STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 8, 2008
v	No. 272074 Macomb Circuit Court
CHARLES QUATRINE, JR., Defendant-Appellant.	LC No. 2005-001299-FH

Before: Schuette, P.J., and Borrello and Gleicher, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of six counts of making or producing child sexually abusive material, MCL 750.145c(2), one count of possession of child sexually abusive material, MCL 750.145c(4), and one count of eavesdropping, MCL 750.539d. The trial court sentenced defendant to concurrent terms of 130 months' to 20 years' imprisonment for each count of making or producing child sexually abusive material, one year of incarceration for the possession of child sexually abusive material conviction, and one month of incarceration for the eavesdropping conviction. We affirm defendant's convictions and the attendant terms of incarceration imposed by the trial court, but remand for a determination of defendant's ability to pay court-appointed attorney fees.

I. Underlying Facts & Proceedings

The events leading to the prosecution's institution of charges against defendant commenced on December 9, 2004, when defendant told his teenaged son, Corey, about a "comical [steroid] song," which defendant claimed to have found on the Internet and downloaded to his computer. Corey searched for the song on a home computer network that linked a laptop computer in defendant's bedroom, a laptop computer in Corey's basement bedroom, and a laptop computer in the family room. Defendant had purchased and installed the computer network several years earlier.

The configuration of the network permitted a computer user to access files on the linked computers by clicking on a "Network Connections" icon. Corey testified that he employed the "Network Connections" link to look for the song in the network's shared files. While searching, Corey noticed a file named "RAC," which he had not previously seen, and opened it. Corey recounted that the file automatically began to display via Windows Media Player video images of a girl wearing a towel, "coming into a room and closing the door, like she just came out of the

shower." Corey recognized the setting of the video as one of the bedrooms in his home, and identified the girl as the daughter of defendant's girlfriend (the victim), then about age 14. As Corey watched, the video revealed the victim drop the towel to put on clothing. Corey could see "[t]he whole front end of her body."

At trial, Corey identified the bedroom visible in the video as one that the victim previously had used when she and her mother stayed overnight in defendant's home. Corey copied the "RAC" file from defendant's computer to his own laptop. Corey then went upstairs to the bedroom featured in the video, where he found a satellite box with a hole "drilled in it," sitting on top of a television. Corey discovered a small camera inside the satellite box. Corey returned to his basement bedroom and searched the home computer network for other files labeled "RAC," ultimately finding at least five of them. But he could not open any of the other "RAC" files because they were "password locked," and he did not know the password.

The next day at school, Corey described to the victim's brother, Richard Rowe, the content of the "RAC" video file and the presence of the hidden camera. Corey and Richard decided to report Corey's discoveries to Christopher Filimon, the school police officer. Filimon testified that he listened to Corey's description of the circumstances leading to his discovery of the computer images and the hidden camera, and that Corey cried while recounting them. Filimon allowed Corey and Richard to leave the school to retrieve Corey's laptop computer. When they returned with the laptop, Filimon watched the video of the victim "long enough to see a young girl enter into this room with a towel on her." He explained that he stopped watching the video at that point because Richard "had his head down in [sic] the ground and I didn't want to embarrass him anymore."

Filimon contacted Detective Kenneth Shutter of the Warren Police Department and described the details of his conversation with Corey and Richard, as well as his review of the video file. Shutter testified that he prepared an affidavit containing the facts supplied by Filimon and Corey. A magistrate signed a warrant permitting a search of defendant's home and the seizure of his computers and computer-related equipment. During the search, the police found the satellite box and hidden camera that Corey had described, and they observed that a cable connected the camera to a laptop computer on a nightstand next to defendant's bed.

Detective Scott Blackwell, a member of a Macomb County computer crimes investigation unit, testified concerning his forensic examination of the seized computers. Blackwell ascertained that defendant's laptop computer and the laptop in the family room contained a number of password-protected video and graphic files, as well as several forms of graphic editing and "video capture" software. He deciphered defendant's password, and successfully opened a number of files containing adult pornography. Blackwell also opened files displaying sexually explicit still photograph and video images of a young girl. The images that formed the basis of the instant charges consisted of photographs or videos of the victim at ages 12 and 13. Through the use of computer editing software, the video and graphic images depicted the victim nude, undressing, in sexually explicit situations, and accompanied by sex organs.

