[Cite as *State v. Hudson*, 2009-Ohio-2776.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22793
v.	:	T.C. NO. 2007 CR 3281
ANDREW L. HUDSON	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 12th day of June, 2009.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on Notice of Appeal of Andrew Hudson, filed June 11, 2008. On August 21, 2007, Hudson was indicted on two counts of Rape

of a child less than thirteen (13) years of age, in violation of R.C. 2907.02(A)(1)(b), a felony of the first degree. Hudson stood mute and not guilty pleas were entered on his behalf. On August 30, 2007, Hudson filed a motion to suppress, which the trial court overruled following a hearing, on December 21, 2007. Following the first day of a jury trial that commenced on May 12, 2008, Hudson entered a plea of no contest to one count of the indictment, reserving his right to appeal. The second count was dismissed. On May 29, 2008, Hudson was sentenced to a mandatory term of ten (10) years to life in prison, and designated as a Tier III child sex offender.

{¶ 2} Hudson's appointed appellate counsel filed an *Anders* brief pursuant to *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 19 L.Ed.2d 493, stating that he could find no meritorious issues for appellate review. We notified Hudson of his counsel's representations and afforded him ample time to file a pro se brief. None has been filed. This case is now before us for our independent review of the record. *Penson v. Ohio* (1988), 488 U.S. 75, 109 S.Ct. 356, 102 L.Ed.2d 300.

{¶ 3} The events giving rise to this matter began on or about July 25, 2007. Detective James Duff of the Miamisburg Police Department was assigned to investigate the sexual assault of a seven-year-old female child. The child reported that Hudson, then nineteen years old, asked the child to perform an oral sex act on him while in the basement of Hudson's parents' home. The child had gone with her mother to the Hudsons as the two families were mutual friends. While Hudson's mother and the child's mother worked in the upper level of a bi-level house, Hudson was with the child and her two younger siblings in the basement.

{¶ 4} While in the basement, the child asked Hudson for help setting up a

game table. In response, Hudson told the child that he would help if she performed oral sex. The child performed the sexual act. Later, the child asked Hudson for help unlocking the door to go outside. Hudson again conditioned his help on the child performing oral sex. The child complied. Prior to leaving the home, the child indicated to her mother that she had performed the act. The following day, the mother and child went to the Miamisburg Police Department to report the incidents.

{¶ 5} After interviewing the child, Detective Duff approached Hudson at his place of employment, the Game Stop video game store, at the Dayton Mall. Detective Duff, dressed in plain clothes, approached Hudson while he was working and asked if there was a time in which they could meet and talk about the incident. Detective Duff and Hudson agreed to meet on August 7, 2007, at the Miamisburg Police Station.

{¶ 6} On August 7, 2007, Hudson arrived at the police station, accompanied by his father, to speak with Detective Duff. Also present at the initial interview was Detective Ring. Hudson requested that his father be present during the interview. Detective Duff told Hudson that his father could not be present in the interview room. The interview room was a small room with no windows. The door to the room was closed but unlocked. The room had one table and four chairs. While in the room Hudson agreed to talk to Detective Duff.

{¶ 7} Hudson was not given *Miranda* warnings, and was told that he was not under arrest and that he could leave if he wished. Hudson was not handcuffed at any time during the interview. Detective Duff learned that Hudson was home-schooled, but had a twelfth grade education. Hudson appeared to understand all of the questions presented and was articulate with his responses. He did not appear to be under the

influence of any drugs or alcohol. Detectives Duff and Ring both had their guns on their persons but did not touch, or threaten Hudson in any way.

{¶ 8} During the course of the interview, Detective Duff accused Hudson of having sex with the victim. Hudson initially denied any involvement in the incident. He later told the officers that the victim may have seen him urinating. Finally, after being asked several times about his involvement, Hudson verbally conceded that he had oral sexual contact with the child. Detective Duff never promised Hudson that if he admitted to oral sex with the child that he could go home. Furthermore, the detective did not threaten Hudson with more serious charges if he refused to confess. Detective Duff asked Hudson for a written statement, which Hudson gave, admitting that he asked the child to "kiss his private," and that the child did "kiss his private." Hudson's written statement was four sentences long and signed by him, and Detective Duff.

