

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLIFFORD LEE LEWIS, JR.,

Defendant-Appellant.

UNPUBLISHED
February 15, 2005

No. 248953
Oakland Circuit Court
LC No. 2001-176932-FH

Before: Wilder, P.J., and Sawyer and White, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of ten counts of child sexually abusive activity, MCL 750.145c(2), and one count of possessing child sexually abusive material, MCL 750.145c(4). Defendant was sentenced to concurrent sentences of 120 months to 20 years for child sexually abusive activity and twelve months for possession of child sexually abusive material. We affirm.

Defendant first argues that the search warrant that led to the evidence used against him was obtained on the basis of an illegal search of defendant's computer. We disagree. The computer in issue was stolen from defendant's home by his son and recovered by the police when the son was arrested. During questioning of defendant's son, the police came to suspect that the computer might hold images of child pornography. The police then initiated an investigation. However, before a search warrant was obtained for defendant's home, the officer leading the investigation discovered that another officer had turned on the computer and discovered suspicious files on its hard drive. The officer in charge of the investigation ordered the computer immediately shut down. Defendant argues that all of the evidence in the case was ultimately the result of this search without a warrant of his computer. The people have not disputed that turning on defendant's computer prior to obtaining a search warrant was improper.

The testimony adduced at the hearing on defendant's motion to suppress indicates that the officer in charge of the investigation was already investigating defendant for child pornography when the computer was improperly turned on. The officer testified that by this time he had already considered obtaining a search warrant and that he was already pursuing an independent source of evidence. Statements made by defendant's son after his arrest led the officer to discover evidence from a prior investigation of defendant. That evidence was reviewed by another officer and an expert in child growth. Ultimately, the officer sought and obtained a warrant to search the computer. The trial court found that there was a valid and

appropriate parallel investigation based on not only the son's statements, but the evidence from the prior investigation. Deferring to the trial court's superior position to assess witness credibility, *People v Howard*, 226 Mich App 528, 543; 575 NW2d 16 (1997), we do not believe that the trial court erred in denying defendant's motion to suppress.

Next, defendant argues he was denied the effective assistance of counsel when counsel effectively conceded defendant's guilt during closing arguments. A claim of ineffective assistance of counsel requires a defendant to show that counsel's performance fell below an objectively reasonable standard and that there is a reasonable probability that the outcome would have been different if counsel's performance had not been deficient. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Defendant has a heavy burden of disproving the presumption that assistance of counsel was effective. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

Contrary to defendant's characterization of counsel's closing argument, defense counsel did not concede defendant's guilt. Rather, counsel acknowledged the existence of the images found on defendant's computer, but continued to insist that the prosecution had the burden to establish defendant's guilt beyond a reasonable doubt. We find this to be a reasonable trial strategy. *People v Rice*, 235 Mich App 429, 445; 597 NW2d 843 (1999) ("this Court will not second-guess counsel regarding matters of trial strategy, and even if defense counsel was ultimately mistaken, this Court will not assess counsel's competence with the benefit of hindsight."). Further, given the overwhelming weight of the evidence produced at trial, no reasonable likelihood exists that defendant would not have been convicted if trial counsel had given a different closing argument. *Ackerman, supra* at 455.

We also reject defendant's contention that the legislative sentencing guidelines were incorrectly scored. Defendant specifically challenges the scoring of offense variables 9, 10, 12, and 13. OV 9 is to be scored at 10 points if "there were 2 to 9 victims . . . who [were] placed in danger of injury or loss of life as a victim." MCL 777.39. Here, there was evidence that a child other than the complainant was present when the abuse occurred. Thus, we see no error in the scoring of OV 9. OV 10 is to be scored at 15 points if there was "exploitation of a vulnerable victim" and "predatory conduct was involved." MCL 777.40. Predatory conduct is defined as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). This Court has found that the timing and location of a sexual assault against a child, where it could "be inferred from the evidence that defendant . . . waited for any opportunity to be alone with her in an isolated location" was sufficient to constitute predatory conduct. *People v Witherspoon*, 257 Mich App 329, 336; 670 NW2d 434 (2003) (emphases omitted). We conclude that the record supports a finding of predatory conduct on the part of defendant and thus a score of 15 points on OV 10. OV 12 is to be scored at 25 points if "three or more contemporaneous felonious criminal acts involving crimes against a person were committed." MCL 777.42. Considering the multiple images of the victim found on defendant's computer, we see no error in the scoring of OV 12 at 25 points. OV 13 is to be scored at 25 points if "the offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43. Under OV 13, the sentencing offense should be counted, but conduct scored under OV 12 may not. MCL 777.43(2)(a), (c). Defendant was sentenced for more than three felonies against a person. Because they should be counted under OV 13, and were not counted under OV 12, the trial court correctly scored OV 13 at 25 points.

Finally, defendant argues that the trial court's departure from the sentencing guidelines was not supported by substantial and compelling reasons. We disagree. If a sentence imposed "is not within the guidelines range, the Court of Appeals must determine whether the trial court articulated a substantial and compelling reason to justify its departure from that range." *People v Babcock*, 469 Mich 247, 261-262; 666 NW2d 231 (2003). The trial court based its departure on three factors: breach of the trust placed in defendant by the complainant's mother, the need to protect other children, and an escalation in defendant's criminal activity. We believe that these are substantial and compelling reasons supporting the departure.

Affirmed.

/s/ Kurtis T. Wilder
/s/ David H. Sawyer
/s/ Helene N. White