

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY LYNN RUSHMORE,

Defendant-Appellant.

UNPUBLISHED

October 9, 2007

No. 269540

Eaton Circuit Court

LC No. 04-020418-FC

Before: Jansen, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

A jury convicted defendant of accosting a child for immoral purposes, MCL 750.145a, and second-degree criminal sexual conduct, MCL 750.520c(1)(a), and the trial court sentenced defendant to prison terms of 300 days for the accosting conviction and forty months to fifteen years for the CSC conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred by refusing to admit evidence that another person pleaded guilty to molesting the nine-year-old victim's young aunt in an unrelated case. He contends that the evidence might have shown that the aunt told the victim about her own molestation, which could account for the victim's advanced sexual knowledge. The admissibility of evidence is within the discretion of the trial court and will not be reversed unless the trial court abused its discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003).

The trial court declined to admit the evidence, observing that "[t]here's been no evidence submitted as to what [the victim] learned of a similar nature that would then cause it to be in any way used to provide evidence in this case." Because defendant's assertions with regard to what the victim's aunt might have told her are purely speculative, the trial court did not abuse its discretion by excluding the evidence. See *People v Carnicom*, 272 Mich App 614, 616-617; 727 NW2d 399 (2006).

Defendant also argues, for the first time on appeal,¹ that the evidence was relevant to show that someone other than he sexually assaulted the victim, and that the failure to admit the

¹ Neither defendant's citations to bench conferences that were not transcribed nor to an affidavit (continued...)

evidence denied him his constitutional right to a defense and to confront his accuser. But defendant never argued on the record that the evidence should have been admitted to show that another person might have sexually assaulted the victim, or that excluding the evidence would deny defendant a fair trial or his right to confront his accuser. *People v Garvie*, 148 Mich App 444, 450; 384 NW2d 796 (1986). Nonetheless, defendant's argument is based at best on mere speculation that another person might have committed the crime, see *People v Kent*, 157 Mich App 780, 793; 404 NW2d 668 (1987), defendant was provided an opportunity to confront the victim, and nothing prevented defendant from arguing that someone else committed the crime. Consequently, defendant's arguments are without merit.

Defendant next argues that he was denied his rights to due process and trial by jury when the trial court instructed the jury with regard to the first element of the accosting charge. "[E]xpressions of satisfaction with the trial court's instructions constitute a waiver of any instructional error." *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004), citing *People v Carter*, 462 Mich 206, 215, 612 NW2d 144 (2000). Because defendant expressed satisfaction with the jury instructions, this issue is waived.

Defendant also argues that he was denied the effective assistance of counsel by defense counsel's failure to object to the jury instruction. Because defendant did not raise his challenge to counsel's performance in the trial court and did not seek a *Ginther*² hearing, this Court's review is limited to mistakes that are apparent from the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient in that it fell below an objective standard of professional reasonableness, and that it is reasonably probable that but for counsel's ineffective assistance, the result of the proceeding would have been different. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Even assuming that defense counsel's failure to challenge the instruction was objectively unreasonable, defendant has failed to establish the requisite prejudice. If the jury interpreted the challenged instruction in the manner suggested by defendant, it inherently would have found that defendant asked the victim directly or indirectly if she wanted to see his penis. There is no reasonable probability that a rational jury would have found such conduct by an adult directed at a child under 16 years old to be moral or not grossly indecent.

Defendant next argues that MCL 750.145a is unconstitutionally vague or overbroad on its face. We review this challenge de novo. *People v Wilson*, 230 Mich App 590, 593; 585 NW2d 24 (1998). "A statute is unconstitutionally vague if persons of ordinary intelligence must necessarily guess at its meaning." *People v Pierce*, 272 Mich App 394, 398-399; 725 NW2d 691 (2006). MCL 750.145a provides in pertinent part as follows:

(...continued)

from defense counsel that is not contained in the lower court record are sufficient to show that these arguments were preserved.

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

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

Defendant quotes *People v Owens*, 13 Mich App 469, 490; 164 NW2d 712 (1968), for the proposition that “[c]ases resting conviction on the interpretation of the word ‘immoral’ have received unfavorable treatment by the courts.” But this quote is contained in the *Owens* dissent, *id.*, and, additionally, the statutory term “immoral” was not before the *Owens* Court.

Applying the ejusdem generis canon of statutory construction, we conclude the terms “immoral act,” “depravity,” and “delinquency” found in MCL 750.145a refer to sexual acts when read in context with language such as “sexual intercourse or an act of gross indecency.” Moreover, MCL 750.145a is not unconstitutionally vague as applied to defendant because no reasonable person of ordinary intelligence would conclude that an adult’s asking a child under 16 to look at his penis is moral conduct, nor would a person of ordinary intelligence have to guess what kind of conduct the statute proscribed after reading the arguably vague terms in context. See *Pierce*, *supra* at 398-399.

Defendant next argues that the statute is unconstitutionally overbroad because it could proscribe legal conduct. Defendant does not cite any instances of the statute being applied to any of the conduct set forth in his hypothetical examples. Moreover, the interpretation advanced above will adequately address his concerns, and the statute would not deter anyone from the activities posed in defendant’s hypotheticals.

Defendant also argues that the statute violates his right to freedom of speech. Defendant does not have a constitutionally protected right to ask a person under 16 years of age to view his penis. See *US v Bailey*, 228 F3d 637, 639 (CA 6, 2000) (“[T]he Defendant simply does not have a First Amendment right to attempt to persuade minors to engage in illegal sex acts.”).

Finally, defendant argues that if this Court reverses his accosting conviction, he must be resentenced because the accosting conviction affected the scoring of offense variables used in calculating his CSC sentence. In light of our affirmance of defendant’s accosting conviction, this issue is necessarily without merit.

Affirmed.

/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey