STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

-vs- **Supreme Ct. No. 157465**

KELVIN WILLIS,
Defendant-Appellant.

Wayne County Circuit Court No. 15-010530-01-FH
Court of Appeals No. 334398

[On Appeal from the Court of Appeals
Talbot, C.J., and Murray, and O'Brien, JJ.]

PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF ON APPEAL
ORAL ARGUMENT REQUESTED

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COUNTERSTATEMENT OF JURISDICTION

The People concur with the Defendant's statement of appellate jurisdiction. The Michigan Supreme Court has jurisdiction to hear this appeal pursuant to MCR 7.030(B), concerning an appeal after a decision in the Michigan Court of Appeals.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I.

A statute should be given its plain and ordinary meaning where possible. Here, the plain meaning of the statute, MCL 750.145c(2), does not require that the prosecution prove that the defendant acted solely for the purpose of producing or making child sexually abusive material, rather, the statute includes that the prosecution may prove that the defendant prepared to engage in child sexually abusive activity, which includes the conduct of the defendant in this case. Therefore, was the statute was properly applied in this case?

The trial court did not answer this question.

The People answer, "Yes."

The Defendant would answer, "No."

II.

A defendant violates the child sexually abusive activity statute when he attempts or prepares to make or arrange to have a child engage in sexually abusive activity. Here, there was evidence that the Defendant invited the victim into his apartment, locked the door, showed a pornographic video to the sixteen-year-old victim and then offered the victim money if the victim would allow the Defendant to have intercourse with him. Was this evidence sufficient to satisfy the elements of child sexually abusive activity?

The trial court would answer this question, "Yes."

The People answer, "Yes."

The Defendant would answer, "No."

COUNTERSTATEMENT OF FACTS

The People do not dispute the Defendant's statement of facts. The Defendant was convicted of one count of child sexually abusive activity,[1] one count of possession of cocaine less than 25 grams,[2] and one count of distributing sexually obscene matter to a minor.[3]

On Wednesday, August 12, 2015, at around 11 p.m., the sixteen-year-old victim, A. A., was walking to the house that he shares with his grandmother, located at 4031 Calhoun Street in Dearborn, Michigan.[4] An apartment complex is located across the street.[5] The victim knew the Defendant as someone who lived at the apartment complex.[6] The Defendant called the victim over, talked to him, specifically asking the victim how old he was, and the victim told him that he was sixteen years old.[7] The Defendant asked for the victim's cell phone number, so the Defendant gave him his cellular telephone number and the victim called him so that the Defendant would have his cellular telephone number.[8]

The Defendant invited the victim into his apartment and the victim complied.[9] When they got inside the apartment, the Defendant told him to sit on the couch. The Defendant locked the door of the apartment.[10] It was dark inside the apartment.[11] A woman named "Tonya" (later identified as Tonya Battle) sat next to the victim on the couch and the Defendant sat on the other

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1 MCL 750.145c(2).
2 MCL 333.7403(2)(a)(v).
3 MCL 722.675.
4 6/14/2016, 63 (110a).
5 6/14/2016, 63 (110a).
6 6/14/2016, 65 (112a).
7 6/14/2016, 66 (113a).
8 6/14/2016, 66 (113a).
9 6/14/2016, 67 (114a).
10 6/14/2016, 68 (115a).
11 6/14/2016, 67 (114a).

side of him.[12] Ms. Battle was smoking marijuana and drinking alcohol.[13] Ms. Battle began to argue with the Defendant and then she left the apartment.[14] The Defendant left the apartment after her but he returned soon after.

