STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 13, 2012
v	No. 303097 Wayne Circuit Court
WILLIAM ARTHUR HOEFLING, Defendant-Appellant.	LC No. 10-008826-FH

Before: WILDER, P.J., and GLEICHER and BOONSTRA, JJ.

PER CURIAM.

A jury convicted defendant of child sexually abusive activity, MCL 750.145c(2), two counts of fourth-degree criminal sexual conduct (CSC-4), MCL 750.520e(1), two counts of using a computer to commit CSC-4, MCL 750.145d(1), disseminating sexually explicit material to a minor, MCL 722.675, and furnishing alcohol to a minor, MCL 436.1701(1), arising from his inappropriate interaction with two teenagers in his Plymouth Boy Scout troop. The prosecution's theory was that defendant, using his position of trust and authority as a scoutmaster, (1) provided 16-year-old MS with alcohol, used his computer to arrange a meeting with MS to have sexual contact, and fondled MS's genitals on two separate occasions, and (2) had inappropriate sexual conversations with 15-year-old DG, and allowed DG to use his computer to observe pornographic material. The defense argued that the victims, who had issues with their sexuality and were uncomfortable talking to their own parents, were not credible witnesses, that their fathers coached them to lie to cause problems for defendant, and that defendant's computer exchanges with the victims could not be interpreted as being sexual in nature.

The prosecution presented sufficient evidence to support defendant's convictions beyond a reasonable doubt and, contrary to defendant's appellate challenges, proceeded to trial under applicable statutory provisions. Defendant has not established that MCL 750.145c(2) is unconstitutional in that it criminalizes acts that are presumably legal under other statutes. The circuit court did not err in admitting copies of electronic messages between defendant and the victims or in limiting defense counsel's cross-examination of prosecution witnesses that would have elicited irrelevant or cumulative testimony. Further, the circuit court accurately and adequately instructed the jury on the elements of the charged offenses. We therefore affirm defendant's convictions and sentences.

I. BACKGROUND

Defendant was the scoutmaster of his sons' Boy Scout troop at a Plymouth church. In 2009 and 2010, defendant became close with two scouts, MS and DG, who were experiencing confusion over their sexual identities. Defendant communicated with the boys regarding personal matters by telephone, email, and through the instant-chat feature on Facebook. In defendant's communications with DG, the two gossiped about the romantic lives of other scouts and speculated regarding other people's sexual orientations. On one occasion, DG asked defendant if he had ever engaged in a homosexual encounter. Defendant stated that he had and asked DG if he thought MS wanted to have sexual relations with defendant.

At one point, DG ran away from home to defendant's house. DG claimed that his father physically attacked him after discovering DG attempting to commit suicide. DG indicated that defendant's wife briefly left the house to go to the store. During that time, DG told defendant about a pornographic website MS had found depicting young men engaging in sexual acts together. Defendant instructed DG to open the website on defendant's laptop computer. After viewing the website together, defendant and DG discussed its contents and defendant gave DG permission to look at pornography in his home.

In relation to MS, defendant purchased alcohol for the minor on various occasions. The pair arranged to meet several times for this purpose. In August 2009, defendant provided MS with liquor, took him to a Meijer store to purchase champagne, and then sat in defendant's van in the parking lot to continue drinking. When MS was inebriated, defendant rubbed the boy's chest and abdomen and then touched his penis. In the days following that incident, defendant sent MS several email messages promising to set limits for their relationship. MS continued to communicate with defendant so defendant would buy him alcohol. In September 2009, the Boy Scout troop went on a weekend campout. MS and defendant prearranged that MS would sneak into defendant's tent at night to drink alcohol. MS claimed that defendant again waited until MS was drunk, rubbed his chest and abdomen, and then grabbed his penis.

DG's and MS's parents eventually discovered the email and Facebook communications between their sons and defendant. The parents then contacted the police, ultimately leading to defendant's prosecution.

