

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT JAMES TURNER,

Defendant-Appellant.

UNPUBLISHED

May 26, 2005

No. 253315

Ogemaw Circuit Court

LC No. 03-002113-FH

Before: Murray, P.J., and O’Connell and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of possession of child sexually abusive material, MCL 750.145c(4). The trial court sentenced defendant to twenty-four months’ probation with the first ninety days in jail. Because the trial court properly denied defendant’s motion for a directed verdict predicated on the ground that the evidence could not constitute child erotic nudity, and because the trial court properly denied defendant’s motion for a mistrial predicated on prosecutorial misconduct, we affirm.

This case arises from defendant’s acts of placing a hidden motion detecting video camera in the master bathroom of his house, taping his fourteen-year-old stepdaughter using the bathroom on two separate occasions, and keeping in his possession two videotapes of her bathroom activities including showering and using the toilet. Defendant was charged with two counts of producing child sexually abusive material. MCL 760.145c(2). The jury found defendant not guilty of one count, but guilty on the other of the lesser included offense of possession of child sexually abusive material. MCL 750.145c(4).

On appeal, defendant argues that the evidence was insufficient to support his conviction because the material in question did not satisfy the definition of child sexually abusive material. The facts in evidence are not in dispute, that defendant made and possessed two tapes, that his step-daughter was fourteen years old at the time, and that the tapes depicted the child naked with some segments exposing the genital or pubic area. At issue is whether the imagery contained on the tapes satisfied the statutory definition of child sexually abusive material. Statutory interpretation is a question of law calling for de novo review. *People v Denio*, 454 Mich 691, 698; 564 NW2d 13 (1997). “The purpose of statutory interpretation is to give effect to the intent of the Legislature.” *Id.* at 699. If a statute is clear, it must be enforced as written. *Id.*

Defendant was convicted and sentenced under the misdemeanor version of MCL 750.145c, which the Legislature substantially recast, effective December 1, 2002, to elevate the crime to felony status. However, all the provisions here at issue were retained in the revised version. MCL 750.145c(4) provides that “[a] person who knowingly possesses any child sexually abusive material is guilty of a misdemeanor” “Child sexually abusive material” includes visual depictions of “a child engaging in a listed sexual act.” MCL 750.145(1)(l).¹ “Listed acts” consist of “sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, or erotic nudity.” MCL 750.145c(1)(g).² “Erotic nudity” is defined as “the lascivious exhibition of the genital, pubic, or rectal area of any person,” with “lascivious” in turn defined as “wanton, lewd, and lustful and tending to produce voluptuous or lewd emotions.” MCL 750.145c(1)(f).³

When faced with defendant’s motion for directed verdict on the issue, the trial court concluded that, of the “listed acts” for purposes of the statute in question, the evidence in this case could support a finding of none except “erotic nudity.” The trial court held that the question whether the imagery constituted “wanton, lewd, lustful, tending to produce . . . lewd emotions” was “up to the jury to decide” and instructed the jury to test the evidence with respect to “erotic nudity” and no other “listed act.” The prosecutor agrees that erotic nudity was the only basis for applying the statute in this instance.

“The statutory definition of erotic nudity does not encompass the depiction of all child nudity. Rather, it is narrowly defined to exclude those depictions that have a ‘primary literary, artistic, educational, political, or scientific value’ and that do not appeal to the prurient interests in sex.” *People v Gezelman (On Rehearing)*, 202 Mich App 172, 174; 507 NW2d 744 (1993). A review of the record reveals that the videotapes show the child disrobing revealing her naked body, stepping into and out of the shower, and urinating. There is no allegation that she knew she was being videotaped, or that defendant strategically placed the camera to emphasize her sexual anatomy. The images captured display ordinary bathroom activities. The depictions at issue cannot be considered to have significant literary, artistic, educational, political, or scientific worth.

