

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KURTIS LANE MIDDLETON,

Defendant-Appellant.

UNPUBLISHED

June 5, 2007

No. 268265

Oakland Circuit Court

LC No. 05-203176-FH

Before: Smolenski, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for second-degree criminal sexual conduct (CSC II), MCL 750.520(c)(1)(a) (involving a child under the age of 13), and accosting a child for an immoral purpose, MCL 750.145a. The trial court sentenced defendant, as a second habitual offender, MCL 769.10, to 7 to 22 ½ years in prison for the CSC conviction and 3 to 6 years in prison for the accosting conviction. We affirm.

I. Alleged Error Extinguished by Waiver

Defendant first argues that the trial court provided an erroneous jury instruction regarding CSC II. Defense counsel's express approval of a given jury instruction constitutes "a waiver that extinguishes any error." *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000). Because defense counsel expressly approved the jury instructions as given, this issue has been waived and will not be considered by this Court. Under this theory, defendant also alleges ineffective assistance of counsel for failing to object to the CSC II jury instruction; however, he fails to address this issue at all in the argument section of his brief. Therefore, this issue is abandoned. "The failure to brief the merits of an allegation of error constitutes an abandonment of the issue." *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004). Furthermore, there is no error in the jury instruction as given, and defense counsel is not required to make futile objections. *People v Wilson*, 252 Mich App 390, 393-394, 397; 652 NW2d 488 (2002). Also with regard to the jury instruction, defendant argues that the trial court failed to properly instruct the jury on the accosting charge because it neglected to define critical terms. But defense counsel's express approval of the instruction "extinguishes any error." *Carter*, *supra* at 216.

II. No Prosecutorial Misconduct

Defendant next argues that the prosecutor committed misconduct during his closing argument by vouching for the victim's credibility. We disagree. Because defendant failed to object to the prosecutor's remarks, this issue has not been properly preserved for appellate review, *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003), and will only be reviewed for plain error affecting his substantial rights, *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999); *Ackerman, supra* at 448.

The test of prosecutorial misconduct is whether defendant was denied a fair and impartial trial, i.e., whether prejudice resulted. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). This Court reviews claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *Abraham, supra* at 272-273. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), overruled on other grounds *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

During cross-examination, defense counsel confronted the victim with inconsistencies between her trial testimony, statements she made during her stay at a juvenile facility, and her preliminary examination testimony. Therefore, the victim's credibility was an issue at trial. Generally, a prosecutor is permitted to argue from the evidence whether a witness is worthy of belief. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). However, "the prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *Bahoda, supra* at 276, discussing the prosecutor's reference to a plea agreement, which contained a promise of truthfulness. Although the prosecutor referenced the victim's statements to child protective services and her preliminary examination testimony, these comments did not imply that the prosecutor had some special knowledge about her truthfulness because defense counsel addressed both of these during cross-examination. The prosecutor's remarks were responsive to defense counsel's challenge to the victim's credibility during cross-examination and must be considered in light of defense arguments. *Ackerman, supra* at 452; *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

Further, no error requiring reversal will be found if the prejudicial effect of the prosecutor's improper conduct could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). The trial court instructed the jury that the attorneys' statements and arguments were not evidence, and jurors are presumed to follow the trial court's instructions. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Therefore, the prejudicial effect of the prosecutor's remarks, if any, would have been cured by the court's timely instructions. Therefore, the prosecutor's remarks did not deny defendant a fair trial.

III. Effective Assistance of Counsel

Under the same theory, defendant contends that defense counsel was ineffective in failing to object to the prosecutor's remarks. We disagree. Because defendant failed to file a motion for a new trial on these grounds or request a *Ginther*¹ hearing, defendant's allegation of ineffective assistance of counsel has not been preserved for appellate review, and this Court's review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

The United States and Michigan constitutions guarantee the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20; *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). To establish ineffective assistance of counsel, a defendant must show that: 1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; 2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and 3) the resultant proceedings were fundamentally unfair or unreliable. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Because we determine the prosecutor's remarks were not improper, counsel was not ineffective for failing to object on that basis as defense counsel is not required to make futile objections. *Wilson, supra* at 393-394, 397.

IV. The Statute is Facially Constitutional and was Constitutionally Applied

Defendant contends that MCL 750.145a is unconstitutional because it is vague and overbroad. He further contends that it was unconstitutional as applied to him. We disagree.