II. SUFFICIENCY OF THE EVIDENCE—MCL 750.145C, MCL 750.145D, AND MCL 722.675

Defendant contends that the prosecution presented insufficient evidence to support his convictions for child sexually abusive activity against MS, use of a computer to commit CSC-4 against MS, and disseminating sexually explicit material to DG.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, we "must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of the crime. *People*

v Truong (After Remand), 218 Mich App 325, 337; 553 NW2d 692 (1996). "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

A. MCL 750.145C—CHILD SEXUALLY ABUSIVE ACTIVITY

1. APPLICABILITY OF THE STATUTE TO DEFENDANT'S CONDUCT

We reject defendant's claim that MCL 750.145c is limited to criminalizing the production of sexually abusive material and, therefore, the evidence was not legally sufficient to sustain his conviction for child sexually abusive activity. Whether conduct falls within the scope of a criminal statute, in this case MCL 750.145c(2), "is a question of statutory interpretation that we review de novo." *People v Hill*, 486 Mich 658, 665-666; 786 NW2d 601 (2010). When construing a statute, our primary goal is to ascertain and give effect to the intent of the Legislature. *People v Dowdy*, 489 Mich 373, 379; 802 NW2d 239 (2011). To that end, we must examine the language of the statute and, "where that language is unambiguous, we presume that the Legislature intended the meaning clearly expressed and enforce that statute as written." *People v Holder*, 483 Mich 168, 172; 767 NW2d 423 (2009). "[O]nly where the statutory language is ambiguous may we look outside the statute to ascertain legislative intent." *Id.*

The child sexually abusive activity statute, MCL 750.145c(2), provides:

> A person who persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material, *or a person who arranges for, produces, makes, or finances, or a person who attempts or prepares or conspires to arrange for, produce, make, or finance any child sexually abusive activity or child sexually abusive material* is guilty of a felony, punishable by imprisonment for not more than 20 years, or a fine of not more than $100,000.00, or both, if that person knows, has reason to know, or should reasonably be expected to know that the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child. [Emphasis added.]

Among the types of conduct proscribed by MCL 750.145c(2) is "arrang[ing] for . . . any child sexually abusive *activity* or child sexually abusive *material*." (Emphasis added.) MCL 750.145c(1)(l) defines "[c]hild sexually abusive activity" as "a child engaging in a listed sexual act." "Child" means an unemancipated "person who is less than 18 years of age." MCL 750.145c(1)(b); MCL 750.145c(6). A "listed sexual act" includes "sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, or erotic nudity." MCL 750.145c(1)(h). The statute provides a separate definition for "child sexually abusive material." See MCL 750.145c(1)(m).

This Court has recognized that MCL 750.145c(2) applies to "three distinct groups of persons." *People v Adkins*, 272 Mich App 37, 40; 724 NW2d 710 (2006) (quotation marks and alteration omitted). The first category includes a person "who persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material[.]" MCL 750.145c(2); *Adkins*, 272 Mich App at 40-41. This category refers to those engaged in the production of pornography. *Id.* at 41. It is undisputed that defendant does not fall within this group. The second category includes a person who "arranges for, produces, makes, or finances . . . any child sexually abusive activity *or* child sexually abusive material[.]" MCL 750.145c(2) (emphasis added); *Adkins*, 272 Mich App at 41. The last category includes "a person who attempts or prepares or conspires to arrange for, produce, make, or finance any child sexually abusive activity *or* child sexually abusive material[.]" MCL 750.145c(2) (emphasis added); *Adkins*, 272 Mich App at 41. The use of the disjunctive "or" in the second and third categories clearly and unambiguously indicates that persons who arrange for or attempt or prepare to arrange for child sexually abusive activity face criminal liability. *Adkins*, 272 Mich App at 41-42. "The Legislature thus omitted from the second and third groups subject to criminal liability any requirement that the individuals therein must have acted for the ultimate purpose of creating any child sexually abusive material, a specific requirement applicable to the first group of criminals." *Id.* at 42.

Accordingly, we reject defendant's argument that MCL 750.145c is limited to conduct involving the production of sexually abusive material. The allegations against defendant squarely place him within the group of persons who arrange child sexually abusive activity on whom MCL 750.145c(2) imposes criminal liability.

2. FACTUAL SUFFICIENCY OF THE EVIDENCE

The prosecution presented sufficient evidence to show that defendant arranged for or attempted to arrange for child sexually abusive activity with 16-year-old MS. As noted, circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of the crime. *Truong*, 218 Mich App at 337. Further, we are required to draw all reasonable inferences and make credibility choices in support of the jury's verdict. *Nowack*, 462 Mich at 400.