When he returned to the apartment, the Defendant put his arm around the victim and used his cellular telephone to show the victim a video of two men having sexual intercourse with each other.[15] When he was showing the victim the video, the Defendant said, "This is what I like to do."[16] The Defendant then told the victim that he would give him $25 if he allowed the Defendant to put his fingers in his "butt hole" and masturbate on him.[17] The victim said, "no, I'm not going to do that" and as he was going to get up off the couch the Defendant grabbed his shoulders and forced him back down on the couch.[18] The Defendant then offered him $100 to have sexual intercourse.[19] The victim repeatedly told him no.[20] The Defendant then left the apartment to find out what Tonya was doing.[21]

At that point the victim tried to climb out a window but it would not open, so he opened the door of the apartment and upon not seeing either the Defendant or Tonya, he ran out of the back door and escaped the apartment complex.[22] The victim saw a person that he knew standing outside the apartment building named Randy (later identified as Randy Ferguson).[23] The victim

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[12] 6/14/2016, 68 (115a).
[13] 6/14/2016, 68 (115a).
[14] 6/14/2016, 68 (115a).
[15] 6/14/2016, 69 (116a).
[16] 6/14/2016, 70 (117a).
[17] 6/14/2016, 70 (117a).
[18] 6/14/2016, 70 (117a).
[19] 6/14/2016, 70 (117a).
[20] 6/14/2016, 70 (117a).
[21] 6/14/2016, 70 (117a).
[22] 6/14/2016, 70 (117a).
[23] 6/14/2016, 125 (1b).

told Mr. Ferguson that he had just been molested so Mr. Ferguson called the police and told the police what was happening.[24]

The Dearborn police arrived and the Defendant was arrested.[25] As his property was being inventoried, a packet of cocaine was found in his right front pocket of his shorts.[26] The Defendant gave a statement to police where he denied the allegations.[27] The Defendant's cellular telephone was placed into evidence and an extraction report was made of the phone.[28] The officer in charge remarked that there were teenage boys depicted in a video saved on the cellular phone.[29] It could not be verified if the males in the video files of the phone were actually juveniles.[30]

The Defendant was found guilty following a jury trial of child sexually abusive activity,[31] possession of less than 25 grams of cocaine,[32] and disseminating sexually explicit material.[33] The Defendant was sentenced within the sentence guidelines as a third habitual offender to 15 to 40 years of imprisonment for the child sexually abusive activity conviction, 2 to 8 years for the possession of cocaine conviction, and 2 ½ to 4 years for the dissemination of sexually explicit material conviction.[34] The Defendant appealed his conviction to the Michigan Court of Appeals on December 31, 2016.

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[24] 6/14/2016, 126-127 (2-3b).
[25] 6/15/2016, 120 (7b).
[26] 6/15/2016, 123 (8b).
[27] 6/14/2016, 139-140 (4b-5b).
[28] 6/15/2016, 125; 141 (9b, 10b).
[29] 6/14/2016, 159 (6b).
[30] 6/14/2016, 159 (6b).
[31] MCL 750.145c(2).
[32] MCL 333.7403(2)(a)(v).
[33] MCL 722.675.
[34] 7/15/2016, 15-16 (11b-12b).

On January 11, 2018, the Michigan Court of Appeals affirmed the Defendant's sentence and conviction in a published decision, *People v Kelvin Willis*, 322 Mich App 579 (2018).[35] The Defendant filed a motion for reconsideration on February 6, 2018, which was denied in an order on February 8, 2018.[36] An application for leave to appeal to the Michigan Supreme Court was filed on April 2, 2018. The People filed an answer to the application on April 23, 2018. On December 19, 2018, this Court ordered oral argument on the Defendant's application for leave to appeal and ordered the parties to file supplemental briefs addressing: (1) whether, to sustain the conviction under MCL 750.145c(2), the prosecution must prove that the defendant acted for the purpose of producing or making child sexually abusive material; and (2) whether the evidence in this case was sufficient to support the Defendant's conviction under MCL 750.145c(2). On January 29, 2019, the Defendant filed his supplemental brief in accordance with the Court's order.

Other facts will be referenced as necessary within the brief.

[35] 16a-22a.
[36] 23a.

ARGUMENT

I. A statute should be given its plain and ordinary meaning where possible. Here, the plain meaning of the statute, MCL 750.145c(2), does not require that the prosecution prove that the defendant acted solely for the purpose of producing or making child sexually abusive material, rather, the statute includes that the prosecution may prove that the defendant prepared to engage in child sexually abusive activity, which includes the conduct of the defendant in this case. Therefore, the statute was properly applied in this case.

Standard of Review

The People do not dispute the Defendant's statement of the standard of review. An issue involving the interpretation and application of a statute is subject to *de novo* review.[37] The primary goal of statutory construction is to give effect to the Legislature's intent.[38] "To ascertain that intent, this Court begins with the statute's language. When that language is unambiguous, no further judicial construction is required or permitted, because the Legislature is presumed to have intended the meaning it plainly expressed."[39]

Discussion

The prosecution need not prove that the defendant acted for the purpose of producing or making child sexually abusive material because MCL 750.145c(2) addresses two different problems: "child sexually abusive material" and "child sexually abusive activity." Under MCL 750.145c(2), titled "Child sexually abusive activity or material," a defendant need not act with the purpose of producing any child sexual abusive material in order to be engaged in child sexual abusive activity in violation of the statute. The Child Sexual Abusive Activity statute provides the following:

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[37] *People v King*, 297 Mich App 465, 482 (2012).
[38] *People v Osantowski*, 481 Mich 103, 107 (2008).
[39] *Id*.

> 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, copies, reproduces, or finances, or a person who attempts or prepares or conspires to arrange for, produce, make, copy, reproduce, or finance any child sexually abusive activity or child sexually abusive material for personal, distributional, or other purposes 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.[40]

MCL 750.145c(1)(l) defines "child sexually abusive activity" as "a child engaging in a listed sexual act." A "listed sexual act" means "sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, or erotic nudity."[41]

The Defendant cites to some legislative history to support his claim that the statute is meant only to combat child pornography. But review of the legislative history of MCL 750.145c(2) is outside the province of this Court because the statute's plain language is unambiguous.[42] "The primary goal of statutory construction is to give effect to the intent of the Legislature. If the language of the statute is unambiguous, judicial construction is not permitted because the Legislature is presumed to have intended the meaning it plainly expressed."[43] Moreover, when looking at the legislative history provided, it provides no insight into the Legislature's desire to outlaw only the production of child sexual abusive material and not child sexually abusive activity. Indeed, the legislative history contained in the Defendant-Appellant's

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[40] MCL 750.145c(2) (emphasis supplied).
[41] MCL 750.145c(1)(h).
[42] *People v Feeley*, 499 Mich 429, 435 (2016).
[43] *People v Light*, 290 Mich App 717, 724 (2010), quoting *People v McLaughlin*, 258 Mich App 635, 672-673 (2003).

Appendix A, relates only to the desire of the Legislature to have Michigan law mirror the federal law in regards to providing copies of exhibits containing the depiction of child abusive activity to the defense, to clarify "making copies" and to codify this Court's decision in *People v Flick*.[44] It contains no indication that the legislature wished to remove the arranging, financing, or preparation of child sexual abusive activity from criminal liability.[45]

> MCL 750.145c(2) applies to three categories of offenders:
>
> 1) the offender "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";
>
> 2) the offender who "arranges for, produces, makes, or finances ... any child sexually abusive activity or child sexually abusive material"; and
>
> 3) the offender "who attempts or prepares or conspires to arrange for, produce, make, or finance any child sexually abusive activity or child sexually abusive material."

As explained in *People v Adkins*,[46] the use of the disjunctive "or" in the second and third categories clearly and unambiguously indicates that a person who arranges for, or attempts, or prepares to arrange for, child sexually abusive activity faces criminal liability. By the statute's plain language, no involvement with child sexually abusive material is required.

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[44] *People v Flick*, 487 Mich 1 (2010).

[45] Moreover, legislative analysis has traditionally been given very little significance by courts when construing a statute. "Legislative bill analyses, which are nothing more than the summaries and interpretations of unelected employees of the legislative branch, have been described by our Supreme Court as 'a feeble indicator of legislative intent and is therefore a generally unpersuasive tool of statutory construction.'" *In re AGD, Minor*, __ Mich App __ , (2019) (Docket No. 345717), citing *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 587 (2001).

[46] *People v Adkins*, 272 Mich App 37 (2006).

The case of *People v Adkins* is most informative on this issue.[47] In *People v Adkins*, the defendant pled guilty to one count of child sexual abusive activity, MCL 750.145c(2), and using the computer or the internet to attempt to commit child sexually abusive activity, MCL 750.145d(1)(a).[48] On appeal, the defendant argued that his guilty plea to MCL 750.145c(2) should be withdrawn for lack of a factual basis. At the guilty plea, the defendant admitted communicating via computer with someone who he believed to be fourteen years old, and making arrangements to meet for the purpose of having sexual activity with the child. The court in *Adkins* ruled that this was a sufficient factual basis to satisfy the requirements of MCL 750.145c(2), because the statute only requires that the defendant prepare or arrange for child sexually abusive activity (which includes sexual intercourse).[49] The same reasoning applies to the instant case but in this case the activity was more egregious since the Defendant met personally with the child to request sexual intercourse in exchange for money.

The Defendant also makes the claim that the child sexually abusive activity statute somehow changes the age of consent from 16 to 18. This is not the case. The statute did not change the age of consent by criminalizing *nonconsensual* conduct. The language of the statute refers to "abusive" activity, which by its terms would mean nonconsensual conduct. Moreover, under a plain reading of MCL 750.145c, the offense does not require that there actually be a minor child victim, only that defendant believed the person to be a minor child. Therefore, the statute could not possibly be changing the age of consent. Also, the Legislature is free to change the age of consent should it choose to do so; it would not invalidate the terms of this particular statute. For example, in the case of criminal sexual conduct in the third degree, the Legislature

[47] *People v Adkins*, 272 Mich App 37 (2006).
[48] *People v Adkins*, 272 Mich App at 38.
[49] *Id*.

has determined that it would be a crime for a teacher, substitute teacher, or administrator of a school to engage in sexual penetration with a student aged 16-18, and for situations where the victim is aged 16-26 and a special education student and the actor is a teacher, substitute teacher, administrator, or school employee.[50] Thus showing that the age of consent is not necessarily age 16 in Michigan, and that it can be, and has been, modified by the Legislature.

[50] MCL 750.520d(1)(e) and (f).

II. A defendant violates the child sexually abusive activity statute when he attempts or prepares to make or arrange to have a child engage in sexually abusive activity. Here, there was evidence that the Defendant invited the victim into his apartment, locked the door, showed a pornographic video to the sixteen-year-old victim, and then offered the victim money if the victim would allow the Defendant to have intercourse with him. This evidence was sufficient to satisfy the elements of child sexually abusive activity.

Standard of Review

The People agree with the Defendant's statement of the standard of review. In reviewing a claim that there was insufficient evidence to support a conviction, the reviewing court must consider the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.[51] The reviewing court must make all reasonable inferences and credibility choices which will support the trier of fact's verdict, and the scope of review is the same whether the case involves direct or circumstantial evidence.[52] Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense.[53] An issue involving the interpretation of a statute is reviewed de novo.[54]

Discussion

Viewing the evidence in a light most favorable to the People, there is sufficient evidence that the Defendant arranged for, or attempted to arrange for, child sexually abusive activity. The Defendant isolated the victim in his apartment, locked the door, exposed the victim to pornography, grabbed him by the shoulders, and then offered to pay the victim to engage in two

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51 *People v Nowack*, 462 Mich 392, 399 (2000)*; People* v *Petrell*a, 424 Mich 221 (1985).
52 *People v Wolfe*, 440 Mich 508, 526 (1992).
53 *People v Nowack*, 462 Mich at 399 (citing *People v Carines*, 460 Mich 750, 757 (1999).
54 *People v Riggs*, 237 Mich App 584, 588 (1999).

separate sexual acts while the victim was alone and vulnerable. Therefore, the Defendant is guilty of violating MCL 750.145c.

MCL 750.145c(2), Child Sexual Abusive Activity, provides the following:

> 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, copies, reproduces, or finances, or a person who attempts or prepares or conspires to arrange for, produce, make, copy, reproduce, or finance any child sexually abusive activity or child sexually abusive material for personal, distributional, or other purposes, 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.[55]

Child sexual abusive activity means a child engaging in a listed sexual act. A "listed sexual act" is defined in the statute as sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, or erotic nudity.[56] "Passive sexual involvement" means an act, real or simulated, that exposes another person to, or draws another person's attention to, an act of sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, sexual excitement, or erotic nudity because of viewing any of these acts or because of the proximity of the act to that person for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved.[57]

In this case, the Defendant met the victim outside of his apartment building and started a conversation with the victim.[58] The Defendant asked for the victim's telephone number and the

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[55] MCL 750.145c(2).
[56] MCL 750.145c(1)(i).
[57] MCL 750.145c(1)(l).
[58] 6/14/2016, 77 (124a).

victim called him so that he would have the number in his cell phone.[59] The Defendant asked the victim how old he was, and the victim replied that he was sixteen years old.[60] The Defendant invited the victim inside of his apartment to "hang out" with him.[61] The victim went inside the apartment and the Defendant told the victim to sit on the couch and the victim complied.[62] While he was seated on the couch, the Defendant showed the sixteen-year-old victim a pornographic video on his cellular telephone and told him "that is what he liked to do."[63] He then offered the victim $25 if he would touch the Defendant's anus with his fingers and let the Defendant masturbate on him, or $100 if he could have sexual intercourse with the victim.[64] The Defendant then left his apartment to go look for his friend, Tonya Battle, and at that time the victim was able to run and escape out the back door of the apartment building.[65] These actions by the Defendant satisfy the elements of the child sexual abusive activity statute because they show that the Defendant attempted to or prepared to arrange for child sexual abusive activity.

The Court gave a non-standard jury instruction on child sexual abusive activity.[66] The court instructed the jury as follows:

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[59] 6/14/2016, 92; 115 (139a, 162a).
[60] 6/14/2016, 63; 66 (110a, 113a).
[61] 6/14/2016, 67 (114a).
[62] 6/14/2016, 67 (114a).
[63] 6/14/2016, 69-70 (116a, 117a).
[64] 6/14/2016, 70 (117a).
[65] 6/17/2016, 72 (119a).
[66] The Standard Jury Instruction is M Crim JI 20.38: Causing or Allowing.

> (1) The defendant is charged with the crime of causing or allowing a child to engage in sexually abusive activity in order to create or produce child sexually abusive material. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> (2) First, that the defendant [persuaded/induced/enticed/coerced/caused/knowingly allowed] a child under 18 years old to engage in child sexually abusive activity.

(3) Child sexually abusive activity includes:

[Choose any of the following that apply:]

(a) sexual intercourse, which is penetration of a genital, oral, or anal opening by the genitals, mouth, or tongue, or with an artificial genital, whether the intercourse is real or simulated, and whether it is between persons of the same or opposite sex, or between a person and an animal, or with an artificial genital, [and/or]

(b) erotic fondling, which is the touching of a person's clothed or unclothed genitals, pubic area, buttocks, female breasts, or the developing or undeveloped breast area of a child for the purpose of sexual gratification or stimulation of any person involved, but does not include other types of touching, even if affectionate, [and / or]

(c) sadomasochistic abuse, which is restraining or binding a person with rope, chains, or any other kind of binding material; whipping; or torturing for purposes of sexual gratification or stimulation, [and / or]

(d) masturbation, which is stimulation by hand or by an object of a person's clothed or unclothed genitals, pubic area, buttocks, female breasts, or the developing or undeveloped breast area of a child for sexual gratification or stimulation, [and / or]

(e) passive sexual involvement, which is watching, drawing attention to, or exposing someone to persons who are performing real or simulated sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, sexual excitement, or erotic nudity for the purpose of sexual gratification or stimulation of any person involved, [and / or]

(f) sexual excitement, which is the display of someone's genitals in a state of stimulation or arousal, [and / or]

(g) erotic nudity, which is showing the genital, pubic, or rectal area of someone in a way that tends to produce lewd or lustful emotions.