A. The Statute is Neither Unconstitutionally Vague or Overbroad

A statute is presumed to be constitutional unless its unconstitutionality is readily apparent. *People v Hill*, 269 Mich App 505, 524; 715 NW2d 301 (2006); *Sands, supra* at 160. As the party challenging the constitutionality of § 145a, defendant bears the burden of proving its unconstitutionality. *Id.* In challenging the facial validity of the statute, defendant must show that there are no circumstances under which it would be valid. *Id.* at 161. Vagueness challenges must be considered in light of the facts at issue. *Id.* MCL 750.145a provides, in pertinent part:

A person who accosts, entices, or solicits a child less than 16 years of age . . . with the intent to induce or force that child or individual to commit an immoral act, to submit to an act of sexual intercourse or an act of gross indecency, or to any other act of depravity or delinquency, or who encourages a child less than 16 years of age . . . to engage in any of those acts is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than \$4,000.00, or both.

A statute may be unconstitutionally vague on any of three grounds: (1) it is overbroad, impinging on First Amendment freedoms, (2) it fails to provide fair notice of the conduct proscribed, or (3) it is so indefinite that it confers unlimited and unstructured discretion on the

¹ *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973).

trier of fact to determine whether an offense has occurred. *Hill, supra* at 524; *Sands, supra* at 161. Defendant challenges the statute on all three grounds.

Defendant claims that § 145a impinges on First Amendment freedoms. Although a criminal defendant may not generally challenge a charging statute on the basis that it is vague or overbroad when his conduct falls fairly within the scope of the statute, he may do so when First Amendment rights are involved. *People v Rogers*, 249 Mich App 77, 95; 641 NW2d 595 (2001). Therefore, defendant has standing to challenge the constitutionality of § 145a on the basis of a hypothetical application to third parties who are not before the court. *Id.* When a criminal defendant challenges a statute that purports to regulate both speech and conduct, the “‘overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep.’” *Id.*, quoting *Broadrick v Oklahoma*, 413 US 601, 615; 93 S Ct 2908; 37 L Ed 2d 830 (1973). The mere fact that one can conceive of an impermissible application of a statute is not sufficient to render it overbroad; rather, “‘there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds.’” *Rogers, supra*, at 96, quoting *Los Angeles City Council v Taxpayers for Vincent*, 466 US 789, 801; 104 S Ct 2118; 80 L Ed 2d 772 (1984). Moreover, a statute “‘may be saved from being found to be facially invalid on overbreadth grounds where it has been or could be afforded a narrow and limiting construction by state courts or if the unconstitutionally overbroad part of the statute can be severed.’” *Rogers, supra*, at 96, quoting *Broadrick, supra* at 613.

Statutes should be construed in a manner that renders them constitutional. *Hill, supra* at 525. The intent of § 145a is to criminalize the victimization of children under 16 through the act of accosting, enticing, soliciting, or encouraging them to engage in certain types of criminal activity. Specifically enumerated acts include inducing or forcing a child to engage in acts of gross indecency or sexual intercourse, which would make the child a victim of a criminal act. When the Legislature included “immoral acts,” in the statute, it indicated an intent to prohibit the victimization of children through soliciting or encouraging children to participate in certain criminal acts, particularly those of a sexual nature. The statute is narrowly drawn so that it includes only communications made in furtherance of a criminal purpose or conduct. Section 145a targets conduct, as opposed to pure speech, and it does not penalize the act of speaking words. Therefore, this statute does not impinge on First Amendment freedoms and is not unconstitutionally overbroad.

B. The Statute Provides Fair Notice

Defendant contends that § 145a, by using the terms “immoral act” and “encourage,” fails to provide fair notice of what conduct is proscribed because their interpretation depends on one’s “personal moral compass.” To evaluate a vagueness challenge, this Court must examine the entire text of the statute and give the words of the statute their ordinary meanings. *Hill, supra* at 524; *Sands, supra* at 161. “To afford proper notice of the conduct proscribed, a statute must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited.” *Id.* A term that requires persons of ordinary intelligence to speculate regarding its meaning and differ about its application may not be used. *Id.* To be sufficiently definite, the meaning of a term must be “fairly ascertainable by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words.” *Hill, supra* at 524; *Sands, supra* at 161.

Random House Webster's College Dictionary (1997) defines the term "immoral" as "lascivious," which in turn means "arousing sexual desire" or "indicating sexual interest or expressive of lust or lewdness." Thus, the term "immoral act" means an act that arouses sexual desire or indicates sexual interest or expresses lust or lewdness and is susceptible of ordinary comprehension. See *People v Martin*, 271 Mich App 280, 352; 721 NW2d 815 (2006). The term "encourage" is defined as promote or foster. *Random House Webster's College Dictionary* (1997). Therefore, both "immoral act" and "encourage" are sufficiently definite and do not require a reasonable person of ordinary intelligence to speculate about their meanings or applications. See *Hill, supra* at 524; *Sands, supra* at 161. Accordingly, § 145a provides fair notice of what conduct is proscribed.