The evidence showed that defendant held a position of authority and trust as MS's scoutmaster. MS was a senior patrol leader for one year, which required frequent interaction with defendant. Defendant progressively graduated his position of influence over MS, eventually declaring to MS that the boy was one of his "closest friends." Defendant began communicating with MS about personal matters over the telephone, and through email and Facebook. They exchanged messages four to five times a week. Defendant apparently believed that MS was gay and knew that MS had experimented sexually with DG. At one point, defendant asked DG if he thought "MS wants to have sex with [defendant]." Around March 2009, when MS turned 16, defendant began regularly providing alcohol to MS, and arranging to secretly meet with him to drink. By August 2009, defendant had gained MS's trust. Defendant and MS then went to a Meijer store, where defendant bought champagne. Before going to the store, defendant had already plied MS with alcohol. While in the store's parking lot, defendant and MS retired to the back of defendant's van to consume more alcohol. MS testified that after he became drunk, defendant reached into MS's pants and "grabbed" his penis. MS told

defendant that he wanted to go home and defendant dropped MS off in a parking lot near his home to avoid detection by MS's parents. In an email, defendant promised to "set limits" for their future encounters. MS admitted that he did not want defendant to cease purchasing alcohol for him, and defendant continued to do so.

The evidence also showed that, in advance of a September 2009 camping trip, defendant and MS had numerous discussions about drinking and tent arrangements, communicating through electronic messages, on the telephone, and in person. Once at the campsite, MS erected his own tent as arranged, but discreetly visited defendant during the night to drink. Defendant provided MS with "hard liquor" as they rested on sleeping bags and talked. After MS became drunk, defendant rubbed MS's abdomen underneath his shirt and touched MS's penis. From this evidence, a rational jury could find beyond a reasonable doubt that defendant arranged for, or attempted to arrange for, child sexually abusive activity with 16-year-old MS.

Although defendant challenges the meanings of the electronic messages he exchanged with MS, which did not explicitly mention "sex," and argues that MS was not credible, these challenges are related to the weight rather than the sufficiency of the evidence. *People v Scotts*, 80 Mich App 1, 9; 263 NW2d 272 (1977). These same challenges were presented to the jury during cross-examination of the prosecution witnesses and through defense counsel's closing argument. This Court may not interfere with the jury's role of determining issues of weight and credibility. *Wolfe*, 440 Mich at 514. The evidence was sufficient to sustain defendant's conviction for child sexually abusive activity.

B. MCL 750.145D—USE OF A COMPUTER TO COMMIT CSC-4

MCL 750.145d(1) provides, in pertinent part:

> A person shall not use the internet or a computer, computer program, computer network, or computer system to communicate with any person for the purpose of doing any of the following:
>
> (a) Committing, attempting to commit, conspiring to commit, or soliciting another person to commit conduct proscribed under section . . . 520e . . . in which the victim or intended victim is a minor or is believed by that person to be a minor.

To establish this offense, the prosecutor was required to prove beyond a reasonable doubt (1) that defendant used the internet or a computer to communicate with MS, (2) for the purpose of attempting to commit CSC-4 against MS, and (3) that defendant believed that the intended victim was a minor. See *People v Cervi*, 270 Mich App 603, 617; 717 NW2d 356 (2006).

Much of the same evidence that supports defendant's conviction of child sexually abusive activity against MS also supports his conviction for using a computer to communicate with MS to commit CSC-4 against him. The evidence established that defendant and MS had numerous discussions about the camping trip through email and Facebook. The messages conveyed defendant's plan for the pair to surreptitiously stay in the same tent and drink. Once at the campsite, MS did what was arranged and, as a result, defendant had the opportunity to sexually assault MS. MS testified that he and defendant also frequently contacted each other via email

and Facebook to arrange drinking excursions closer to home. One such excursion was the August 2009 trip to Meijer after which defendant assaulted the inebriated MS in the back of his van. Because defendant's communications on the computer facilitated his arrangements for sexual contact with MS, a rational jury could reasonably conclude that when defendant used the computer to communicate with MS about the camping trip and the Meijer incident, he intended to attempt to commit conduct proscribed by MCL 750.520e.

C. MCL 722.675—DISSEMINATING SEXUALLY EXPLICIT MATERIAL TO DG

A person violates MCL 722.675 when he "[k]nowingly disseminates to a minor sexually explicit visual or verbal material that is harmful to minors" or "[k]nowingly exhibits to a minor a sexually explicit performance that is harmful to minors." MCL 722.675(1)(a)-(b). Defendant's particular contention on appeal is that the prosecutor failed to prove that he *disseminated* any sexually explicit material. Defendant relies on a dictionary definition of "disseminate." However, this part of the statutory scheme defines "disseminate" as "to sell, lend, give, exhibit, show, or *allow to examine* or to offer or agree to do the same." MCL 722.671(b) (emphasis added). Accordingly, we may not resort to a dictionary definition. *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007).