{¶ 9} Upon obtaining the written statement, Detective Duff informed Hudson that he would present the case to the prosecutor and that Hudson was free to go home. The interview lasted about one hour.

{¶ 10} On August 13, 2007, Detective Duff called Hudson again requesting to meet a second time to ask a few questions to clarify the information that he had obtained. Hudson agreed, and told the detective that he would come to the police station after taking a shower. Twenty minutes later, Hudson arrived at the police station. Detective Duff and Detective Jeff Muncy informed Hudson that the prosecutor's office had approved the charges and issued a warrant for Hudson's arrest. After informing Hudson of the charges, the detectives gave Hudson the *Miranda* warnings.

{¶ 11} The detectives gave Hudson a pre-interview form containing the *Miranda* warnings and read the warnings to Hudson. Hudson indicated he understood his rights, and initialed each of the written warnings. The detectives then read the waiver form to Hudson. Hudson signed the form, and indicated that he had twelve years of schooling. After verbally questioning him for 20 minutes, Detective Duff provided Hudson with a legal pad and asked that Hudson clarify the discrepancies from the first interview in writing. Hudson gave a written statement where he admitted to asking the child to "kiss his private" on two occasions. He also admitted to having the child "put it [his penis] in her mouth about a little over the head of my private." Hudson was subsequently arrested.

{¶ 12} On August 30, 2007, Hudson filed a motion to suppress the statements given to the police officers. At the suppression hearing, held December 21, 2007, Detectives Duff and Muncy testified for the S tate. The defendant's father, Douglas Hudson also testified at the hearing. The trial court overruled Hudson's motion to suppress in a decision rendered December 31, 2007.

{¶ 13} In overruling Hudson's motion to suppress, the trial court, relying on *State v. Mason* (1988), 82 Ohio St.3d 144, found the August 7 interview was non-custodial. Therefore, *Miranda* did not apply. The court also found that the August 13 interview was a custodial interview but the State proved by a preponderance of the evidence that Hudson voluntarily, knowingly, and intelligently waived his *Miranda* rights prior to the interview. Finally, the court found that Hudson's statements to the detectives in both the August 7 and the August 13 interviews were voluntary statements.

{¶ 14} During opening statements at trial, defendant's counsel conceded to the

jury that Hudson had "encouraged this little girl to kiss his sexual organ." However, defense counsel argued, "But kissing is not rape and we ask you to think about that." Counsel further urged the jury, "[w]e ask you, at the end of his trial, while some other offense may apply, some other offense may even be presented to you but there is no rape." Counsel admitted oral-to-genital contact between Hudson and the child while denying that this constituted rape.

{¶ 15} Hudson's counsel also argued for a jury instruction that allowed for consideration of a lesser included offense. The trial court and State initially seemed to be in agreement to provide a jury instruction allowing the jury to consider a lesser charge, Gross Sexual Imposition, pursuant to R.C. 2907.04(A)(4). After the first day of trial where the State presented the child and the child's mother as witnesses, the attorneys met with the judge in chambers to review matters pertaining to the jury instructions.

{¶ 16} After the charging conference, the trial judge found authority that prevented a jury instruction for Gross Sexual Imposition. The trial court found that the determination about whether to instruct on Gross Sexual Imposition depended on the definition of fellatio. Fellatio is classified as sexual "conduct" under the R.C. 2907.01(A). Sexual conduct is required for the Rape charges filed against Hudson. Gross Sexual Imposition only requires sexual "contact." The court found that the law defined fellatio as any contact between any part of the mouth and the male sex organ. The court elaborated stating that the legal definition of fellatio did not require penetration into the mouth. Therefore, the court concluded that the facts adduced did not warrant an instruction for the lesser offense of Gross Sexual Imposition.

{¶ 17} After the judge's conclusion on the appropriate jury charge, Hudson changed his plea from not guilty to no contest to one count of rape of a child under thirteen. The State dropped the second count of the indictment. On May 29, 2008, Hudson was sentenced to a mandatory term of ten years to life in prison.

{¶ 18} As noted above, Hudson's appointed appellate counsel filed a brief stating the appeal had no meritorious assignments of error. Hudson's counsel has identified three potential assignments of error on appeal.

{¶ 19} The first potential assignment of error raised by Hudson's counsel is as follows:

{¶ 20} "THE TRIAL COURT ERRED WHEN IT OVERRULED APPELLANT'S MOTION TO SUPPRESS."

{¶ 21} At the outset, it should be noted that there were two separate interviews conducted between Hudson and detectives from the Miamisburg Police Department. Hudson argued that the suppression hearing evidence established that the Appellant was a sheltered nineteen-year-old who had been homeschooled and had limited social experiences. Hudson emphasizes that he was interrogated on August 7, 2007 by Detective Duff, a seasoned veteran, in a small, windowless room for fifty-five minutes before obtaining an admission. Hudson argued that he was never given his *Miranda* warnings, he initially denied the allegations but eventually succumbed to the detective's pressure and made the written statement.

{¶ 22} In its opinion overruling the motion to suppress, the trial court noted separate reasons for allowing the statements to be used at trial. First, the trial court noted that the August 7 interview was non-custodial and did not require *Miranda*

warnings. Second, the court ruled that Hudson voluntarily waived his *Miranda* rights at the August 13 interview. Finally, the court held that Hudson's verbal and written statements were voluntarily obtained.

{¶ 23} In *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, the United States Supreme Court held that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrations the use of procedural safeguards to secure the defendant's privilege against self-incrimination. Only a custodial interrogation triggers the requirement for the *Miranda* warnings. *Berkemer v. McCarty* (1984), 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317. The determination as to whether a custodial interrogation has occurred requires "an inquiry into 'how a reasonable man in the suspect's position would have understood his situation.' " *State v. Mason* (1998), 82 Ohio St.3d 144, 154 *citing Berkemer*, 468 U.S. at 442. The fact that an interrogation is occurring at a police station does not mean that there is a per se custodial interrogation. *Mason*, at 154. Ultimately, the inquiry is simply whether there has been either a formal arrest or restraint on the freedom of movement of the degree associated with a formal arrest. *California v. Beheler* (1983), 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275.

{¶ 24} Prior to their August 7 interview, Detective Duff visited Hudson at his place of employment. Detective Duff mentioned that he would like to speak with Hudson about "an incident" that he was investigating. The two mutually agreed to meet on August 7 at the Miamisburg Police Station. Detective Duff informed Hudson, who was then nineteen years old, that Hudson's father could drive him to the police

station, but that the father could not be present in the interrogation. Upon arriving at the police station, Detective Duff directed Hudson to a small interrogation room and closed the door during the interview. Detective Duff did not administer the *Miranda* warnings. At the outset of the interview, Detective Duff informed Hudson that he was not under arrest and that Hudson was free to go at anytime during the interview.

{¶ 25} During the August 7 interview, Detective Duff accused Hudson of performing sexual acts on the child. After first denying the allegations, Hudson began to concede that there was inappropriate conduct. First, Hudson stated that the child may have seen his exposed penis while Hudson was urinating. After Detective Duff pressed the matter, Hudson stated that he asked the child to "kiss his private," and he admitted that the child did "kiss his private." After the verbal admission, Detective Duff asked Hudson to make a written statement. Hudson provided a four-sentence written statement admitting that he asked and the child did "kiss his private." After the statements were made, Detective Duff informed Hudson that he was free to go.

{¶ 26} Since Hudson agreed to meet with Detective Duff on a given day at the police station, was informed that he was not under arrest, and was informed that he was free to leave at any time, we agree with the trial court that the August 7 interview was not a custodial interview. Therefore, *Miranda* warnings were not necessary.

