STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH MICHAEL CHONTOS,

Defendant-Appellant.

UNPUBLISHED
July 29, 2004

No. 246799
Wayne Circuit Court
LC No. 02-007853

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH MICHAEL CHONTOS,

Defendant-Appellant.

No. 246884
Wayne Circuit Court
LC No. 02-009913

Before: Jansen, P.J., and Meter and Cooper, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted on two counts of first-degree criminal sexual conduct with a person under the age of thirteen (CSC I), MCL 750.520b(1)(a), two counts of second-degree criminal sexual conduct with a person under thirteen (CSC II), MCL 750.520c(1)(a), and one count of disseminating sexually explicit material to a minor, MCL 722.675. Defendant was sentenced to 225 months to 40 years' imprisonment for each conviction of CSC I, 5 to 15 years' imprisonment on each conviction of CSC II, and 1 to 2 years'

imprisonment on the conviction of disseminating sexually explicit material to a minor. We affirm.[1]

Defendant contends that there was insufficient evidence to support a conviction of disseminating sexually explicit material to minors. We disagree.

In reviewing a claim of insufficient evidence, this Court views evidence in light most favorable to the prosecution to determine whether a rational trier of fact would have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999).

A person violates MCL 722.675 when he "[k]nowingly disseminates to a minor sexually explicit visual or verbal material that is harmful to minors" or "[k]nowingly exhibits to a minor a sexually explicit performance that is harmful to minors." Defendant's particular contention on appeal is that the prosecution failed to prove that the material exhibited was "harmful to minors." The statute itself defines the term "harmful to minors," as MCL 722.674 provides:

> (a) "Harmful to minors" means sexually explicit matter which meets all of the following criteria:
>
> (i) Considered as a whole, it appeals to the prurient interest of minors as determined by contemporary local community standards.
>
> (ii) It is patently offensive to contemporary local community standards of adults as to what is suitable for minors.
>
> (iii) Considered as a whole, it lacks serious literary, artistic, political, educational, and scientific value for minors.
>
> (b) "Local community" means the county in which the matter was disseminated.
>
> (c) "Prurient interest" means a lustful interest in sexual stimulation or gratification. In determining whether sexually explicit matter appeals to the prurient interest, the matter shall be judged with reference to average 17- year-old minors. If it appears from the character of the matter that it is designed to appeal to the prurient interest of a particular group of persons, including, but not limited to, homosexuals or sadomasochists, then the matter shall be judged with reference to average 17-year-old minors within the particular group for which it appears to be designed.

The testimony of the victim regarding the movies included:

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[1] We note that defendant conceded, at oral argument, the first issued raised in his appellate brief regarding the constitutionality of the disseminating sexually explicit material statute, thus, we need not address this issue.

Q. Let me ask you this: did your uncle ever show you some kind of movies that you hadn't seen before?

A. Yes.

* * *

Q. And do you remember what the movies were about?

A. They were porno movies.

Q. Could you tell us what you saw?

A. People having sex.

Q. You say people; can you describe that in any more detail?

A. Guy and a girl; then a guy and two girls.

Q. What were the guys and the girls doing?

A. Having intercourse.

The prosecution showed the victim two physical video tapes and the victim identified those as the two video tapes that defendant had showed him. Additionally, the victim testified:

Q. Do you remember telling detective Lancaster something about watching a 69 position?

A. Yes.

Q. What did you mean when you told her about watching a 69 position?

A. That's where you lie on the floor, and the other person lays on top of them, and they both give oral sex.

Q. And when you told her about that, what were you making reference to?

A. Can you repeat the question?

Q. When you told detective Lancaster about that, what were you talking about?

A. I saw it on the movie; it was - - I don't understand.

Detective Sally Lancaster testified that she executed a search warrant and discovered the two video tapes which the victim identified. And, Detective Lancaster described the video tapes as "pornographic video tapes" and explained that she viewed them briefly and that they showed "males and females having sexual intercourse, or oral sex; some of male and two females."