DG, who was only 15 years old at the time of the offense, unequivocally testified that defendant instructed him to "pull up" a pornographic website that DG mentioned MS had visited. As directed by defendant, DG opened the website, which showed "[g]raphic sexual depictions of young men having sex with each other," and DG and defendant looked through it together. Defendant told DG that it was "okay" to look at the pornography in his home. Based on this evidence, a rational trier of fact could have found beyond a reasonable doubt that defendant knowingly allowed a minor to examine sexually explicit visual material in violation of MCL 722.675(1).

III. THE CONSTITUTIONALITY OF MCL 750.145C(2)

Defendant contends that the child sexually abusive activity statute is unconstitutionally overbroad because it criminalizes consensual sex between partners aged 16 years and older. Defendant argued below that MCL 750.145c(2) is inconsistent with the CSC statutes, MCL 750.520a *et seq.*, which set the age of consent at 16, as support for his claim that MCL 750.145c(2) applies only to child pornography. Defendant never argued below that MCL 750.145c(2) is unconstitutionally overbroad. Therefore, this issue is not preserved and our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

"Statutes are presumed to be constitutional, and the party challenging the statute has the burden to prove its invalidity." *People v Dillon*, ___ Mich App ___; ___ NW2d ___ (Docket No. 303083, issued May 15, 2012), slip op at 2. "When a party asserts a facial challenge to the constitutionality of a statute, the party must demonstrate that no circumstances exist where the statute would be valid." *Id.* "A statute may be challenged for vagueness on three grounds: (1) it does not provide fair notice of the conduct proscribed; (2) it confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed; (3) its coverage is overbroad and impinges on First Amendment freedoms." *People v Nichols*, 262

Mich App 408, 409-410; 686 NW2d 502 (2004) (quotation marks and citations omitted). Defendant's argument is directed at the requirement that a statute cannot be overbroad. "An overbroad statute is one which is likely to 'chill' constitutionally protected behavior." *People v Roberts*, 292 Mich App 492, 500; 808 NW2d 290 (2011).

Defendant does not argue any First Amendment impingement as required for such a challenge. Further, MCL 750.145c does not hinder any constitutionally protected behavior, and defendant has not established that the statute is unconstitutionally overbroad as applied to his conduct. This Court has observed that the statute "focuses on protecting children from sexual exploitation, assaultive or otherwise." *People v Ward*, 206 Mich App 38, 42; 520 NW2d 363 (1994). The fact that Michigan has chosen to allow individuals 16 years of age and older to engage in legal sexual conduct is not relevant. The Legislature is empowered to provide protections to 16 and 17-year-old individuals in regard to child sexually abusive activity despite the fact that it has deemed the age of consent to partake in sexual conduct at 16 years of age. Consensual sexual conduct and child sexually abusive activity are two distinct animals. Accordingly, it is not plainly apparent that the statute is unconstitutionally overbroad.

IV. SUFFICIENCY OF THE EVIDENCE—FOURTH-DEGREE CSC CONVICTIONS

Defendant challenges the sufficiency of the evidence supporting that he used "force or coercion" against MS to commit CSC-4.

MCL 750.520e(1) describes CSC-4 as follows:

> A person is guilty of [CSC-4] if he or she engages in sexual contact with another person and if any of the following circumstances exist:
>
> * * *
>
> (b) Force or coercion is used to accomplish the sexual contact. Force or coercion *includes, but is not limited to,* any of the following circumstances:
>
> (*i*) When the actor overcomes the victim through the actual application of physical force or physical violence.
>
> (*ii*) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute that threat.
>
> (*iii*) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute that threat. As used in this subparagraph, "to retaliate" includes threats of physical punishment, kidnapping, or extortion.

(*iv*) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable.

(*v*) When the actor achieves the sexual contact through concealment or by the element of surprise. [Emphasis added.]

Defendant's conduct does not fit within the examples provided in the statute. MCL 750.520e does not, however, provide an exhaustive list of circumstances constituting force or coercion. "Force or coercion is not limited to physical violence but is instead determined in light of all the circumstances." *People v Brown*, 197 Mich App 448, 450; 495 NW2d 812 (1992). Coercion may take many forms; it "'may be actual, direct, or positive, as where physical force is used to compel act [sic] against one's will, or implied, legal or constructive, as where one party is constrained by subjugation to other to do what his free will would refuse.'" *People v Premo*, 213 Mich App 406, 410-411; 540 NW2d 715 (1995), quoting Black's Law Dictionary (5th ed). Coercion can also exist where those in an authoritative position exploit the "special vulnerability" of those under their general control; the authoritative relationship between a defendant and a victim does not have to be formal. *People v Reid*, 233 Mich App 457, 471-472; 592 NW2d 767 (1999).

