

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
April 25, 2013

v

AARON DANIEL MULL,

Defendant-Appellant.

No. 309452
Kent Circuit Court
LC No. 10-008444-FH

Before: FITZGERALD, P.J., and O'CONNELL and SHAPIRO, JJ.

PER CURIAM.

This appeal is before the Court on remand from our Supreme Court for consideration as on leave granted. See *People v Mull*, 493 Mich 867; 821 NW2d 661 (2012). We consider defendant Aaron Daniel Mull's appeal from his plea-based convictions for distributing or promoting child sexually abusive material, MCL 750.145c(3), and using a computer to commit a crime, MCL 752.796 and 752.797(3)(d). We affirm.

On March 6, 2010, defendant sent an email to which he attached, from his own computer, 10 images of minor boys. In nine of the images, boys were engaged in fellatio, and the tenth featured two nude boys lying in bed together. In the body of the message defendant stated, "I guess most of my stuff is younger. Do you have these already? I tried sending vids, but AOL says the files were too big." The police eventually received information about this message, and searched defendant's home, recovering a laptop that defendant used. The police recovered additional child sexually abusive material that differed from the 10 images sent by email on March 6, 2010, on the computer's hard disk drive. Defendant ultimately entered a no contest plea to the charges.

On appeal, defendant challenges the trial court's decision to score 25 points for offense variable (OV) 12. "The proper interpretation and application of the legislative sentencing guidelines are questions of law, which this Court reviews de novo." *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008). OV 12 requires the assessment of 25 points when "[t]hree or more contemporaneous felonious criminal acts involving crimes against a person were committed[.]" MCL 777.42(1)(a). A felonious criminal act is "contemporaneous" when it occurs within 24 hours of the sentencing offense and where the act has not and will not lead to a separate conviction. MCL 777.42(2)(a)(i) and (ii). The sentencing offense cannot be considered a "contemporaneous felonious criminal act." *People v Light*, 290 Mich App 717, 723, 726; 803

NW2d 720 (2010). Distributing, promoting, or financing the distribution of child sexually abusive activity or material, MCL 750.145c(3), and possession of child sexually abusive material, MCL 750.145c(4), are both categorized as crimes against a person. MCL 777.16g. MCL 750.145c(4) provides that “[a] person who knowingly possesses any child sexually abusive material is guilty of a felony,” if the defendant knows, has reason to know, should reasonably be expected to know, or has not taken reasonable precautions to determine that the child sexually abusive material includes, or appears to include a child.

Defendant asserts that his conviction encompassed the transfer of all ten images and so OV 12 cannot be scored because it may not be scored based on offenses that resulted in a conviction. However, in accepting the plea agreement, the trial court in this case relied on only one photo in finding a factual basis for the plea and defendant avoided the possibility of multiple other charges as well as referral to other authorities.

In *People v Waclawski*, 286 Mich App 634, 686-687; 780 NW2d 321 (2009), the defendant was in possession of child sexually abusive materials at the time and place where he committed another crime. The Court held that this possession of multiple pictures supported scoring OV 12 at 25 points if the possession did not lead to separate convictions. Additionally, defendant’s exertion of control over the 10 images as shown by his act of attaching each image to an email message, which he then sent to another address, is evidence in support of a finding that defendant “possessed” each of the images. See *People v Flick*, 487 Mich 1, 11-14; 790 NW2d 295 (2010). Therefore, because each of the remaining nine images could support a separate charge under MCL 750.145c, the trial court’s determination that there were at least three contemporaneous yet uncharged offenses that justified scoring OV 12 was not error. *Waclawski*, 286 Mich App at 686-687; *People v Phelps*, 288 Mich App 123, 135; 791 NW2d 732 (2010).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O’Connell
/s/ Douglas B. Shapiro