# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HOMER LEE JOHNSON,

Defendant-Appellant.

UNPUBLISHED
March 21, 1997

No. 191520
Muskegon Circuit Court
LC No. 95-138437-FH

Before: Sawyer, P.J., and Neff and A. L. Garbrecht,* JJ.

PER CURIAM.

Defendant appeals as of right his conviction by a jury of child sexually abusive activity, MCL 750.145c; MSA 28.342a. Defendant subsequently pleaded guilty to being an habitual offender (second), MCL 769.10; MSA 28.1073(10), having previously been convicted of second-degree criminal sexual conduct, MCL 750.520c; MSA 28.1082. Defendant was sentenced to three to thirty years of imprisonment. We affirm.

Defendant took nude and partially nude photographs of the victim when she was between the ages of two and six. The photographs depicted the victim in various poses, including kneeling in prayer, in which the victim's vaginal area was exposed.

I

Defendant argues that his conviction must be vacated because the statute proscribing child sexually abusive activity, MCL 750.145c; MSA 28.342a, is unconstitutionally vague. We find this challenge is without merit.

MCL 750.145c(2); MSA 28.342a(2) provides, in relevant part:

> 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

* Circuit judge, sitting on the Court of Appeals by assignment.

> 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. . . .

"Child sexual abuse activity" is defined as "a child engaging in a listed sexual act." MCL 750.145c(1)(h); MSA 28.342a(1)(h). "Listed sexual act[s]" include sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual enticement, or erotic nudity. MCL 750.145c(1)(e); MSA 28.342(1)(e).

The sexual act at issue here is "erotic nudity," which, at all times relevant to the present case,[1] was defined as follows:

> [T]he display of the human male of female genital or pubic area, or developed or developing female breasts, in a manner which lacks primary literary, artistic, educational, political, or scientific value and which the average person applying contemporary community standards would find appeals to prurient interests. As used in this subdivision, "community" means the state of Michigan. [MCL 750.145c(1)(d); MSA 28.342a(1)(d).]

Statutes are presumed to be constitutional, and courts are obligated to construe a statute as constitutional unless its unconstitutionality is clearly apparent. *People v Hubbard (After Remand)*, 217 Mich App 459, 483; 552 NW2d 593 (1996). A statute may be unconstitutionally vague if: (1) it does not provide fair notice of the conduct proscribed; (2) it confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed; or (3) its coverage is overly broad and impinges on First Amendment freedoms. *People v White*, 212 Mich App 298, 309; 536 NW2d 876 (1995).

Defendant's challenge to MCL 750.145c; MSA 28.342a involves the first two of the above defects. Specifically, defendant argues that the definition of erotic nudity is unconstitutionally vague because only a local community standard, rather than a statewide community standard, should be used in determining whether the photographs at issue appeal to prurient interests.[2] It is simply unreasonable, posits defendant, to require an individual to determine what the contemporary community standards are in a state as diverse as Michigan. We disagree.

The United States Supreme Court has stated that the purpose of using a standard of an "average person applying contemporary community standards" is to ensure that the material will be judged by its impact on an average person, rather than a particularly sensitive person or a totally insensitive one. *Miller v California*, 413 US 15, 33; 93 S Ct 2607; 37 L Ed 2d 419 (1973) (discussing definition of obscenity). In *Miller*, the Court rejected the imposition of a nationwide community standard, but concluded that reference to statewide contemporary standards was constitutionally permissible. *Id* at 33-34. The Court has left the question of what geographic area constitutes the "community" to the state legislatures. *Id.*; see also *Smith v United States*, 431 US 219,

303; 97 S Ct 1756; 52 L Ed 2d 324 (1977); *Jenkins v Georgia*, 418 US 153, 157; 94 S Ct 2750; 41 L Ed 2d 642 (1974).

The Michigan Legislature's decision to define "community" as encompassing the entire state is constitutionally sound. *Miller, supra* at 33-34. MCL 750.145c(1)(d); MSA 28.342c(1)(d), including the definition of "community," gives adequate warning of the conduct proscribed and provides boundaries sufficiently distinct for courts to fairly administer the law. Therefore, it is not unconstitutionally vague. *White, supra* at 309. Defendant has failed to meet his burden of proving otherwise.

II

Defendant also argues that he was denied effective assistance of counsel because his trial counsel failed to assert the defense that the photographs at issue had "primary artistic value." We disagree.

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate both that counsel's performance fell below an objective standard of reasonableness and that this deficient performance prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2 797 (1994). In determining whether an error was prejudicial, the defendant must overcome the presumption that, under the circumstances, the challenged action could be considered sound trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). This Court will neither substitute its judgment for that of counsel regarding matters of trial strategy, nor assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

Defense counsel is not required to raise every possible defense theory. See *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). In the present case, defense counsel asserted that the prosecutor's attempt to portray defendant as a bad man whose artwork overemphasized nudity was merely a smoke screen, and urged the jury to focus their attention on the question whether the photographs at issue were displayed "in a manner in which the average person applying contemporary community standards would find appeals to prurient interests." MCL 750.145c(1)(d); MSA 28.342a(1)(d).

We find that the strategy chosen by defendant's counsel was reasonable. The fact that this strategy was unsuccessful does not constitute ineffective assistance of counsel. *Stewart, supra* at 42. Defendant has not overcome the presumption that, under the circumstances, the performance of his counsel could be considered sound trial strategy. Therefore, his claim of ineffective assistance of counsel must fail.

Affirmed.

/s/ David H. Sawyer
/s/ Janet T. Neff
/s/ Allen L. Garbrecht

[1] In 1995, MCL 750.145c(1)(d); MSA 28.342a(1)(d) was amended to redefine erotic nudity as "the lascivious exhibition of the genital, pubic, or rectal area of any person. As used in this subdivision, 'lascivious' means wanton, lewd, and lustful, and tending to produce voluptuous or lewd emotions."

[2] Defendant does not suggest what geographical boundary ( i.e., neighborhood, city, or county) would, in his opinion, pass constitutional muster.