{¶ 27} Although not specifically raised in the Appellant's assignment of error, our independent review of the record indicates that the trial court properly concluded that Hudson voluntarily, knowingly, and intelligently waived his *Miranda* rights prior to the August 13 interview.

{¶ 28} "Whether any subsequent waiver of a defendant's *Miranda* rights is given

freely and voluntarily is a question of fact." *North Carolina v. Butler* (1979), 441 U.S. 369, 373, 99 S.Ct. 1755, 60 L.Ed.2d 286. "[T]he State must establish by a preponderance of the evidence (1) that the accused relinquished his right voluntarily in the sense that 'it was the product of a free choice rather than intimidation, coercion, or deception,' and (2) that he waived 'with full awareness of the nature of the right being abandoned and the consequences of the decision to abandon it.' " *State v. Vanderpool*, Montgomery App. No. 21908, ¶ 6, 2007-Ohio-2430.

{¶ 29} Prior to the second interview held on August 13, Detective Duff presented Hudson with a pre-interview form that lists the *Miranda* warnings. Detective Duff then verbally read to Hudson each warning, asking Hudson if he understood the warnings. Hudson indicated that he did, and initialed each of the warnings. After reading the warnings, Detective Duff asked Hudson if he wished to continue on with the interview. Hudson indicated that he did. Detective Duff then read to Hudson the "Waiver of Rights" and asked if Hudson understood the waiver. Once again, Hudson stated that he did. Hudson signed the waiver prior to the interrogation.

{¶ 30} After signing the waiver, Hudson made further incriminating verbal and written statements. The trial court found by a preponderance of the evidence that Hudson fully understood the *Miranda* rights and voluntarily waived the rights. We agree with the trial court.

{¶ 31} Finally, Appellant argues "the totality of the circumstances demonstrate that his August 7 confession was involuntarily induced and should have been suppressed." This Court has held that in order for a statement made by the accused to be admitted, the prosecution must prove that the accused effected a voluntary,

knowing, and intelligent waiver of his right against self-incrimination. *State v. Goodspeed*, Montgomery App. No. 19979, 2004-Ohio-1819 *citing State v. Edwards* (1976), 49 Ohio St.2d 31, 38. Furthermore, the test for analysis is whether or not the accused's statement was the product of police overreaching. *State v. Dailey* (1990), 53 Ohio St.3d 88, 92. "In deciding whether a defendant's confession is involuntarily induced, the court should consider the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement." *Goodspeed*, Montgomery App. No. 19979, at ¶ 27, *citing Edwards*, 49 Ohio St.3d at paragraph two of the syllabus.

{¶ 32} The August 7 interview conducted by Detective Duff lasted approximately one hour. Present at the interview were Detective Duff, Detective Ring, and Hudson. The interview occurred in a small interrogation room that had no windows. The door was closed and unlocked. Both detectives had weapons, but they were holstered. The detectives did not touch, threaten, or make promises of leniency to elicit a response. The detectives informed Hudson that the door was unlocked and he was free to leave at any time during the interview. Hudson was never handcuffed.

{¶ 33} Hudson appeared to the detectives to understand all of the questions he was asked. His speech was clear in response. He did not appear to be under the influence of any drugs or alcohol.

{¶ 34} During the course of the interview, Hudson initially denied the allegations several times. Ultimately, the defendant admitted some oral sexual contact with the child and his admissions were reduced to writing and signed by him. After the

confession was made, Hudson was permitted to go home.

{¶ 35} The following week, Detective Duff once again contacted Hudson and asked him to come in a second time in order to clear some things up. Detective Duff allowed Hudson to choose between conducting the interview at his home or at the police station. Hudson elected to go to the police station. When Hudson arrived at the police station, Detective Duff informed Hudson that the prosecutor had approved criminal charges and a warrant had been issued for his arrest. Hudson was then given the *Miranda* warnings and Hudson waived his rights, electing to speak with Detective Duff. The interview lasted twenty-five to thirty minutes. The detectives made no threats or promises, and Hudson did not appear to be under the influence of any drugs or alcohol. Hudson was described as articulate in response to questions. During the interview, Hudson made further incriminating statements. At the detectives' request, Hudson provided a written statement consistent with the verbal confessions he made to the officers.

{¶ 36} The trial court determined after considering the totality of the circumstances that both the August 7 and August 13 statements were voluntarily given. The trial court acted properly when it overruled Hudson's motion to suppress the statements. We agree with the appellate counsel that the argument that the trial court erred when it denied Appellant's motion to suppress is without merit.

{¶ 37} Hudson's counsel's second potential assignment of error is as follows:

{¶ 38} "THE TRIAL COURT ERRED WHEN IT REFUSED TO GIVE THE LESSER INCLUDED OFFENSE JURY INSTRUCTION."

{¶ 39} The Appellant asserts that during trial all parties were in agreement that a

lesser jury instruction would be provided which included a charge for Gross Sexual Imposition pursuant to R.C. 2907.05. However, the trial judge found specific authority narrowly defining fellatio under sexual conduct. Sexual conduct is an element of Rape under R.C. 2907.02.

{¶ 40} It is prejudicial error to refuse a requested charge that is pertinent to the case, and is not covered by the general charge. *State v. Hicks* (1989) 43 Ohio St.3d 72, 77. The requested instruction must contain a correct, pertinent statement of the law and must be appropriate to the facts. *State v. Nelson* (1973) 36 Ohio St.2d 79, paragraph one of the syllabus (*reversed on other grounds*). However, it is well established that the trial court will not instruct the jury where there is no evidence in the record to support an issue. *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585, 591. In determining whether a requested instruction was proper, a reviewing court should examine the record for evidence from which reasonable minds might reach the conclusion sought by the instruction. *Feterle v. Huettner* (1971), 28 Ohio St.2d 54, 55-56.

{¶ 41} In the present case, the trial transcript indicates that the parties and the trial court were apparently initially in agreement that a jury instruction would be given that would include the lesser included offense of Gross Sexual Imposition. As the trial judge was preparing the jury instructions between the first and second days of trial, he found authority which narrowly defined what must be proven in order to establish fellatio. Fellatio is a specific act which falls under the definition of "sexual conduct." R.C. 2907.01(A). The pertinent law of Rape states "[n]o person shall engage in sexual conduct with another . . . who is less than thirteen years of age." R.C.

2907.02(A)(1)(b). Gross Sexual Imposition states that "[n]o person shall have sexual contact with another…" R.C. 2907.05(A)(1). "Sexual contact" carries a different definition under R.C. 2907.01(B), and does not include fellatio.

{¶ 42} While in chambers, the trial judge reviewed seven Ohio appellate court cases which encompass the legal definition of fellatio. "Fellatio is committed by touching the male sex organ with any part of the mouth." *State v. Long* (1989), 64 Ohio App.3d 615, 618 (Ohio App. 9th Dist.). Fellatio does not require oral penetration. *State v. Turvey* (1992), 84 Ohio App.3d 724, 747 (Ohio App. 4th Dist.)

{¶ 43} Based on the law, the judge determined that there would not be a lesser offense instruction given for Gross Sexual Imposition. The judge stated that based on the evidence in the record, including Hudson's own admissions, reasonable minds could not, based upon the evidence adduced, find that the offense was merely Gross Sexual Imposition instead of Rape.

{¶ 44} The trial court correctly determined that a lesser jury instruction should not be given in this case. Therefore, we agree with Hudson's appellate counsel that this assignment of error is without merit.

{¶ 45} Finally, the third potential assignment of error raised by Hudson's counsel is as follows:

{¶ 46} "THE APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL."

{¶ 47} Hudson argues that his counsel was ineffective by making certain admissions during the opening statement of trial. Hudson argues that his trial counsel clearly did not know the legal definition of fellatio going into the trial. Hudson further

argues that his counsel believed that if it was shown that the child just kissed Hudson ’s penis and that the penis did not penetrate the mouth, he would be found guilty of only the lesser included offense of Gross Sexual Imposition.