The prosecution presented sufficient evidence to allow a rational trier of fact to find beyond a reasonable doubt that defendant impliedly, legally, or constructively coerced MS to allow this unwanted sexual contact. Defendant was in a position of practical authority over MS as his scoutmaster. Through this position, defendant developed a close relationship with MS and earned his trust. Defendant knew that MS was vulnerable because of his continuing desire for alcohol, as well as his personal struggle with his sexual orientation. Defendant repeatedly provided alcohol to MS, and MS did not want defendant to stop the supply. MS testified that on two specific occasions—in the Meijer parking lot and on the camping trip—he and defendant met secretly and defendant made sexual contact with him after he became intoxicated. During both incidents, defendant isolated MS—once in his van and once in his tent—to further his plan. The evidence demonstrates MS's diminished faculties and vulnerability as a result of defendant providing him with alcohol, and that defendant's acts against MS were the product of an abuse of his authority to coerce MS's submission. Accordingly, there was sufficient evidence of force or coercion to support defendant's convictions for CSC-4.

V. THE ADMISSION OF THE FORWARDED AND COPIED ELECTRONIC MESSAGES

Defendant asserts that the trial court abused its discretion by admitting emails and online chats between defendant and the victims that were retrieved from their home computers by their parents. When the boys' parents found the electronic communications, they did not simply print them. Instead, MS's mother forwarded the emails to her own account before printing them. DG's father was unable to follow the Facebook communication thread online. Accordingly, he copied the information and pasted it into a Word document. Defendant challenges the authentication, alteration, and chain of custody of this evidence, and asserts that it was not the "best evidence."

We review a trial court's decision to admit evidence for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). We also review a trial court's decision whether a proponent has sufficiently authenticated an item for admission into evidence for an abuse of discretion. *People v Ford*, 262 Mich App 443, 460; 687 NW2d 119 (2004). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008).

"The rule governing the admission of physical evidence requires that a proper foundation be laid and that the articles be identified as that which they purport to be and that the articles are shown to be connected with the crime or with the accused." *People v Furman*, 158 Mich App 302, 331; 404 NW2d 246 (1987). MRE 901(a) provides that for a document to be admissible, it must be authenticated by the introduction of "evidence sufficient to support a finding that the matter in question is what its proponent claims." MRE 901(b) delineates, "[b]y way of illustration only, and not by way of limitation," various means or methods to comply with "the requirements of this rule." MRE 901(b)(1) permits authentication of a document through the elicitation of testimony from a "witness with knowledge . . . that a matter is what it is claimed to be." MRE 901(b)(4) also permits authentication by "distinctive characteristics," meaning "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." "Once a proper foundation has been established, any deficiencies in the chain of custody go to the weight afforded to the evidence, rather than its admissibility." *People v White*, 208 Mich App 126, 133; 527 NW2d 34 (1994).

The record supports that the documents were sufficiently authenticated to be admitted into evidence. MS's mother testified regarding her discovery of the emails. She stated that the messages forwarded to her account were accurate representations of those she had observed in MS's account. She claimed that she did not alter the contents of the communications. MS testified that he had personal knowledge of the emails that he had sent to defendant, and was familiar with both the emails forwarded from his account to his mother's account and the emails recovered by Yahoo from his and defendant's accounts. MS acknowledged that the contents of the forwarded emails mirrored the content of the emails recovered from the parties by Yahoo, and were from his account. In addition, the emails sent and received by MS had distinctive characteristics connecting them to defendant; they were sent to and from accounts bearing defendant's name—bhoefli@yahoo.com and williamhoefling@yahoo.com—and included defendant's first name in the salutations.

DG also positively and unequivocally identified the Facebook chats between him and defendant. He testified that the messages admitted at trial were exact representations of his communications with defendant and had not been doctored or modified. The messages displayed defendant's name and email address. DG's father testified that the Word document he had created was an accurate representation of the "chat" he observed in the web browser, and that he did not alter the content of the communications.

