STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

File No. 00-8080-AR
HON. THOMAS G. POWER

RONALD ALLEN VANBROCKLIN,

Defendant-Appellant,
/

Dennis M. LaBelle (P24091)
Attorney for Plaintiff-Appellee

Matthew L. Posner (P33287)
Attorney for Defendant-Appellant

DECISION AND ORDER AFFIRMING
DEFENDANT-APPELLANT'S CONVICTIONS

Defendant-Appellant was convicted by jury of one count of using the services of the communications common carrier to suggest a lewd or lascivious act during a telephone conversation, MCL 750.540e(1)(d), and two counts of accosting and soliciting, MCL 750.448. The Defendant-Appellant appealed, each party has filed briefs and has made oral arguments, and the Court now issues its decision.

It was the prosecution's theory that the Defendant-Appellant arranged for a Mr. David Dugas to take the Defendant-Appellant's car, the Defendant-Appellant's cellular telephone, and $100 of the Defendant-Appellant's money, go to the Traverse City Central Senior High School in the morning as classes were about to begin, and approach male students. Dugas was to hand the cellular telephone to students who would then talk to the Defendant-Appellant who was on the other end of the line. The Defendant-Appellant would then proposition the students for sexual acts. David Dugas was the key witness for the prosecution and testified that the Defendant-Appellant in fact arranged for him to act as described above and that the Defendant-

Appellant was doing this for the purpose of arranging sex with the Defendant-Appellant, Mr. Dugas, and whatever student he could secure. The two counts of soliciting and accosting related to approaches made by Dugas and the Defendant-Appellant to students Jeffrey Wheeler and John Gallop.

Defendant-Appellant on appeal objects that there was insufficient evidence that Defendant-Appellant used a "communications common carrier" to suggest a lewd or lascivious act in the course of a "telephone conversation." The Defendant-Appellant on appeal further objects that the instructions to the jury concerning the count alleging violation of MCL 750.540e(1)(d) failed to state that an element of the offense was that the Defendant-Appellant used a "communications common carrier."

MCL 750.540e provides in relevant part as follows:

> Sec. 540e (1) Any person is guilty of a misdemeanor who maliciously uses any service provided by a communications common carrier with intent to terrorize, frighten, intimidate, threaten, harass, molest, or annoy any other person, or to disturb the peace and quiet of any other person by any of the following:
>
> * * *
>
> (d) Using any vulgar, indecent, obscene, or offensive language or suggesting any lewd or lascivious act in the course of a telephone conversation.

As to the instruction issue, the Defendant-Appellant did not object to the instructions as given to the jury. Indeed, the Defendant-Appellant was explicitly given an opportunity to comment on the instructions prior to deliberations but declined to do so. Transcript, p 272. Defendant-Appellant's objection to the instructions is not preserved for appeal. *People v VanDorsten*, 441 Mich 540 (1993).

As for the claimed lack of evidence that the Defendant-Appellant used a "communications common carrier," the Defendant-Appellant failed to preserve this issue by making a motion for directed verdict. *Napier v Jacobs*, 429 Mich 222 (1987). Had he done so, the trial court might have permitted the prosecution to cure this possible defect by producing evidence as to whether a cellular phone is a "communications common carrier," a term which does not appear to be defined in the statute. Applying the common understanding of what a "common carrier" is, a cellular telephone would seem to be within that term in that anyone who

wishes to become a customer and pay the requisite costs and charges can use the cellular telephone system. To the extent additional evidence on the specifics of this cellular phone system were needed, they could have been provided had the Defendant-Appellant raised the issue in a timely manner and had the trial judge permitted.

The statutory requirement that the suggesting of a lewd or lascivious act must occur in the course of a "telephone conversation" does apply to a cellular telephone conversation. A cellular telephone is a subset of telephones generally. The statute covers conversations by cellular telephone.

The Defendant-Appellant also objects on appeal that the trial court did not instruct the jury that it must be unanimous in agreeing which of the victims was the subject of the obscene phone call under MCL 750.540e(1)(d).

Again, the Defendant-Appellant failed to object to the instructions as given and indeed declined to comment upon them prior to the jury commencing deliberations despite being specifically asked. Transcript, p 272. This issue therefore was not preserved for appeal. *People v VanDorsten, supra*. Had this issue been raised, the problem could have been addressed by the trial court.

The Defendant-Appellant generally denied being involved in this incident at all. The issue actually contested at trial was not what happened vis-a-vis each of the complainants, but rather whether the Defendant-Appellant participated at all. Consequently, the Defendant-Appellant is not prejudiced by failing to require unanimity as to which victim the violation of law related to. The jury would either have concluded that he violated MCL 750.540e(1)(d) because he was in fact involved in this matter or they would have concluded that he was not. The jury would not have concluded he was involved with some victims but not others.

It is not at all clear that an unanimity instruction would have been appropriate in any event. See, *People v Cook*, 446 Mich 503 (1994).

Defendant-Appellant also appeals claiming that there was insufficient evidence that the Defendant-Appellant solicited Jeffery Wheeler in violation of MCL 750.448 and that the trial court erred in failing to give the aiding and abetting instruction particularly as it relates to Mr. Wheeler.

First, as to the sufficiency of the evidence to support the conviction the issue has not been properly preserved by raising it in the trial court by motion for a directed verdict. *Napier, supra*.

Indeed, the trial court specifically suggested the possibility of a directed verdict to the Defendant-Appellant. The Defendant-Appellant declined to ask for one. Transcript, pp 217-218. Even if the objection had been properly preserved, there was evidence at trial that Mr. Dugas, who was acting on behalf of the Defendant-Appellant, solicited Mr. Wheeler for a specific sexual act. Transcript, p 78. Under this view of the facts, the Defendant-Appellant aided and abetted Mr. Dugas who himself committed this solicitation against Mr. Wheeler. Thus, there was sufficient evidence to support a conviction of the Defendant-Appellant for soliciting Mr. Wheeler.

As the Defendant-Appellant points out, it might have been better to have given an aiding and abetting instruction at least as to the solicitation charge relating to Mr. Wheeler. But the Defendant-Appellant did not request that instruction and indeed specifically objected to the giving of an aiding and abetting instruction. Transcript, pp 217 and 221. The Defendant-Appellant went on to decline a specific opportunity to comment on the instructions after they were given and before the jury retired to deliberate. Transcript, p 272. Given the Defendant-Appellant's specific objection to the aiding and abetting instruction, the trial court can hardly be faulted for failing to give it. The Defendant-Appellant's attorney had has own tactical reasons for objecting to that instruction. He may have felt it more likely the jury would acquit of solicitation as to Mr. Wheeler without the aiding and abetting instruction being given.

The Defendant-Appellant also objects on appeal to the prosecution's cross-examination of the Defendant-Appellant and arguments in closing concerning the Defendant-Appellant's refusal to speak with the police when he was interviewed by them in the investigation of this matter.

Page 192 of the transcript shows that the Defendant-Appellant testified under direct questioning by his own attorney that he went in voluntarily to meet with the officers and that he was more than happy to answer their questions and more than willing to answer their questions. The prosecutor merely pointed out that the evidence showed that that was not true, that he had refused to speak to the investigating officers and demanded his right to speak to an attorney. The Defendant-Appellant injected his cooperation with the investigation into the case and can hardly criticize the prosecutor for responding to avoid leaving a false impression with the jury as to the Defendant-Appellant's credibility.

Furthermore, the issue was not preserved for appeal by a timely objection by the Defendant-Appellant at trial. Neither the questions asked by the prosecutor on cross-examination of the Defendant-Appellant nor the prosecutor's arguments in closing on these issues were objected to at a time when curative action could have been taken by the trial court.

Lastly, the Defendant-Appellant argues on appeal that he was denied the effective assistance of counsel, a retained defense attorney which he hired out of the area. No record other than that made at trial has been created as to the ineffective assistance of counsel issue. See, *People v Ginther*, 390 Mich 436 (1973).

All of the matters as to which the Defendant-Appellant now says his attorney was ineffective are matters which at the time were reasonable trial strategy and as to which the Defendant-Appellant has not made a showing that they might have made a difference in the outcome of the trial.

The Defendant-Appellant's convictions on all three counts are affirmed.

IT IS SO ORDERED.

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HONORABLE THOMAS G. POWER
Circuit Court Judge

Dated: _____