

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY DAVID SKOVERA,

Defendant-Appellant.

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UNPUBLISHED

September 11, 2007

No. 272186

Iron Circuit Court

LC No. 05-008582-FH

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from a bench trial conviction of possession of child sexually abusive material, MCL 750.145c(4), for which he was sentenced as an habitual offender, second offense, MCL 769.10, to 1-1/2 to 6 years in prison. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's sole claim on appeal is that MCL 750.145c "is unconstitutionally overbroad to the extent that it criminalizes the purely private possession of sexually explicit" depictions of young women who, although minors, are nonetheless old enough to consent to sexual relations. Defendant did not raise this issue below and thus it has not been preserved for appeal. *People v Bauder*, 269 Mich App 174, 177; 712 NW2d 506 (2005). Therefore, defendant must establish plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Walker (On Remand)*, 273 Mich App 56, 65-66; \_\_\_ NW2d \_\_\_ (2006).

"Statutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *People v Gregg*, 206 Mich App 208, 210; 520 NW2d 690 (1994). "A party challenging the constitutionality of a statute has the burden of proving its unconstitutionality. A party challenging the facial validity of a statute must show that no circumstances exist under which it would be valid. A vagueness challenge must be considered in light of the facts at issue." *People v Sands*, 261 Mich App 158, 160-161; 680 NW2d 500 (2004) (citations omitted). A penal statute may be unconstitutionally vague if it "is overbroad and impinges on First Amendment freedoms." *Id.* at 161.

The general rule is that pornography can be banned only if it is obscene, but pornography showing minors can be constitutionally prohibited whether or not the images are obscene. *Ashcroft v Free Speech Coalition*, 535 US 234, 240; 122 S Ct 1389; 152 L Ed 2d 403 (2002).

The statute at issue meets the restrictive criteria necessary for constitutionality: it is limited to visual depictions of sexual conduct by minors, the sexual conduct itself is limited and described, and it includes an element of scienter. *Osborne v Ohio*, 495 US 103, 113-115; 110 S Ct 1691; 109 L Ed 2d 98 (1990); *New York v Ferber*, 458 US 747, 764-765; 102 S Ct 3348; 73 L Ed 2d 1113 (1982).

Further, the statute does not impinge upon any privacy interests. It does not prohibit or criminalize consensual sexual activity between consenting persons above the age of consent for sexual relations. It is restricted to filming or photographing such activity and, while a person between 16 and 18 years of age may be able to consent to sexual relations, he or she cannot, unless emancipated, consent to appearing in child sexual abusive material. Moreover, the film at issue depicted a teenage girl engaging in sexual intercourse and was plainly intended to appeal only to the viewer's prurient interests. See *Miller v California*, 413 US 15, 24; 93 S Ct 2607; 37 L Ed 2d 419 (1973). Accordingly, defendant has failed to establish a plain error.

Affirmed.

/s/ Jane E. Markey  
/s/ Henry William Saad  
/s/ Kurtis T. Wilder