Given DG's and MS's testimony concerning their personal knowledge of their electronic communications and the distinguishing characteristics in the communications, a proper foundation was established under MRE 901. Defendant's cursory claims based on the chain of custody and the fact that the messages were forwarded to another account, "cut and pasted," or

possibly altered, do not preclude their admission. Rather, those claims affect the weight of the evidence. *White*, 208 Mich App at 133.

Likewise, defendant's best evidence claim lacks merit. MRE 1003 allows a duplicate to be admitted into evidence "to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." The subject electronic communications were sufficiently authenticated, and defendant has not demonstrated how their admission was unfair. Accordingly, the trial court did not abuse its discretion by admitting the forwarded and copied electronic communications that originally occurred between defendant and the victims.

VI. THE LATE DISCLOSURE OF THE CERTIFIED YAHOO EMAILS

Defendant argues that the prosecution denied him a fair trial by its late introduction of certified records of the Yahoo emails in violation of an earlier discovery demand, and that the trial court failed to remedy this discovery violation by suppressing the emails or granting an adjournment. Prior to trial, the prosecutor gave defense counsel photocopies of the printed messages between defendant and the victims. The documents had been highlighted by the police and those portions were unreadable on the photocopies. The prosecutor subpoenaed original documents from Yahoo. On the first day of trial, Yahoo sent the prosecutor a CD including the earlier provided emails, as well as a few messages that had not previously been available to either party.

A. DISCOVERY VIOLATION

"A trial court's decision regarding discovery is reviewed for [an] abuse of discretion." *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003). The court rules govern the scope of discovery in a criminal case. *Id.* at 588-589; MCR 6.201. To be entitled to relief for a discovery violation under MCR 6.201(J), the defendant must establish prejudice. *People v Rose*, 289 Mich App 499, 525-526; 808 NW2d 301 (2010).

The record does not support defendant's claim that the prosecution violated the trial court's discovery order. Thus, there was no basis for the trial court to fashion a remedy. On appeal, defendant does not point to anything in the lower court record establishing that the prosecutor failed to provide the Yahoo emails to the defense immediately upon receipt. Defendant never argued below that the prosecutor was in possession of the Yahoo emails and withheld them. Rather, the prosecutor had provided the defense with copies of the emails that had been discovered, forwarded, and printed by the victims' parents. The prosecution advised defendant and the trial court that it had requested the certified records from Yahoo and was regularly following up with Yahoo to obtain the items. The record provides no factual basis on which to conclude that the prosecutor failed to make the emails available to defendant immediately after they were provided by Yahoo.

Further, as the trial court noted, defendant was well aware of the messages between defendant and the victims. Although the parties were not yet in possession of the certified Yahoo emails, defendant had possession of the copies, and the content of the emails was

discussed at the preliminary examination. In addition, defendant would have known about the Yahoo emails from his participation in creating the evidence, i.e., by exchanging messages with MS and DG. See *People v Taylor*, 159 Mich App 468, 487-488; 406 NW2d 859 (1987) ("[W]e find that defendant was entitled to no remedy for the prosecutor's nondisclosure of the letter in question since the defendant, having written it himself, had knowledge of it independent of discovery."). Defendant's independent knowledge of the email exchanges, coupled with his prior possession of the copied material, eliminated any possibility that he was "ambushed" and prejudiced at trial by the late receipt of the certified emails. Accordingly, defendant has failed to demonstrate a discovery violation, let alone that he was entitled to a remedy.

B. DENIAL OF AN ADJOURNMENT

On the first day of trial, when the prosecutor presented the certified copies of the Yahoo email messages to defendant, defense counsel requested an adjournment to review the evidence, which the court denied. We review a trial court's decision on a motion for a continuance for an abuse of discretion. *People v Steele*, 283 Mich App 472, 484; 769 NW2d 256 (2009). "No adjournments, continuances or delays of criminal causes shall be granted by any court except for good cause shown . . . ." MCL 768.2. When deciding whether the trial court abused its discretion, we consider "whether defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments." *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). To merit relief, a defendant must also show prejudice as a result of the failure to adjourn the trial. *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000).

Defendant has not established good cause for an adjournment, or that he was actually prejudiced by the lack of an adjournment. Again, defense counsel had copies of the emails and was present at the preliminary examination where the subject of the emails was discussed. The key emails relied upon by the prosecution—the ones copied by the victims' parents—were identical to the certified copies later provided. Defendant has failed to establish any prejudice, and he does not indicate what he would have done differently if the defense had additional time to review the Yahoo emails. Moreover, the record shows that defense counsel thoroughly questioned the victims and their parents about the messages, including challenging their context and meaning and suggesting that they were altered. Consequently, the trial court did not abuse its discretion by denying defendant's motion to adjourn.

VII. THE DENIAL OF DEFENDANT'S RIGHT OF CONFRONTATION

Defendant argues that by limiting his cross-examination of MS's mother about her knowledge of MS's drinking problem and of DG about his mental illness, the trial court denied his constitutional right to confront the witnesses against him. At trial, defendant argued that he should be permitted to question MS's mother about MS's drinking problem and DG about his medical problems. Therefore, that evidentiary issue is preserved for review. However, defendant did not previously claim that precluding this questioning violated his constitutional right of confrontation, so that argument is not preserved. An objection on one ground is insufficient to preserve an appellate challenge based on a different ground. *People v Bulmer*, 256 Mich App 33, 35; 662 NW2d 117 (2003).

We review defendant's preserved evidentiary challenge to determine whether the trial court abused its discretion by limiting the scope of defendant's cross-examination. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). We review the unpreserved claim for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 752-753, 763-764.

Although a defendant has a constitutional right to confront his accusers, US Const, Am VI; Const 1963, art 1 § 20; *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993), he must still comply with procedural and evidentiary rules established to assure fairness and reliability in the verdict. See *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984); *People v Arenda*, 416 Mich 1, 8; 330 NW2d 814 (1982). To this end, a court may impose reasonable limits on cross-examination, *People v Sexton*, 250 Mich App 211, 221; 646 NW2d 875 (2002), and must "exercise reasonable control over the mode . . . of interrogating witnesses" to "avoid needless consumption of time." MRE 611(a). In this case, the trial court did not preclude defendant from presenting evidence regarding MS's and DG's credibility and bias. Rather, it precluded admission of cumulative testimony and evidence that was not relevant to the charges against defendant.

With regard to MS, defendant was charged with furnishing alcohol to a minor, and defendant's supplying of alcohol to MS was related to the prosecution's theory regarding the sexual misconduct charges involving MS. At trial, MS testified that defendant regularly provided him with alcohol, he and defendant arranged covert meetings to drink alcohol together, and on two occasions when MS was inebriated, defendant touched his penis. Given this testimony, defendant has not established that whether a neighbor or friend had advised MS's mother of MS's "drinking problems" had any tendency to make defendant's culpability "more probable or less probable than it would be without the evidence." MRE 401; *Yost*, 278 Mich App at 355. Further, defense counsel was allowed to challenge MS's credibility and bias. Counsel questioned MS and his parents about their alleged vendetta against defendant, their attempts to remove him as scoutmaster, and MS's parents' lack of knowledge about MS's sexual preference. Also, a defense witness testified that MS had sold alcohol to another minor. Under the circumstances, the trial court did not err in precluding the irrelevant testimony.

With regard to DG, the trial court did not err by precluding admission of cumulative testimony and avoiding a needless waste of time by preventing additional discussion of DG's psychiatric issues. There was already testimony that DG was "very ill" and upset and frantic during the relevant time period. The jury knew that DG had tried to commit suicide once and contemplated suicide a second time. Evidence revealed that the police had taken DG to the hospital for a psychiatric evaluation, and that DG was ultimately admitted to care. Further, defense counsel was otherwise allowed to question DG and his father about DG's medical issues, his difficult relationship with his father, and to explore his possible or potential reasons to falsely accuse defendant, including whether his father encouraged DG to lie because of defendant's involvement in their family matters. On this record, the trial court did not err by limiting the presentation of cumulative testimony.

VIII. SUPPLEMENTAL JURY INSTRUCTIONS ON COERCION

Defendant argues that the trial court denied him a fair trial by including the "position of authority" theory in its jury instructions for fourth-degree CSC.

> We review de novo claims of instructional error . . . . This Court reviews jury instructions as a whole to determine whether there is error requiring reversal. The instructions must include all the elements of the charged offense and must not omit material issues, defenses, and theories if the evidence supports them. Even if somewhat imperfect, instructions do not create error if they fairly present to the jury the issues tried and sufficiently protect the defendant's rights. [*People v Bartlett*, 231 Mich App 139, 143-144; 585 NW2d 341 (1998).]