At trial, defendant denied knowing of or using the hidden camera or the video editing software. He also denied creating any child sexually abusive material, and insisted that he was unaware of the presence of any illegal material on the home computer network. Defendant suggested that Corey possessed more advanced computer skills than he did, and recounted that

he and Corey had argued bitterly several days before Corey revealed the sexual material he purportedly found on the home computer network.

II. Analysis of Questions Presented

A. The Search Warrant

Defendant first contends that insufficient probable cause supported the magistrate's decision to issue a search warrant for his home and computers. Defendant argues that because neither officer Filimon nor the magistrate watched the complete "RAC" video, including the segment in which the victim dropped her towel, Detective Shutter's affidavit did not supply probable cause. Defendant additionally asserts that because Corey's allegations regarding the complete content of the video file and the hidden camera were uncorroborated, the magistrate lacked the reliable quality of information required for issuance of a search warrant.

"[A]ppellate scrutiny of a magistrate's decision involves neither de novo review nor application of an abuse of discretion standard." *People v Russo*, 439 Mich 584, 603; 487 NW2d 698 (1992). Rather, this Court must afford a magistrate's probable cause determination "great deference." *People v Keller*, 479 Mich 467, 476-477; 739 NW2d 505 (2007) (citation omitted). "Affording deference to the magistrate's decision simply requires that reviewing courts ensure that there is a substantial basis for the magistrate's conclusion" that probable cause exists. *Russo*, *supra* at 604.

A search warrant may issue only on a showing of probable cause. *People v Barr*, 156 Mich App 450, 457; 402 NW2d 489 (1986), citing US Const, Am IV; Const 1963, art I, § 11. "Probable cause to issue a search warrant exists where there is a 'substantial basis' for inferring a 'fair probability' that contraband or evidence of a crime will be found in a particular place." *People v Kazmierczak*, 461 Mich 411, 417-418; 605 NW2d 667 (2000), citing *Russo*, *supra* at 604. In ascertaining probable cause, the magistrate should "make a practical, common-sense decision . . . given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information . . . ." *Keller*, *supra* at 475, quoting *Illinois v Gates*, 462 US 213, 238; 103 S Ct 2317; 76 L Ed 2d 527 (1983). The "probability" evaluation required of a magistrate need not rest on "hard certainties" or scholarly analysis, but instead should keep in mind "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Gates*, *supra* at 231-232 (internal quotation omitted).

We find that Detective Shutter's affidavit supplied the magistrate with a substantial basis for inferring a fair probability that defendant's home computer network contained child sexually abusive material. The affidavit related information supplied by a known informant, who had personal knowledge regarding the contents of defendant's computer and the presence of a hidden camera in a bedroom used by the young victim. Additionally, the affidavit included Officer Filimon's personal verification of a portion of the information Corey provided, by watching a computer video file reveal a young girl, wrapped only in a towel, enter a bedroom. Detective Shutter also averred in the affidavit that he had confirmed via the law enforcement information network (LEIN) that defendant previously had faced charges of criminal sexual conduct involving a minor. We conclude that the abbreviated video footage viewed by Officer Filimon, combined with Corey's consistent description of the hidden camera and the images of the victim

without clothing, amply supported the magistrate's conclusion that "a fair probability" existed that "contraband or evidence of a crime" would be found in defendant's home. *Keller*, *supra* at 475; *Kazmierczak*, *supra* at 417-418.

Defendant also challenges the search warrant under MCL 780.653, which provides as follows:

> The magistrate's finding of reasonable or probable cause shall be based upon all the facts related within the affidavit made before him or her. The affidavit may be based upon information supplied to the complainant by a named or unnamed person if the affidavit contains 1 of the following:
>
> (a) If the person is named, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information.
>
> (b) If the person is unnamed, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable.

Detective Shutter's affidavit contained affirmative allegations from two named persons: Corey and Officer Filimon. The magistrate properly concluded that Corey "spoke with personal knowledge" of the images he saw on defendant's computer and the location of the hidden camera on the basis that Officer Filimon verified the accuracy of at least some of Corey's information. Even assuming that the magistrate did not comply with MCL 780.653, the Michigan Supreme Court has rejected the proposition that "noncompliance with [the] terms [of MCL 780.653] should result in suppression of evidence obtained by police acting in reasonable and good-faith reliance on a search warrant." *People v Hawkins*, 468 Mich 488, 513; 668 NW2d 602 (2003).