(4) Second, that the defendant caused or allowed the person to engage in child sexually abusive activity for the purpose of producing or making child sexually abusive material. Child sexually abusive materials are pictures, movies, or illustrations, made or produced by any means, of [a person under 18 years old / the representation of a person under 18 years old] engaged in sexual intercourse, erotic fondling, sadomasochistic

…To prove this charge the prosecution must prove each of the following elements beyond a reasonable doubt, and there are two elements.

First, that the Defendant attempted, prepared, or attempted to make or arrange to have someone engage in sexually abusive activity with a person.

Second, that this person was [sic under] eighteen years of age.

Okay. On a separate page I've defined sexually abusive activity, but I didn't do it on the same page as Count 1. So if you need to look it up again it's another page, okay.

In Count II, the defendant is charged with a second count of child sexually abusive activity. So in Count II the Defendant is charged with a crime known as child sexually abusive activity. The Defendant has pled not guilty to this charge. To prove this charge the prosecution must prove each of the following elements beyond a reasonable doubt and there are two elements for Count II.

First that the Defendant attempted, prepared or attempted to make or arrange to have someone engage in sexually abusive activity with a person.

Second, that this person was under eighteen years of age.

So on the next page I've defined – I have the definition of child sexually abusive activity that applies to Count I and Count II. Sexually abusive activity is defined by law as a child engaging in any of the following sexual acts. A, sexual intercourse whether genital, anal, or oral. B, fondling of a person's clothed or unclothed genitals, pubic area, buttocks, or female breasts for the purpose of sexual gratification. C, masturbation.

And then below that I have a cautionary instruction which reads, mere desire to commit those acts is not a crime. The Defendant must have either one, actually attempted to commit those acts or, two, have made preparation for committing those acts.[67]

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abuse, masturbation, passive sexual involvement, sexual excitement, and/or erotic nudity.

(5) Third, that the defendant knew or reasonably should have known that the person was less than 18 years old, or failed to take reasonable precautions to determine whether the person was less than 18 years old.

[67] 6/17/2016, 135-136 (195a-196a).

The trial court's jury instruction was complete and properly described the crime of child sexual abusive activity because the child sexual abusive activity statute only requires that the defendant prepare to arrange for child sexually abusive activity. It does *not* require that those preparations actually proceed to the point of involving or actually touching the child. Here, we have the Defendant approaching the victim, asking the victim his age, upon learning that the victim was only sixteen years old, inviting him into his apartment, locking the door, showing the child a video of two men having intercourse, telling the victim that is what he likes to do,[68] offering the victim $25 if he allowed the Defendant to insert his fingers into his anus, and another $100 if he allowed the Defendant to have sexual intercourse with the victim.[69] Under the statute, this activity satisfies the definition of child sexual abusive activity.

People v Aspy[70] held that MCL 750.145c(2) does not actually require physical contact involving a minor, rather, it only requires that the defendant prepares to arrange for child sexually abusive activity. In *People v Aspy*,[71] the defendant arranged over the internet with a girl he believed to be fourteen years old to meet and engage in sexual activity. The defendant traveled to the place he believed to be the child's home, but the child was actually an adult pretending to be a child (an adult member of Perverted Justice, a group dedicated to identifying internet predators).[72] The defendant was arrested as he got to the home, his car was searched, and it contained alcohol, specifically the type of alcohol the person pretending to be the teenager told him that she wanted, Mike's Hard Lemonade.[73] The court in *Aspy* ruled that the evidence

[68] 6/14/2016, 70 (117a).
[69] 6/14/2016, 70 (117a).
[70] *People v Aspy*, 292 Mich App 36 (2011).
[71] *People v Aspy*, 292 Mich App 36 (2011).
[72] *Id* at 38.
[73] *People v Aspy*, 292 Mich App at 40.

supported the conviction for child sexually abusive activity, even though the defendant did not produce a videotape, photograph, or computer generated image, or picture of an under-aged girl. The same reasoning should apply in the instant case. The Defendant attempted or prepared to arrange for child sexually abusive activity with the victim. In this case, the Defendant put his arm around the victim and then exposed the child victim to a video of two men having sexual intercourse and stated to the victim, "This is what I like to do."[74] Showing the victim a video of two men having sexual intercourse was "passive sexual involvement" as described in MCL 750.145c(l). The Defendant's further offering to pay the victim for sexual activity was further inducement or enticement to get the child to engage in a sexually abusive activity. Therefore, the Defendant could be found guilty of child sexually abusive activity and the evidence was sufficient.

Similarly, in *People v Adkins*, the defendant was found guilty of child sexually abusive activity contrary to MCL 750.145c. In that case the defendant engaged in sexually explicit internet dialogue with and arranged to meet an undercover police officer posing as a fourteen-year-old boy. The court in *Adkins* held that the child sexually abusive activity statute, MCL 750.145c(2), applied to this conduct because the statute 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."[75] The *Adkins* court ruled that the statute divided offenders into three groups: one group that produces child sexually abusive material, a second group that arranges, produces, or finances the child sexually abusive material, and a third group that merely attempts or prepares or conspires to arrange for, produce, make, or finance child

[74] 6/14/2016, 69-70 (116a-117a).
[75] *People v Adkins*, 272 Mich App 37, 41 (2006), quoting MCL 750.145c. The statute was amended in 2013, but the amendment did not change the relevant language.

sexually abusive activity or child sexually abusive material. The disjunctive "or" in the statute signifies that the second and third groups of persons face criminal liability for participation in the arrangement for or production, making, or financing of *either* child sexually abusive activity *or* child sexually abusive material.[76] The language of the statute defining the groups of criminal actors eliminates the requirement applicable in the first group that the proscribed actions must have been taken for the purpose of creating child sexually abusive material. 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.[77] Therefore, the actual production of child sexually abusive material is not necessary in order to violate the act, contrary to the argument of the Defendant. In summary, the Defendant was properly convicted of child sexually abusive activity contrary to MCL 750.145c(2).

The Defendant also argues that the child sexually abusive activity statute is ambiguous because the statute makes certain sexual conduct with a person under the age of eighteen a crime whereas the age of consent in Michigan (for purposes of MCL 750.520a et seq.) is sixteen years old.[78] The Defendant did not argue this point at the trial court level so the claim is unpreserved and review is limited to plain error affecting defendant's substantial rights.[79]

There is no doubt that the conduct proscribed by the child sexually abusive activity statute applies to anyone under the age of eighteen. The statute "focuses on protecting children

[76] *People v Adkins*, 272 Mich App at 41.
[77] *People v Adkins*, 272 Mich App 37, 41–42 (2006).
[78] Defendant-Appellant's supplemental brief on appeal, p. 22.
[79] *People v Carines*, 460 Mich 750, 752-753 (1999).

from sexual exploitation, assaultive or otherwise."[80] The fact that the legislature has proscribed certain conduct for persons under the age of eighteen, whereas in other statutes the age limit is sixteen years of age, is of no moment. The legislature is free to proscribe different ages for different types of conduct as it seems fit. For example, the drinking age is 21, but people can legally smoke cigarettes at age 18. Perhaps more applicable to the instant case, there are more severe punishments proscribed for the perpetration of criminal sexual conduct in the first degree for an offense perpetrated against someone under the age of 13 than if the victim was above 13 years of age.[81] Moreover, there is a substantial difference between consensual sexual activity involving a person sixteen years of age and the instant conduct.

The Defendant also cites the rule of lenity, which has no application to the instant case. The rule of lenity applies only where there is statutory ambiguity, that is, where reasonable doubt exists about a statute's intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute.[82] Here, the conduct provided for in MCL 750.145c is very clear. The Defendant does not explain how the language is ambiguous (other than his personal belief as to the Legislature's intent, which is irrelevant). Therefore, the Defendant's claim must fail.

[80] *People v Ward*, 206 Mich App 38, 42 (1994).
[81] MCL 750.520b(2).
[82] *Moskal v United States*, 498 US 103, 108 (1990).

RELIEF REQUESTED

THEREFORE, the People respectfully request that this Honorable Court deny leave to appeal.

Respectfully submitted,

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