In instructing the jury on "force or coercion," the trial court stated:

> Force or coercion means this. Coerce means to compel by threat or by other wrongful action. Coercion exists where one, by unlawful conduct of another, is induced to do something or perform sine [sic] act under circumstances that deprives a person of the exercise of free will.
>
> It includes actual physical force put on a person to compel that person to act against him [sic] or her will.
>
> Force or coercion does not require that the Defendant overcome the victim, rather any force used in an attempt to induce the victim to submit to the sexual act, or to seize control of the victim in a manner to facilitate accomplishment of the sexual act, without regard to the victim's wishes is sufficient for force or coercion.
>
> Also, coercion exists where someone, by unlawful conduct of another, is induced to do or perform some act under circumstances which deprive the person of the exercise of free will. It might be either actual where physical force was used to compel a person to act against the persons will; or implied, where the relation of the parties was such that one was under submission. Submission to request of an authority figure is coerced if it is achieved through undue influence.

Defendant correctly notes that the trial court's supplemental instructions are not covered by MCL 750.520e, CJI2d 20.13, or CJI2d 20.15. Defendant takes a narrow a view of coercion, however. As previously discussed, MCL 750.520e does not provide an exhaustive list of circumstances that constitute force or coercion, and coercion may take many forms. "Coercion may be . . . implied, legal or constructive, as where one party is constrained by subjugation to other to do what his free will would refuse," *Premo*, 213 Mich App at 410-411 (citation omitted), and can exist where one in an authoritative position exploits the "special vulnerability" of another under his or her general control. *Reid*, 233 Mich App at 471-472. The trial court's instructions as a whole fairly presented the issue of coercion as applied to the facts of this case involving a scoutmaster who provided a 16-year-old boy with alcohol and made sexual advances when the minor was isolated and drunk. While the supplemental instructions further clarified the meaning of coercion, they did not lessen the prosecutor's burden of proof. Because the supplemental instructions accurately stated the law and did not lessen the prosecutor's burden of proof, defendant is not entitled to relief.

IX. THE LACK OF THE DEFINITION OF "HARMFUL TO MINORS"

Defendant lastly argues that the trial court erred by failing to instruct the jury on the definition of "harmful to minors" as part of the charge of disseminating "sexually explicit visual or verbal material that is *harmful to minors*" as provided in MCL 722.675, and that defense counsel was ineffective for failing to request the instruction.

As defendant acknowledges, he did not request an instruction on the definition of "harmful to minors." After the trial court completed its final instructions, it asked the parties whether there was "anything on the instructions as given that you want to bring to my attention." Defense counsel responded, "Not with the instructions, your Honor[.]" By assenting to the trial court's instructions as given, counsel waived any error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). A waiver extinguishes any error, leaving nothing to review. *Id.* at 216.

Defendant alternatively argues that defense counsel was ineffective for failing to request an instruction on the definition of "harmful to minors." Because defendant did not raise an ineffective assistance of counsel claim in the trial court by requesting a new trial or an evidentiary hearing, our review of is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). To establish ineffective assistance of counsel, defendant

> must show that counsel's performance fell below an objective standard of reasonableness. In doing so, the defendant must overcome the strong presumption that counsel's assistance was sound trial strategy. Second, the defendant must show that, but for counsel's deficient performance, a different result would have been reasonably probable. [*People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011).]

MCL 722.674(a) provides that the term "harmful to minors" means "sexually explicit matter which meets all of the following criteria":

> (*i*) Considered as a whole, it appeals to the prurient interest of minors as determined by contemporary local community standards.
>
> (*ii*) It is patently offensive to contemporary local community standards of adults as to what is suitable for minors.
>
> (*iii*) Considered as a whole, it lacks serious literary, artistic, political, educational, and scientific value for minors.

Given the meaning of "harmful to minors" as used in the statute, defendant cannot demonstrate that, but for counsel's failure to request the definition, the outcome of the trial would have been different. There was testimony that when discussing MS's sexual orientation with defendant, DG told defendant that MS had viewed a particular sexual website. Defendant directed 15-year-old DG to use defendant's computer to open the pornographic website that depicted "graphic sexual" images of men having sex with other men. DG and defendant discussed the website afterward, and DG was aroused by both viewing the pornography and discussing it with defendant. Defendant never contended that the content of the website would not meet the statutory definition of "harmful to minors." Indeed, there was no argument or

evidence presented during trial that would support the conclusion that the material displayed was harmless to minors. Consequently, defendant cannot establish a claim of ineffective assistance of counsel.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Elizabeth L. Gleicher
/s/ Mark T. Boonstra