{¶ 48} We review the alleged instances of ineffective assistance of trial counsel under the two prong analysis set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. *State v. Bradley* (1989), 42 Ohio St.3d 136. To prevail on a claim of ineffective assistance of counsel, the defendant must establish: (1) the counsel’s performance was deficient and unreasonable under the circumstances; and (2) the deficient performance prejudiced the defendant. *State v. Kole* (2001), 92 Ohio St.3d 303, 306 *citing Strickland*, 466 U.S. at 687. Trial counsel is entitled to a strong presumption that his or her conduct falls within the wide range of reasonable assistance. *Strickland*, 466 U.S. at 688. Tactical or strategic trial decisions, even if unsuccessful do not generally constitute ineffective assistance of counsel. *State v. Carter* (1995), 72 Ohio St.3d 545, 558.

{¶ 49} “To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different.” *State v. Bradley* (1989), 42 Ohio St. 3d 136, 143. A “reasonable probability” is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694.

{¶ 50} According to Hudson, it is hard to conceive of an error more egregious for a defense counsel to make than informing the jury in opening statement that his client has in fact committed acts which establish his guilt of the crime he is charged with, particularly where the charge is Rape of a child under thirteen. During opening

statements at trial, defendant's counsel conceded to the jury that Hudson had "encouraged this little girl to kiss his sexual organ." However, defense counsel argued, "But kissing is not rape and we ask you to think about that." Counsel further urged the jury, "[w]e ask you, at the end of his trial, while some other offense may apply, some other offense may even be presented to you but there is no rape." Counsel admitted oral-to-genital contact between Hudson and the child while denying that this constituted rape.

{¶ 51} At the time the statement was made, the trial transcript seems to indicate that Hudson' s trial counsel was under the impression that he would obtain a lesser included offense jury instruction. This misapprehension of the law could be considered deficient performance on the part of counsel. This conduct thus could be deemed a substantial violation of his duty to the Appellant that would satisfy the first part of the *Strickland* test.

{¶ 52} However, even with the misstatement of law in the opening statement, it is highly unlikely that Hudson could have achieved a better outcome than a conviction for one count of Rape. Thus, counsel's statements during the opening statements did not prejudice Hudson.

{¶ 53} The state had substantial evidence against Hudson. The state had two admissible written confessions from Hudson that he asked the child to "kiss his private" and to "put his private in her mouth." Hudson admitted that the child engaged in the oral sexual conduct when he asked. The state had already presented testimony of the child and the child's mother. Since there were two counts on the indictment and the defendant admitted to two separate instances of sexual conduct with the child, Hudson

could have been convicted of both counts. Furthermore, the judge, upon thorough research, determined that the lesser included offense jury instruction was not warranted. Therefore, based on the overall evidence at trial, whether the admission was made during opening statement or not, it is impossible to find that Hudson could have achieved a better outcome than a conviction of one count of Rape. More importantly, there is nothing in the record to suggest that Hudson's plea was motivated by his attorney's misstatement of law.

{¶ 54} We agree with Appellant's counsel that Hudson's assignment of error of ineffective assistance of counsel is without merit.

{¶ 55} In addition to reviewing the three potential assignments of error raised by Hudson's counsel, we have conducted an independent review of the trial court's proceedings and have found no error having arguable merit. Accordingly, Hudson's appeal is without merit and the judgment of the trial court is affirmed.

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FAIN, J., concurs.

GRADY, J., concurring:

{¶ 56} Defendant was likely influenced to enter his plea of no contest to one count of Rape by the trial court's interlocutory ruling denying Defendant's requested instruction that could permit the jury to convict him of Gross Sexual Imposition as a lesser-included offense of the two crimes of Rape with which Defendant was charged. However, because Defendant's no contest plea waived his right to a jury determination of whether he should be convicted of Gross Sexual Imposition instead of Rape, Defendant was not legally prejudiced by the trial court's ruling on his requested jury

instruction. For the same reason, neither was Defendant prejudiced by any admission his counsel made during counsel's opening statement to the jury.

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