We find that the above provided testimony is sufficient for a reasonable jury to conclude that the videos which defendant showed to the victim were harmful to minors. Certainly depictions of males and females engaging in sexual intercourse and oral sex would appeal to the prurient interest of a minor by contemporary local standards. See MCL 722.675(a)(i). Additionally, a reasonable jury could conclude that it is patently offensive to contemporary local standards of adults to show depictions of individuals engaged in sexual intercourse and oral sex to a minor. See MCL 722.675(a)(ii). Finally, both the victim and the detective described these movies as "porno movies." Accordingly, a reasonable jury could conclude that such movies lack any serious literary, artistic, political, educational, and scientific value for minors. See MCL 722.675(a)(iii). Therefore, viewing the evidence in the light most favorable to the prosecution there is sufficient evidence to support defendant's conviction.

Next, defendant argues that the prosecution erred when it failed to disclose a document evidencing an interview between the victims' father (and defendant's brother), Derek Chontos, and a friend of the court (FOC) referee wherein he stated that he believed the statements against defendant were true.

Due process requires disclosure of certain information possessed by the prosecution if that evidence might lead a jury to entertain a reasonable doubt about a defendant's guilt. *People v Lester,* 232 Mich App 262, 280; 591 NW2d 267 (1999), citing *Brady v Maryland,* 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), and *Giglio v US,* 405 US 150, 154; 92 S Ct 763; 31 L Ed 2d 104 (1972). In *Lester, supra* at 281, this Court reiterated what a defendant must prove to establish that a prosecutor violated this rule:

> (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *United States v Meros,* 866 F2d 1304, 1308 (CA11, 1989), cert den 493 US 932; 110 S Ct 322, 107 L Ed 2d 312 (1989).

First, it is important to point out that the particular document which defendant complains was not disclosed was never entered as evidence. Second, and most important, this document simply is not favorable to defendant. Rather, the record indicates that this document is a report prepared by the friend of the court purporting that Derek Chontos stated to the FOC referee that he believed the allegations against defendant were true. Defendant fails to explain, and we fail to see, how this could be considered favorable evidence, a distinction necessary for due process to require disclosure. See *Lester, supra* at 281. Consequently, we find that no disclosure was necessary here.

Next, defendant argues that the prosecutor improperly impeached Derek Chontos using extrinsic evidence, specifically, the record of the FOC interview. Again, the FOC record was not entered as evidence, nor is there any other evidence regarding that meeting or statements. Rather, the prosecutor merely asked the witness about prior inconsistent statements, and in the course of that questioning, offered the FOC report, not as evidence, but to refresh the witness' memory. We find that there was no impeachment using extrinsic evidence at all, and accordingly, no error.

Finally, defendant argues that trial court improperly considered defendant's choice to exercise his right to a jury trial when imposing its sentence. After reviewing the record, we disagree. Sentencing decisions are reviewed by this Court for an abuse of discretion. *People v Kowalski*, 236 Mich App 470; 601 NW2d 122 (1999).

In support of his contention that the trial court considered the fact that defendant exercised his right to have a jury trial, in his brief on appeal defendant points to a number of comments made by the trial court at the sentencing hearing. We have reviewed the challenged remarks and conclude that rather than chastising defendant for going to trial, as defendant suggests, the trial court is actually addressing directly the multiple statements made by defendant's family members pleading with the court that defendant did not commit the crime and responding to defendant's claim that he has suffered because of the charges and trial. The trial court's statement expresses to defendant that he brought it about himself and that suffering through the process is not a basis for leniency. We find that, taken as a whole, there is simply no evidence that the trial court sentenced defendant more harshly based on the exercise of his constitutional right to a jury trial.

Affirmed.

/s/ Kathleen Jansen
/s/ Patrick M. Meter
/s/ Jessica R. Cooper