C. The Statute Provides Structured Parameters for the Fact Finder

Defendant next argues that the terms "immoral act" and "encourage" permit the trier of fact unfettered discretion in deciding what acts are prohibited. To determine whether a statute provides unstructured and unlimited discretion to the trier of fact, this Court examines whether it provides standards for enforcing and administering the laws so that enforcement is not arbitrary or discriminatory. *English v Blue Cross Blue Shield of Michigan*, 263 Mich App 449, 469; 688 NW2d 523 (2004); *People v Boomer*, 250 Mich App 534, 539-540; 655 NW2d 255 (2002). Using the definitions provided, *supra*, § 145a prohibits a person from accosting, enticing, or soliciting a child under age 16 "with the intent to induce or force" the child to commit an act that arouses sexual interest or submit to an act of gross indecency, sexual intercourse, or other act of depravity or delinquency or foster or promote a child to engage in any of those acts. Furthermore, this Court has held that the mens rea requirement in a similar statute, MCL 750.145d, properly limited the discretion of the trier of fact in determining what acts are prohibited. *People v Tombs*, 260 Mich App 201, 220; 679 NW2d 77 (2003). Therefore, the use of the terms "immoral act" and "encourage" do not provide the trier of fact with unfettered discretion in determining which acts are prohibited.

D. The Statute was Applied Constitutionally

Defendant argues that MCL 750.145a is unconstitutional as applied to the facts of the instant case. Section 145a prohibits accosting, enticing, or soliciting a child under age 16 "with the intent to induce or force" the child to commit an act that arouses sexual interest or submit to an act of gross indecency, sexual intercourse, or other act of depravity or delinquency or foster or promote a child to engage in any of those acts. The evidence shows that defendant asked the victim to show him her breasts in exchange for cigarettes, the possession of which by a minor is a misdemeanor. MCL 722.642. Based on this evidence, the jury could have concluded that defendant intended to engage in an immoral act, sexual intercourse, or some other act of depravity or delinquency. Further, encouraging a girl under 16 to engage in nudity for a sexual purpose constitutes an immoral act, i.e., one that arouses sexual interest. Defendant asserts that the sole act of providing cigarettes to a minor could have supported defendant's conviction. However, defendant overlooks the statutory requirement that an offender must accost, entice, or solicit the child, and the mere provision of cigarettes does not satisfy that requirement. Therefore, defendant's acts were a violation of MCL 750.145a, and the statute is not unconstitutionally vague as applied.

IV. Sufficiency of the Evidence

Defendant claims that there was insufficient evidence to sustain his accosting conviction. When the sufficiency of the evidence is challenged, this Court reviews the evidence in a light most favorable to the prosecutor to determine whether any trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006).

The elements of accosting a minor include 1) accosting, enticing or soliciting, 2) a child under 16, 3) with the intent to induce or force the child to commit or submit to an immoral act, an act of sexual intercourse or gross indecency, or any other act of depravity or delinquency, or 4) encouraging a child to engage in any of those acts. MCL 750.145a. The victim and her friend testified defendant asked the victim to show him her breasts in exchange for a cigarette, and there is no dispute that the victim was under 16 when this occurred.

MCL 750.145a was amended in 2002, and, effective June 1, 2002, accosting a minor was elevated from a misdemeanor to a felony. 2002 PA 45. The new version of the statute also authorizes a maximum prison term of four years, whereas the former version authorized a maximum jail term of one year. Defendant contends that there was insufficient evidence that this act occurred after June 1, 2002, and his conviction therefore constitutes a violation of the Ex Post Facto Clauses of the Michigan and United States Constitutions. US Const, art I, § 10; Const 1963, art 1 § 10. “A statute that affects the prosecution or disposition of criminal cases involving crimes committed before its effective date violates the Ex Post Facto Clauses if it (1) makes punishable that which was not, (2) makes an act a more serious criminal offense, (3) increases the punishment, or (4) allows the prosecution to convict on less evidence.” *People v Haynes*, 256 Mich App 341, 350; 664 NW2d 225 (2003) (internal quotations omitted).

The victim’s friend recalled that she witnessed the incident during the summer when the victim was 13, and the summer the victim was 13 would have been the summer of 2002. Any trier of fact could find beyond a reasonable doubt that the prosecutor proved that the incident occurred after June 1, 2002. See *Robinson, supra* at 5. Defendant correctly notes that the testimony of the victim and her friend differs regarding where the incident occurred. The victim recalled it occurring in the basement, and her friend remembered that it happened on the porch. However, absent exceptional circumstances, issues of witness credibility are for the jury. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). This Court will not interfere with the role of the trier of fact of determining the weight of the evidence or witness credibility. *People v Hill*, 257 Mich App 126, 141; 667 NW2d 78 (2003). Therefore, reversal is not warranted on this ground.

Defendant claims that he is entitled to resentencing if this Court vacates his accosting conviction because his scores for prior record variable 7 and offense variable 13 require adjustment. Given our resolution of defendant’s other issues, we need not address this issue.

Affirmed.

/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra