provide fair notice of what constitutes preparation for child sexually abusive activity.

Defendant argues this Court's definition of "preparation" in *Thousand* means that a defendant may be convicted of child sexually abusive activity for merely thinking or forming an evil intent. However, the statute only prohibits "preparing or attempting *to arrange for* child sexually abusive activity" and does not punish thinking or forming an evil intent. MCL 750.145c(2). Moreover, the statute's language is not so vague that a person of common intelligence must necessarily guess at its meaning. *Heim*, *supra*, 442. Rather, the language provides fair notice that using the Internet in an attempt to entice a minor to engage in a listed sexual act is a prohibited act under the statute. Furthermore, because the statute defines "child sexually abusive activity" and this Court's holding in *Thousand* defines "preparation," the factfinder does not have unlimited discretion to determine whether an offense has been committed. The factfinder is constrained by the definitions of those terms. Accordingly, because defendant has failed to establish that the statute was unconstitutionally vague, he has not shown plain error that affected his substantial rights.

Defendant argues that the statute is overbroad because it impinges on the First Amendment right to freedom of speech. Although defendant states that the statute "proscribe[s] free speech between adults," he provides this Court with no specific examples as to how the statute chills free speech between adults. A party may not leave it to this Court to search for the factual basis to sustain or reject his position. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001). Furthermore, contrary to defendant's argument on appeal, the statute does not prevent two adults from discussing sexual activity. Rather, it proscribes conduct aimed toward enticing children to engage in a "listed sexual act" as that term is used in the child sexually abusive activity statute.

Similarly, defendant does not explain how commercial advertising to promote the use of condoms among teenagers constitutes "child sexually abusive activity" under the statute. Likewise, although defendant states that the statute proscribes two seventeen-year-olds from "engaging in courtship or other normal sexual activity which requires communication," he fails to provide any explanation as to how or why the statute chills free speech among teenagers. In his reply brief, defendant argues that the statute is overbroad because the preparation may consist of protected conduct only and the statute chills protected speech. However, defendant provides no support for the concept that sexual speech for the purpose of enticing a minor to engage in a sexual act is protected.

III

Defendant next argues that trial counsel deprived him of his state and federal constitutional rights to effective assistance of counsel by failing to move for an evidentiary hearing on the issue of entrapment. However, the record does not support that any entrapment occurred.

Entrapment exists where either 1) police engaged in impermissible conduct that would have induced a person similarly situated to the defendant and otherwise law-abiding to commit crime, or 2) if police engaged in conduct so reprehensible that it cannot be tolerated by the court. *People v Fabiano*, 192 Mich App 523, 526; 482 NW2d 467 (1992). Here, there was no police conduct that would cause a law abiding person similarly situated to defendant to commit the charged offense. The officer who conducted the undercover sting operation testified that, while he went online posing as a thirteen-year-old in several Internet chat rooms, he did not initiate any conversation. The officer further testified that it was defendant who brought up the topic of sex. Defendant asked the fictitious minor about her sexual experience and told her about different sexual acts he would like to engage in with her. Defendant suggested that they meet. Limiting our review to the record below, we conclude that the police conduct would not have prompted a law-abiding individual similarly situated to defendant to seek out a thirteen-year-old girl on the Internet for the purpose of enticing her into engaging in sexual activity.

Similarly, the police conduct was not reprehensible. Reprehensible conduct is government conduct that a civilized society will not tolerate because basic fairness arising from due process precludes the defendant's prosecution. *Id.*, 532. Again, limiting our review to the record below, there is no indication of any reprehensible conduct on the part of the police. The police did nothing more than pose as a thirteen-year-old girl. Defendant initiated the conversation with the hypothetical minor, brought up the topic of sexual activity, and encouraged the minor child to meet him for the purpose of engaging in sexual activity with him. Accordingly, the officer's conduct was not reprehensible. Moreover, because defendant did not sustain his burden of proving that his trial counsel's exploration of the issue of entrapment would have affected the outcome of trial, we find no merit to his argument that his trial counsel's failure to explore the issue deprived him of his state and federal constitutional right to effective assistance of counsel.

IV

Defendant next argues that the jury verdict was against the great weight of the evidence. Defendant failed to preserve this issue when he withdrew his motion for a new trial; thus, we review the issue for a miscarriage of justice. *People v Noble*, 238 Mich App 647, 658; 608 NW2d 123 (1999).

Here, the evidence does not "preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). A person may violate the child sexually abusive activity statute by preparing for any child sexually abusive activity. *Thousand, supra*, 115. Trial testimony established that a male using the nickname of "M.Maxima" had several conversations with an officer posing as a thirteen-year-old girl named Tammy Livingston in which M.Maxima discussed sexual acts he would like to engage in with the minor child. During these chats,

M.Maxima identified himself as "Bill Chan" and E-mailed the girl a photo of himself. He made plans to meet with the girl in order to engage in sexual activity with her. He further stated that he would bring alcohol, prophylactics and whipped cream to the meeting place and told the minor child that after their initial meeting, they would go to a motel room where they would engage in various sexual acts. Defendant described what he would be wearing, as well as the color, make and model of the car he would be driving. "Tammy" told M.Maxima that she liked wine coolers and that her birthday was approaching.

When defendant arrived at the agreed-upon meeting place, he told a waitress he was "meeting someone." He looked like the photo he E-mailed to "Tammy" and fit the description that M.Maxima gave to "Tammy" during their chats. He was wearing the clothing that M.Maxima said he would be wearing, and he was driving the car that M.Maxima stated he would be driving. When the police arrested defendant, a search of his jacket pocket revealed a receipt from Kroger's listing items such as a birthday card, two four-packs of wine coolers, a pack of prophylactics, and a tub of whipped cream. In addition to the receipt, the police found two four-packs of wine coolers, a package of prophylactics, and a tub of whipped cream during a search of defendant's vehicle. Also on defendant's person was a birthday card to "Tammy" from "Bill." Here, the evidence does not preponderate so heavily against the verdict that it would be a miscarriage of justice to let the verdict stand. On the contrary, the trial testimony supports defendant's guilty verdict. Accordingly, we find no miscarriage of justice in allowing the verdict to stand.

V

Defendant next asserts that the totality of the errors deprived defendant of his state and federal constitutional rights to due process of law and a fair trial. We disagree.

As to any possible cumulative error, the test to determine whether reversal is required is not whether there are some irregularities, but whether defendant has had a fair trial. *People v Duff*, 165 Mich App 530, 539; 419 NW2d 600 (1987). Here, although defendant argues that the cumulative effect of all these errors warrants the conclusion that he was deprived of his due process rights and his right to a fair trial, because none of the failures rose to the level of ineffective assistance, their cumulative effect did not deny defendant his right to a fair trial. Likewise, because the evidence supported the verdict, and because defendant failed to establish that the child sexually abusive activity statute was unconstitutionally vague or overbroad, no error occurred.

VI

Next, defendant requests resentencing, arguing that the trial court was laboring under a misconception of law erred when it sentenced defendant to sex offender treatment as a condition of parole because the sentencing judge. We conclude that defendant is not entitled to resentencing.

At the sentencing hearing, the trial court computed the guidelines and sentenced defendant to six months to twenty years' imprisonment. The court further ordered that defendant receive treatment for his sexual addiction tendencies, and stated that if defendant could not

receive the treatment he needed during his period of incarceration, then, as a condition of his parole, he could complete the treatment after he is on out on parole.

Defendant now challenges the trial court's decision, arguing that the trial judge failed to properly exercise her discretion because she was laboring under "a misconception of the law." Defendant argues that, because of his immigration status, he has not been able to receive treatment for his sexual addiction tendencies during his period of incarceration, and that the parole board will not consider an inmate for parole who is required to take such classes and who has not completed the course of therapy. He asserts that the trial judge was "under a misconception as to how [defendant] could be released by making sex offender classes a condition of his parole."

While it appears that the sentencing court believed that it was at least possible that defendant would be permitted by the parole board to receive the court-ordered treatment while on parole, if the treatment was not available while defendant was incarcerated, there is no indication that if the court knew that the imposition of the condition might result in defendant serving more than his minimum time, the court would have either sentenced him other than to the jurisdiction of the Department of Corrections, or would have opted not to impose the condition. It is clear that the court wanted defendant to be required to undergo treatment as a condition of parole, and that the court wanted defendant to serve him time under the jurisdiction of the Department of Corrections.

VII

In his supplemental brief, defendant argues that the prosecutor's misconduct deprived him of a fair trial. We review this unpreserved issue for plain error that affected defendant's substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). This Court will find no reversible error if the prejudicial effect of the prosecutor's comments could have been cured by at timely instruction. *Id.*

Defendant failed to object to the prosecutor's comments. Further, the court instructed on abandonment, and did not confine consideration of that defense to the attempt, as opposed to the preparation, language of the statute. Under these circumstances, we find no reversible error.

Nor do we find reversible error in the court's initial oversight of the defense instruction concerning character witnesses. The court gave the instruction after its omission was called to its attention. There is no reason to conclude that defendant was prejudiced by the timing of the instruction.

Defendant also argues that the prosecutor engaged in misconduct depriving him of a fair trial when the prosecutor changed his theory of the crime from attempting child sexually abusive activity to preparing for child sexually abusive activity. We disagree.

The amended information charged defendant with one count of child sexually abusive activity charging that he attempted or prepared to arrange for child sexually abusive activity. Thus, contrary to defendant's argument on appeal, defendant was on notice of the possibility that the prosecution would argue that the proofs established either attempting or preparing to arrange

for child sexually abusive activity. Because defendant fails to identify any misconduct, we find no error.

Defendant further argues that the prosecutor's remarks attacked the veracity of defendant's counsel. Defendant quotes the following remark that the prosecutor made during rebuttal:

> Look at all of the evidence. Consider it. Apply the evidence to the law provided by Judge Hathaway. Keep your eye on the ball. Mr. Pitts is very eloquent. And there's an old saying, "Don't think of that pink elephant, don't think of that pink elephant." What are you thinking about? A pink elephant, right? Mr. Pitts is a master. As my seventh grade basketball coach said, "Keep your eye on the ball," to justly decide a true verdict based solely upon evidence presented. Do not allow bias, prejudice, or sympathy to enter into your decision. Thank you.

Although defendant argues that this was an attack on the veracity of defendant's counsel and states that the comment encouraged the jury to view defense counsel as unscrupulous and untrustworthy, the context of the remark reveals that the comment is not an attack on defense counsel's truthfulness. Rather, in making this remark, the prosecutor was asking the jury to focus on the evidence and not on any attempts by defendant's counsel to sway the jurors' views by appeals to their sympathy, biases, or prejudices. The statement "Mr. Pitts is very eloquent" in no way implies that defendant's counsel was not trustworthy. Accordingly, because defendant has failed to show any improper conduct by the prosecutor, he has failed to establish error. Therefore, his argument lacks merit.

VIII

Lastly, defendant argues that the trial court erred in failing to remove two jurors for cause and in failing to allow him an additional peremptory challenge to remove juror Muncy, who in any event should have also been removed for cause. We disagree.

The decision to seat a jury panel member on a jury is reviewed de novo. *People v Manser*, ___ Mich App ___; ___ NW2d ___ (Docket No. 221480, issued 2/15/02). However, this Court reviews for an abuse of discretion a trial court's rulings on challenges for cause based on bias. *People v Williams*, 241 Mich App 519, 521; 616 NW2d 710 (2000).

Defendant has failed to established that the trial court abused its discretion when it denied challenges for cause concerning prospective jurors Duckworth and Cehanowicz. MCR 2.511(D)(3), (4) and (5) provide that a jury panel member may be excused for cause based on a demonstrated bias for or against a party, a state of mind that will prevent the juror from rendering a just verdict, or opinions that would improperly influence the juror's verdict. MCR 2.511(D)(3), (4) and (5); *Williams*, *supra*, 521.

Here, prospective juror Duckworth initially stated that she had a boyfriend who wanted to become a police officer and that she had a tendency to believe police officers more than persons who are not police officers. However, after being asked three different times whether she could be fair, Duckworth stated that she could be fair and, if instructed to do so, would treat the

testimony of police and lay witnesses the same. Thus, the trial court was legitimately satisfied that Duckworth would not be biased.

Similarly, the trial court questioned prospective juror Cehanowicz and asked her whether she could put her experiences of sexual abuse behind her and be fair. Cehanowicz stated that she could put the experience behind her and base her decision on the evidence in the case. She also stated that she could be fair to both sides.

An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001). Given the responses Duckworth and Cehanowicz gave the court, the trial court's failure to remove these jurors for cause did not constitute an abuse of discretion. Further, because the trial court properly denied such challenges, it did not err in denying defendant's motion for mistrial.

Nor was juror Muncy removable for cause. Muncy stated several times that while she has a daughter the same age as the hypothetical minor in this case, she unequivocally would be able to render a just verdict. Because Muncy never demonstrated a bias for or against either party, a state of mind that would have prevented her from rendering a just verdict, or opinions that would improperly influence her verdict, she was not removable for cause. MCR 2.511(D)(3), (4), and (5). Thus, the trial court properly seated juror Muncy.

Defendant also argues that the trial court should have allowed him an additional peremptory challenge so that he could have excused juror Muncy. Although a criminal defendant has a constitutional right to be tried by a fair and impartial jury, US Const, Am VI; Const 1963, art 1, § 20, MCL 768.12 and MCR 6.412(E) govern the right to exercise peremptory challenges. MCR 6.412(E)(2) provides, in pertinent part, as follows:

> *Additional Challenges*. On a showing of good cause, the court may grant one or more of the parties an increased number of peremptory challenges.

Here, because the trial court properly denied defendant's challenge for cause concerning prospective jurors Duckworth and Cehanowicz, defendant fails to show good cause for an additional peremptory challenge.

Furthermore, defendant failed to request an additional peremptory challenge in order to excuse juror Muncy. It is well recognized that the right to a peremptory challenge exists only until the jury is sworn. *People v Daoust*, 228 Mich App 1, 7; 577 NW2d 179 (1998). Here, defendant never made such a request and waited until after the jury was sworn to bring up the potential bias of juror Muncy in a motion for a mistrial. Therefore, defendant's argument that the trial court should have allowed him to exercise another peremptory challenge lacks merit.

Affirmed.

/s/ Helene N. White
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald