

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
August 17, 2010

v

JEREMY DEAN WILLIAMS,

Defendant-Appellant.

No. 291363
Kalamazoo Circuit Court
LC No. 2008-000609-FH

Before: SAWYER, P.J., and BANDSTRA and WHITBECK, JJ.

PER CURIAM.

Defendant was found guilty by a jury on January 9, 2009, of using a computer to commit a crime, MCL 752.797(3)(d), and for possession of child sexually abusive material, MCL 750.145c(4). Defendant was sentenced to five years of probation and to 60 days in jail. He now appeals, and we affirm.

In 2006, agents of the United States Immigration and Customs Enforcement Agency (“ICE”) in Grand Rapids conducted undercover operations to investigate child pornography. ICE received about 30 leads on a number of individuals who had purchased access to child pornography websites. ICE turned the leads over to local law enforcement agencies for further investigation. One of the leads led to defendant. Based on this lead, in the winter of 2008, Detective Matt Schultz contacted defendant and told him that he was listed as a possible suspect in a child pornography investigation. Defendant’s computer was taken in for a forensics evaluation. There were images and references to known child pornography websites on his computer. Schultz then interviewed defendant concerning the images found on his computer, and Schultz determined that defendant had intentionally accessed child pornographic material.

Defendant testified that he purchased a membership to an adult pornographic website. Defendant also testified that that he only viewed images of youthful looking women whom he believed to be about 15 or 16 years old. Defendant said that he never intended to view underage children. He said that sometimes images of underage children would appear on his computer, but he did not intentionally seek them out, and he would promptly delete them. A jury found defendant guilty.

Defendant first challenges the admission of his statements to the police. He alternatively argues that his constitutional right to effective assistance of counsel was violated when his

counsel failed to object to the admission of his statements to the police without having first been read or waived his *Miranda*¹ rights. We find no merit to either claim.

Defendant did not file a motion in the trial court to suppress the statements; therefore, the issue is not preserved on appeal. *People v Stanaway*, 446 Mich 643, 694; 521 NW2d 557 (1994). When an issue is not preserved, this Court reviews the issue for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Miranda warnings need only be given where there is a custodial interrogation, and, absent such interrogation, the fact that an individual has become the focus of an investigation does not trigger the *Miranda* requirement. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). A "custodial interrogation" occurs when law enforcement officers initiate questioning "after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* In determining if a defendant is in custody, the court must look to the totality of the circumstances and ask whether a reasonable person would have believed that he was not free to leave. *Yarborough v Alvarado*, 541 US 652, 663; 124 S Ct 2140, 2147; 158 L Ed 2d 938, 949 (2004); *People v Marsack*, 231 Mich App 364, 374; 586 NW2d 234 (1998). Here, defendant voluntarily met Detective Schultz at police headquarters and was told that he was free to leave, and not under arrest. We cannot say that a reasonable person under the same circumstances would have believed that he was not free to leave. Therefore, *Miranda* warnings were not required. Accordingly, we find no plain error affecting defendant's rights. *Carines*, 460 Mich at 763.

Turning to defendant's claim of ineffective assistance of counsel, he must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there was a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) that the proceedings were fundamentally unfair or unreliable. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002). The right to effective assistance of counsel is substantive and focuses on the actual assistance received. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996).

Defendant claims that trial counsel was ineffective because counsel did not move to suppress or object to the admission of the statements defendant allegedly made to the police. However, given that *Miranda* warnings were not required under the circumstances, even if defense counsel had objected, his objection would have been futile. It is well settled that counsel does not give ineffective assistance by failing to raise futile objections. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Defendant next argues that there was insufficient evidence to support his conviction because the evidence did not show that the person depicted in the photograph was a "child," as defined by the statute, or that defendant "knowingly possess[e]d" the material, within the meaning and intent of the statute. We disagree.

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

A claim of insufficiency of the evidence invokes a defendant's constitutional right to due process of law, which this Court reviews de novo on appeal. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences arising from the evidence can amount to satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

When interpreting a statute, this Court must ascertain and give effect to the Legislature's intent. *People v Pasha*, 466 Mich 378, 382; 645 NW2d 275 (2002). "If the statutory language is clear and unambiguous, the statute is enforced as written." *People v Schaefer*, 473 Mich 418, 430; 703 NW2d 774 (2005), mod on other grounds in *People v Derror*, 475 Mich 316, 320; 715 NW2d 822 (2006).

As to defendant's claim, MCL 750.145c(4) states:

A person who knowingly possesses any child sexually abusive material is guilty of a misdemeanor punishable by imprisonment for not more than 1 year, or a fine of not more than \$10,000.00, or both, if that person knows, has reason to know, or should reasonably be expected to know the child is a child, or that person has not taken reasonable precautions to determine the age of the child.

Defendant first argues that there was insufficient evidence to prove that the children in the images were under the age of 18. We disagree. Under MCL 750.145c(1)(b), "'Child' means a person who is less than 18 years of age[.]" Further, MCL 750.145c(5) provides that "[e]xpert testimony as to the age of the child used in a child sexually abusive material . . . is admissible as evidence in court and may be a legitimate basis for determining age, if age is not otherwise proven." Here, ICE Agent Blair Babcock, who was qualified as an expert in computer forensics, testified that six images found on defendant's computer depicted images of prepubescent children who lacked genital development and secondary sexual characteristics. Therefore, we conclude that there was sufficient evidence to prove that the children in the images were under the age of 18.

Moreover, defendant briefly appears to contend that he did not know that the children were minors. However, based on the obvious nature of the images themselves, the jury could have determined that defendant should reasonably have been expected to know that the images were of persons under 18—or as defendant puts it, "real children." See *People v Girard*, 269 Mich App 15, 22; 709 NW2d 229 (2005).

Defendant also argues that the prosecution failed to prove that he "knowingly possessed" prohibited images. "Child sexually abusive material" includes "a developed or undeveloped photograph, picture, . . . electronic visual image, computer diskette, computer or computer generated image, or picture, or sound recording which is of a child or appears to include a child engaging in a listed sexual act" MCL 750.145c(1)(m). But defendant relies on *Girard*, 269

Mich App at 20, in which this Court found that to convict a defendant under MCL 750.145c(4), “the prosecution had to show more than just the presence of child sexually abusive material in a temporary [i]nternet file or a computer recycle bin to prove that defendant knowingly possessed the material.” And defendant claims that, here, the prosecution’s expert testified that the images on his computer were contained only in either a temporary internet file or in a deleted file. However, defendant admitted to Detective Schultz that he had downloaded photographs of females whom he believed to be 15 or 16 years old. Defendant also admitted signing up for a child pornography website. And Agent Babcock confirmed that defendant visited child pornography websites from which pictures were downloaded and remained accessible on defendant’s computer. The jury could have reasonably concluded that defendant was not a casual internet user who accidentally happened on a child pornographic website, but that he deliberately accessed the images. Therefore, there was sufficient evidence to support defendant’s conviction.

Defendant next argues that the trial court denied him a fair trial by not properly instructing the jury that the prosecution was required to prove beyond a reasonable doubt that the persons depicted in the images were under the age of 18. We disagree. Defendant did not object to the trial court’s jury instructions; therefore, the issue is not preserved and will be reviewed only for plain error. *Carines*, 460 Mich at 763; *Stanaway*, 446 Mich at 694. Despite, defendant’s contentions to the contrary, the trial court properly instructed the jury that the prosecutor must prove *each* element of the crime beyond a reasonable doubt. The jury was read standard jury instructions and neither party objected to the instruction. Therefore, there was no plain error.

Defendant’s final argument is that the trial court erred when it scored 25 points for offense variable (OV) 13 because the crimes here all arose out of one criminal transaction. We disagree. Defendant objected to the scoring of OV 13; therefore, this issue is preserved. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310; 684 NW2d 669 (2004). The court has discretion in determining the number of points to be scored if there is evidence on the record that adequately supports a particular score. *People v Waclawski*, 286 Mich App 634, 680; 780 NW2d 321 (2009).

Contrary to defendant’s claim, there was sufficient evidence in the record to support scoring 25 points for OV 13. MCL 777.43 states:

(1) Offense variable 13 is continuing pattern of criminal behavior. Score offense variable 13 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

* * *

(c) The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person25 points

* * *

(2) All of the following apply to scoring offense variable 13:

(a) For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.

Here, the trial court found 29 images of possible child pornography, six of which were clearly child pornography. OV 13 allows all crimes within a five-year period, regardless if the offense results in a conviction. MCL 777.43(2)(a). Although defendant was not charged or convicted for the other images, there was still proof that he committed multiple offenses involving the possession of child sexually abusive material. The trial court properly scored OV 13 at 25 points.

Affirmed.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ William C. Whitbeck