

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JARRETT JASON MCCORMICK,

Defendant-Appellant.

UNPUBLISHED

May 10, 2007

No. 266329

Washtenaw Circuit Court

LC No. 05-000558-FH

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

PER CURIAM.

Defendant appeals as of right his jury convictions of two counts of accosting, enticing, or soliciting a minor for immoral purposes, MCL 750.145a, and two counts of furnishing alcohol to a minor, MCL 436.1701. Defendant was sentenced as a habitual offender, second offense, MCL 769.10, to 23 months to 6 years of imprisonment for each conviction of accosting, enticing, or soliciting a minor and to 90 days in jail for each conviction of furnishing alcohol to a minor. Defendant was also ordered to pay \$1,280 in court costs and \$500 in attorney fees. We affirm defendant's convictions and sentences, but vacate that portion of the sentence that orders defendant to pay \$500 in attorney fees.

I. Facts

This case arises out of a referral to the office of Michigan's Children's Protective Services alleging that defendant provided alcohol and solicited a sex act from his cousin, A.R. and her friend, R.H., who were both 13 years of age at the time. At the time of the incidents in question, defendant was residing with his aunt in the same household as A.R.

Testimony by A.R. and R.H. established that, on the night in question, defendant drove to R.H.'s house and picked up both A.R. and R.H. At some point after 11:00 p.m., defendant drove to a "party store" near a White Castle restaurant. A.R. testified that defendant left the store with three plastic cups, "Bacardi," grape soda, and orange juice. Subsequently, the group went to pick up L.S., who sat in the back seat, next to A.R. After picking up L.S., defendant drove to the apartment complex where defendant and A.R. resided. Defendant drove to the rear parking lot behind the complex. According to A.R., defendant created three mixed drinks and distributed the drinks to the other passengers. According to A.R., the group stayed there and drank until roughly 2 a.m.

According to A.R., while the group was consuming their mixed alcoholic drinks, R.H. requested that A.R. switch seats with her. A.R. testified that R.H. wanted to sit next to L.S. so she could “serve [L.S.] up.” R.H. denied performing fellatio on L.S., but claimed that A.R. had done so. A.R. testified that shortly after R.H. fellated L.S., they returned to their original seating positions, and A.R. “gave [L.S.] oral.” According to both A.R. and R.H., when R.H. entered the front seat, defendant asked R.H., “Are you going to serve me up too?” R.H. testified that defendant made this request roughly five times. According to R.H., she refused stating, “I’m half your age and I’m A.R.’s friend” A.R. testified that when she returned to the front seat, defendant asked her, “Are you going to serve me up?” In response, A.R. further testified, she stated, “Hell, mother fuckin, no.” R.H. testified that she overheard defendant proposition A.R. as well. A.R. and R.H. testified that they interpreted defendant’s phrase “serve me up” as a request for the victims to perform fellatio on defendant. According to A.R., defendant made this request roughly three times to her. A.R. testified that while defendant was making this request, he told her, “You got my dick all hard.” A.R. also testified that, on the morning after the incident, defendant apologized to her, stating; “I’m sorry for the way that I was actin’ [sic] last night. I was drunk.”

The jury found defendant guilty on all counts. This appeal followed.

II. Specific Unanimity Instruction

Defendant first argues that he was deprived of his constitutional right to a unanimous jury verdict by the trial court’s failure to give the jury a specific unanimity instruction. We disagree. Because defendant failed to request a specific unanimity instruction, this claim of error is unpreserved. *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003).

This Court reviews a claim of instructional error de novo. *People v Martin*, 271 Mich App 280, 337; 721 NW2d 815 (2006). However, this Court reviews unpreserved instructional challenges for plain error affecting the defendant’s substantial rights. *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001). To avoid forfeiture: (1) an error must have occurred, (2) the error must have been plain, and (3) the error must have affected defendant’s substantial rights, meaning the error affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Criminal defendants are entitled to unanimous jury verdicts. MCR 6.410(B); *People v Cooks*, 446 Mich 503, 510-511; 521 NW2d 275 (1994). The trial court is required to properly instruct the jury on the unanimity requirement. *Id.* at 511. There are circumstances where a general unanimity instruction is insufficient to protect the defendant’s right to a unanimous verdict. *People v Gadomski*, 232 Mich App 24, 30; 592 NW2d 75 (1998). But, a trial court is not required to give a specific unanimity instruction merely because a single charge may be based on more than one underlying course of conduct. *Cooks, supra* at 512. Where a prosecutor presents evidence of multiple acts to establish a single charged offense, a general unanimity instruction is sufficient unless: “1) the alternative acts are materially distinct (where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives), or 2) there is reason to believe the jurors might be confused or disagree about the factual basis of defendant’s guilt.” *Id.* at 524.

Defendant argues on appeal that the prosecutor presented evidence of materially distinct courses of conduct on which the jury could have based the verdicts for the charges of accosting children for immoral purposes. Defendant argues that the jury could have based those convictions upon defendant's request for fellatio from the victims, or on defendant's act of furnishing alcohol to the victims. Furthermore, defendant argues that, because no definition was given to the jury for the terms "immoral act" or "gross indecency," there was a strong likelihood of substantial juror confusion.

While defendant is arguably correct that proof was presented of two materially distinct acts, which could have been the basis of the jury's verdicts, defendant cannot demonstrate that materially distinct evidence to support these charges was presented. In *Cooks*, the prosecutor presented three distinct acts of sexual penetration, while defendant was charged with only one count of criminal sexual conduct. *Cooks, supra*, at 506. Here, the prosecutor presented evidence of four distinct acts of defendant (propositioning A.R., propositioning R.H., furnishing alcohol to A.R., and furnishing alcohol to R.H.), and defendant was charged with four criminal counts (two counts accosting a child, and two counts of furnishing alcohol to a minor). The evidence of defendant's inappropriate requests to the victims was conceptually linked by the prosecutor to the charges of accosting a minor for immoral purposes. During closing argument, the prosecutor described defendant's inappropriate requests for fellatio to the victims immediately after outlining the elements of accosting a child for immoral purposes. The prosecutor presented the testimony of the victims to prove each charge of accosting a minor for immoral purposes. A.R. testified that defendant requested fellatio from her and from R.H. R.H. testified that defendant requested fellatio from her and from A.R. It was clear at trial that it was these requests that led to the charge related to accosting a minor for immoral purposes. The charges of furnishing alcohol to a minor were based on different, distinct proofs. No other circumstantial evidence to support the charges was offered against defendant. "This is not a case in which different witnesses testified as to one incident but not the other or where different items of real evidence were introduced to prove one act but not the other, so that the jury might have distinguished between the credibility of different witnesses or the weight to be given various items of real evidence." *Cooks, supra* at 523, quoting *People v Deletto*, 147 Cal App 3d 458, 466; 195 Cal Rptr 233 (1983).

Furthermore, defendant has not presented any evidence to support that the jury suffered from confusion when considering the charges.¹ The jury did not request further instruction from the trial court, nor did any of the jurors indicate confusion or disagreement with the final verdict. Therefore, defendant has not met his burden of demonstrating the existence of plain error that affected his substantial rights. *Carines, supra* at 763.

III. Constitutional Challenge to MCL 750.145a

¹ While defendant complains that definitions of "immoral act," "gross indecency," or "act of depravity or delinquency" were not defined, he cites no authority to support that definitions were required, and he provides no explanation or rationalization for his argument that the jury was confused as to the meaning of those terms. The issue is entirely abandoned. *Martin, supra* at 315.

Defendant next argues that MCL 750.145a is unconstitutionally vague and overbroad on its face and as applied to him. For this reason, defendant further argues, his convictions for violating this statute must be vacated. We disagree.

This Court generally reviews constitutional challenges to the interpretation and application of statutes de novo. *Martin, supra* at 328. However, because this issue was not properly preserved by a constitutional challenge before the trial court, see *People v Sands*, 261 Mich App 158, 160; 680 NW2d 500 (2004), this Court's review is for plain error affecting defendant's substantial rights. *Carines, supra* at 763-765.

Under MCL 750.145,

[a] person who accosts, entices, or solicits a child less than 16 years of age, regardless of whether the person knows the individual is a child or knows the actual age of the child, or an individual whom he or she believes is 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, regardless of whether the person knows the individual is a child or knows the actual age of the child, or an individual whom he or she believes is a child less than 16 years of age to engage in any of those acts is guilty of a felony”

Defendant first argues that the statute is overbroad and, as a result, impermissibly prohibits speech protected by the First Amendment. A statute is overbroad when it prohibits constitutionally protected conduct, as well as conduct that it may legitimately regulate. *People v McCumby*, 130 Mich App 710, 714; 344 NW2d 338 (1983). Under the overbreadth doctrine, a defendant may “challenge the constitutionality of a statute on the basis of the hypothetical application of the statute to third parties not before the court.” *People v Rogers*, 249 Mich App 77, 95; 641 NW2d 595 (2001). However, because defendant argues that the statute at issue regulates both speech and conduct, he must show that the overbreadth of the statute is both real and substantial. *Id.* at 96. In other words, defendant is required to demonstrate that there is 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.” *Id.* 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). The statute will not be found to be facially invalid on overbreadth grounds, however, “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.” *Id.* at 96.

Under a plain reading, the statute at issue protects children under the age of 16 from being victimized by certain types of criminal activity. Specifically, the list of prohibited conduct in MCL 750.145a includes prohibitions against soliciting or enticing a child under 16 years of age with intent to induce or force the child to engage in acts of sexual intercourse or gross indecency. Hence, the statute prohibits encouraging or soliciting children to engage in criminal conduct or otherwise be the victims of criminal conduct. Construed in this manner, MCL 750.145a is not unconstitutionally overbroad on its face. *Rogers, supra* at 96; *People v Hayes*,

421 Mich 271, 284; 364 NW2d 365 (1984) (noting that, “[w]henver possible, courts should construe statutes in such a manner as to render them constitutional.”).

Defendant also argues that the statute is impermissibly vague, as applied in this case, because it fails to give the public proper notice as to what conduct is proscribed. A statute can be deemed unconstitutionally vague on three grounds: (1) the statute does not provide fair notice to the public of the conduct proscribed; (2) the statute confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed; (3) the statute is overbroad and impinges on First Amendment freedoms. *People v Nichols*, 262 Mich App 408, 409-410; 686 NW2d 502 (2004). It is presumed that a statute is constitutional. *Phillips v Mirac, Inc*, 470 Mich 415, 442; 685 NW2d 174 (2004). Whenever possible, courts construe statutes in a manner that renders them constitutional. *Hayes, supra* at 284. To determine whether a statute is void for vagueness, this Court must examine the entire text of the statute and give the words of the statute their ordinary meanings. *Dep't of State Compliance & Rules Division v Michigan Ed Ass'n-NEA*, 251 Mich App 110, 116; 650 NW2d 120 (2002). Substantive due process requires proscriptions in a statute to be “reasonably precise.” *Id.* A statute is “reasonably precise” if the terms of the statute give a person of ordinary intelligence a reasonable opportunity to realize the behavior that the statute proscribes or requires. *Id.* at 116-117.

Defendant presents a convincing argument that MCL 750.145a might be unconstitutionally vague. Groups with different moral codes could proscribe completely different behaviors as “immoral,” and therefore require potential defendants to guess what law enforcement officers would classify as “immoral acts.” *People v Boomer*, 250 Mich App 534, 540-542; 655 NW2d 255 (2002). However, defendant cannot successfully assert that the statute is unconstitutionally vague or overbroad if the defendant's conduct is clearly within the constitutional scope of the statute. *Rogers, supra* at 95. From the evidence presented at trial, defendant suggested and encouraged the victims to perform fellatio on him, which would constitute a criminal sexual act. See MCL 750.520a(o); MCL 750.520b. This is clearly prohibited by the explicit, unchallenged terms of MCL 750.145a. Therefore, defendant's constitutional challenge fails as applied to the facts of this case. Defendant failed to show that the trial court committed clear error by allowing him to be prosecuted for violating MCL 750.145a.

As applied to defendant, MCL 750.145a is not vague, nor does it impermissibly infringe first amendment freedoms. There was no error warranting relief.

IV. Assessment of Costs and Attorney Fees

Defendant next argues that the trial court lacked statutory authority to tax defendant with additional court costs and erred when it imposed attorney fees as part of the judgment of sentence. For these reasons, defendant contends, this Court should vacate the costs and fees. We agree in part.

Defendant did not preserve this issue by challenging the imposition of costs at the sentencing hearing, see *Sands, supra* at 160, therefore, this issue was not properly preserved for review. See *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). This Court generally reviews an award of costs and fees for an abuse of discretion. *In re Condemnation of Private Property for Highway Purposes (Dep't of Transportation v Curis)*, 221 Mich App 136,

139-140; 561 NW2d 459 (1997). However, because this issue was not preserved, this Court reviews for plain error that affected defendant's substantial rights. *Carines, supra* at 763-765.

A trial court is permitted to require a defendant to pay costs only to the extent authorized by statute or court rule. *People v Jones*, 182 Mich App 125, 126-127; 451 NW2d 525 (1989). Defendant argues that MCL 769.34 authorized the trial court to assess costs against defendant.² MCL 769.34(2), provides that Michigan's statutory sentencing guidelines apply to felonies "enumerated in part 2 of chapter XVII" of the Code of Criminal Procedure, which occur on or after January 1, 1999. MCL 777.16g, which is found in part two of Chapter XVII of the Michigan Code of Criminal Procedure, lists MCL 750.145a as an "enumerated felony."

Under MCL 769.34(6),

As part of the sentence, the court may also order the defendant to pay any combination of a fine, costs, or applicable assessments. The court shall order payment of restitution as provided by law.

Hence, under the plain language of MCL 769.34(6), the trial court could properly order defendant to pay court costs. Although the trial court did not specifically cite MCL 769.34(6) as authority for the costs, because this issue is unpreserved, defendant had the burden to prove that plain error occurred, *Carines, supra* at 763, which he has not done. Therefore, there was no error warranting relief.

Trial courts may also order criminal defendants to reimburse attorney fees. *People v Nowicki*, 213 Mich App 383, 387-388; 539 NW2d 590 (1995). In issuing such an order, the trial court must consider several factors, including defendant's ability to pay. *People v Dunbar*, 264 Mich App 240, 251-254; 690 NW2d 496 (2004). Because defendant did not object to the imposition of attorney fees, the trial court was not required to make formal findings of fact regarding defendant's financial situation. *Id.* at 254. However, the trial court was required to demonstrate on the record that it considered defendant's ability to pay. *Id.* at 254-255. Furthermore, any order in this case requiring defendant to pay attorney fees must be separate from the judgment of sentence. *Id.* at 255-256, 256 n 15. Because it was plain error for the trial court to order defendant to pay attorney fees in the judgment of sentence, we vacate that portion of defendant's sentence that orders him to pay \$500 in attorney fees.

Affirmed in part and vacated in part.

/s/ Michael R. Smolenski

/s/ Kurtis T. Wilder

/s/ Brian K. Zahra

² On January 1, 2006, MCL 769.1k became effective. MCL 769.1k authorizes a sentencing court to impose any fine or costs on a convicted defendant. This provision is inapplicable to defendant, because his sentence became effective on October 5, 2005.