Turning to applicable case law, this Court has found that a defendant who shot ostensibly innocent footage of children at play, with the consent of the children’s parents, including fleeting moments when the children playfully revealed their genitals, but who then edited the results so as to emphasize, through repetition, slow motion, and camera focus, the exhibitions of genitalia thus captured, thereby crossed the line into producing erotic nudity. *People v Riggs*, 237 Mich App 584, 587, 590; 604 NW2d 68 (1999). The instant case is distinguishable from *Riggs*, because, as the prosecutor acknowledges, “defendant did not appear to edit the tape by focusing on certain body parts or slowing the motion of the tape.” The prosecutor thus frames the issue as

¹ This language formerly appeared in § 145c(1)(i).

² This provision was formerly designated as § 145c(1)(e).

³ This provision was formerly designated as § 145c(1)(d).

“whether the intentional capturing on videotape of a child naked in the bathroom without her consent and knowledge is ‘erotic nudity’”

Looking to the unexact language of the statute, erotic nudity means an exhibition “*tending* to produce voluptuous or lewd emotions” (emphasis added). The Legislature has not provided further language directing *who* must experience the required emotions. The words “tending to produce” do not differentiate between suggesting that the exhibition must tend to produce voluptuous or lewd emotions in society at large or produce those emotions in a specific person. The Legislature is presumed to be familiar with the rules of statutory construction and when promulgating laws is presumed to be aware of the consequences of its use or omission of statutory language. *People v Ramsdell*, 230 Mich App 386, 392; 585 NW2d 1 (1998). The Legislature clearly chose not to restrict the definition of “erotic nudity” to that which tends to produce voluptuous or lewd emotions only in society in general. Instead, a plain reading of the statute allows for the production of the required emotions both in general society or in a specific person – here, defendant.

This being the case, defendant’s motives in capturing his step-child’s otherwise mundane bathroom nakedness on video become of the utmost importance when deciding whether the material in question satisfied the statutory definition of child sexually abusive material. The record reflects that on two occasions defendant secretly videotaped his fourteen-year-old step-daughter in the bathroom in a state of undress stepping in and out of the shower and using the toilet. Defendant admits his depiction on the video tape on which he was convicted entering the bathroom and immediately turning off the camera within a minute and a half after his step-daughter exited the bathroom. Defendant retained the tapes. Whether defendant engaged in this activity for purposes of stimulating his own libido is relevant to whether the normal bathroom activity defendant captured can be considered “erotic nudity” for the purposes of the statute. As such, the trial court properly denied defendant’s motion for a directed verdict predicated on the ground that the evidence could not constitute child erotic nudity because it was properly a question for the jury.

Defendant next argues that the trial court erred when it denied the motion for a mistrial predicated on prosecutorial misconduct. When reviewing preserved issues of prosecutorial misconduct, this Court evaluates the prosecutor’s comments in context to determine if the defendant was denied a fair and impartial trial. *People v Truong (After Remand)*, 218 Mich App 325, 336; 553 NW2d 692 (1996).

Defendant specifically makes issue of the following statement in the prosecutor’s closing argument: “Is there something else out there that fits? Well, you are going to get a lesser included. Why is there a lesser included? Because it was asked for by [defense counsel.]” The trial court immediately sustained an objection, admonished the jurors to disregard that fragment of argument, and reminded them that defense counsel had the right and obligation to defend his client. The trial court later denied defendant’s request for a mistrial over this incident.

Defendant argues in his brief on appeal that by mentioning his counsel’s role in having a lesser-included instruction provided, the prosecutor “completely and improperly undermined the defense attorney’s credibility based on the closing arguments.” However, defendant cites no authority for the proposition that mentioning that a defense attorney requested a lesser-included instruction is itself improper argument. After reviewing the record, we conclude that the

prosecutor's highlighting of defense counsel's strategic decision to request a lesser-included instruction is not commendable, but that defendant's argument that such revelation seriously undermined his defense is strained and unpersuasive. The trial court immediately instructed the jury to disregard the argument. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Moreover, the trial court instructed the jury to decide the case solely on the evidence, and that the comments of counsel were not evidence. For these reasons, defendant's prosecutorial-misconduct argument fails.

Affirmed.

/s/ Christopher M. Murray

/s/ Peter D. O'Connell

/s/ Pat M. Donofrio