

## MSC Opinion: Failure to properly instruct jury regarding actus reus of alleged crime did not result in outcome-determinative error

28. July 2011 By Kristina Araya

On July 26, 2011, the Michigan Supreme Court released its opinion in *People v. Kowalski*, No. 141695. The Court reviewed Edward Kowalski's convictions for accosting a minor for immoral purposes or encouraging a minor to commit an immoral act, under MCL 750.1451, and using a computer and internet to accomplish the same, under MCL 750.145d. The Court held that although the trial court failed to properly instruct the jury as to the *actus reus* of the accosting a minor statute, this error was not outcome-determinative. After further holding that defendant was not denied the effective assistance of counsel and that sufficient evidence was produced at trial to support the jury's verdict, the Court reversed the judgment of the Court of Appeals and reinstated defendant's convictions.

Defendant, at the age of 51, engaged in highly sexual conversations in a Yahoo! chat room with an individual whom defendant believed to be a 15-year-old girl. This individual, who used the screen name "keyanagurl," was actually an undercover police officer. Defendant continued to chat with keyanagurl after learning her supposed age, and in several conversations over approximately six days, requested that keyanagurl engage in sexual activities with him. Shortly after police appeared at defendant's home with a search warrant, a local homeowner reported to police that defendant dumped computer parts near a rural dirt road. Police collected these parts and the homeowner testified at trial.

Evidence at trial also included testimony from Jasmine DeWeese, who testified that she began an online relationship with defendant when she was 22, and that their relationship included consensual cybersex and eventually physical sex. She offered detailed testimony regarding defendant's efforts to persuade her to visit his home, their sexual relationship, and his proclivity for pornography depicting girls that looked "extremely young." She also testified that her underage sister accompanied her to defendant's home, where he encouraged them to swim without swimsuits in his pool. The trial court admitted this testimony under MRE 404(b) "to show defendant's intent and to show that defendant acted according to a common plan, scheme or system."

In his appeal, defendant argued that the jury was not properly instructed as to the *actus reus* of the accosting a minor crime, that he was denied effective assistance of counsel, and that the jury did not hear sufficient evidence to support his conviction. The Court of Appeals overturned defendant's convictions due to improper jury instruction, but the Supreme Court reversed.

First, the court defined the elements of the accosting a minor statute, MCL 750.145a. It determined that the statute permits conviction under two alternative theories. The first, which requires evidence of specific intent, provides, "A defendant is guilty of accosting a minor if the prosecution proves beyond a reasonable doubt that the defendant (1) accosted, enticed or solicited (2) a child (or an individual whom the defendant believed to be a child) (3) with the intent to induce or force that child to commit (4) a proscribed act." The second theory only requires general criminal intent: "a defendant is guilty of accosting a minor if the prosecution proves beyond a reasonable

doubt that the defendant (1) encouraged (2) a child (or an individual whom the defendant believed to be a child) (3) to commit (4) a proscribed act.”

The Court then evaluated the jury instruction explaining the accosting a minor statute. The jury instruction did not include the “accosts, entices or solicits” prong of the offense; instead, the jury was instructed that the defendant would be guilty if he (1) believed he was engaging with a child, and (2) had the intent to induce that person to commit a proscribed act or encouraged that person to engage in a proscribed act. The Court held that in failing to include the “accosts, entices or solicits” prong of the offense, the jury was not properly instructed as to the *actus reus* of the crime. But the defendant explicitly and repeatedly approved the instruction, so he waived this constitutional error.

Defendant’s waiver did not relieve the Court of its responsibility to evaluate the error, but it affected the standard of review: the Court noted that it will review unpreserved constitutional error only for “plain error affecting a defendant’s substantial rights.” The Court held that the error did not affect the defendant’s substantial rights because “even if the trial court had properly instructed on the accosts, entices and solicits prong of the offense, the jury would still have convicted defendant because the Internet chats ... were immoral, grossly indecent, delinquent, and depraved acts that constituted the *actus reus* under either prong of the offense.” The evidence before the jury – the chats themselves, DeWeese’s testimony, and testimony from the homeowner who testified that defendant destroyed his computer and discarded it in a secluded, rural location – was “overwhelming and uncontroverted,” and was sufficient to support conviction even if the jury was properly instructed. As a result, the erroneous instruction did not affect defendant’s substantial rights, so the Supreme Court reinstated his convictions.

Justice Cavanaugh, joined by Justice Kelly, concurred in result only. He disagreed that the evidence against defendant was “overwhelming,” but concurred in the result because concluded that defendant could not establish that he was entitled to relief under plain-error review. Justice Cavanaugh disagreed with the majority’s waiver analysis, and reasoned that an attorney’s statement that he has “no objection” to a jury instruction may not necessarily determine whether the right to appeal the instruction was waived. Instead, Justice Cavanaugh stated that a failure to object should only be deemed a waiver if “the defendant had knowledge of the right, yet intentionally chose to abandon it or consciously refrained from objecting as a tactical matter.” He also recognized that the majority’s application of plain-error review to unpreserved constitutional errors is consistent with its precedent, but noted that he continues to disagree with those decisions, and instead would apply a harmless-error analysis to unpreserved constitutional error.