Defendant's allegation that the magistrate lacked probable cause because the affidavit failed to do more to confirm Corey's reliability also lacks merit. The authorities defendant cites to support his argument pertain to unnamed or confidential informants, and not to an identified source. For example, in *People v David*, 119 Mich App 289, 294; 326 NW2d 485 (1982), the affidavit contained a single hearsay statement received from an unnamed informant. This Court struck the affidavit because it "made no allegation that the informant was credible or that his information had proven reliable in the past." *Id.* In *United States v Allen*, 211 F3d 970, 971-972 (CA 6, 2000), also cited by defendant, the police worked with a confidential informant, who had supplied information over the course of five years. The appellate court held that "where a known person, named to the magistrate, to whose reliability an officer attests with some detail, states that he has seen a particular crime and particular evidence, in the recent past a . . . magistrate *may* believe that evidence of a crime will be found." *Id*. at 976 (emphasis in original).

The instant facts are clearly distinguishable from those underlying *David*. Here, a known informant with personal knowledge reported a possible crime to a police officer. The officer verified a portion of the information by watching a few moments of the computer video file. "The strict standard of reliability which must be satisfied in the case of an anonymous or criminal informant or 'professional stool pigeon' does not apply to ordinary, known citizens who

supply information to the police." *People v Goeckerman*, 126 Mich App 517, 522; 337 NW2d 557 (1983). Michigan courts "consider identified citizens and police officers to be presumptively reliable." *People v Powell*, 201 Mich App 516, 522-523 (opinion by Corrigan, P.J.); 506 NW2d 894 (1993). Because Corey was a named source with personal knowledge of the facts he reported, the magistrate could presume his reliability and need not have made any further inquiry into his credibility.

B. Testimony Regarding Corey's Credibility

Defendant next alleges that the trial court's admission of opinion testimony provided by Officer Filimon and Detective Shutter regarding Corey's credibility denied him a fair trial. The decision whether to admit evidence rests within the trial court's discretion, and will warrant reversal only where a clear abuse of discretion exists. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). A trial court's decision on a close evidentiary question cannot be an abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001).

Defendant objected to the opinion expressed by Officer Filimon, but failed to object to Detective Shutter's testimony. A preserved, nonconstitutional error does not warrant reversal unless it affirmatively appears more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 569 NW2d 607 (1999), citing MCL 769.26. When a defendant fails to object to the admission of challenged evidence, however, he must demonstrate a plain error affecting his substantial rights. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

Officer Filimon's challenged testimony concerned the circumstances that motivated him to call Detective Shutter regarding a search warrant:

> *Prosecutor*: And what was your belief related to the proceedings of the warrant at the time?
>
> *Filimon*: That they would get the search warrant to go to Corey's house to get the original files, not—not a copy that I was lookin' at.
>
> *Prosecutor*: The video screen—the—the snippet that you saw, was that consistent with what Richard and Corey—or I'm sorry, with what Corey told you earlier in the day?
>
> *Filimon*: Yes.
>
> *Prosecutor*: Based upon your discussions with Corey and Richard, did you doubt their credibility at all when they were telling you their story?
>
> *Defense counsel*: I object. Improper foundation.
>
> *Prosecutor*: Your Honor, I believe the officer can testify whether—
>
> *The Court*: (Interposing) Allowing him to answer.
>
> *Prosecutor*: —or not he thought Corey and Richard were telling the truth.

The Court: Go ahead, he can answer, if you—if you can. If you can't tell us—

Filimon: Yes, I—I believed them. I didn't have any reason to doubt them. Yes, I believed them.

Prosecutor: And based upon that, you took action and contacted Detective Shutter?

Filimon: Absolutely.

Defendant correctly observes that "[i]t is generally improper for a witness to comment or provide an opinion on the credibility of another witness, since matters of credibility are to be determined by the trier of fact." *People v Smith*, 158 Mich App 220, 230; 405 NW2d 156 (1987). In reply to the prosecutor's questions, Filimon did not offer an opinion regarding either Corey's or Richard's general credibility. Instead, Filimon's statement that he "believed" the boys relates only to the circumstances leading to Detective Shutter's subsequent efforts to obtain the search warrant. Defense counsel placed those circumstances at issue during her opening statement, when she told the jury that one aspect of the case

> is what did law enforcement do here? Did they do their job? … Was there a thorough investigation? … If you were being investigated for a crime would you be comfortable with this? Or with your son or your daughter, or your niece, your . . . husband, if they were being investigated, would this be a sufficient investigation for your purposes? Does it satisfy you in terms of what was done or not done? And I ask you to think about that all along the way. . . . [B]efore the arrest, at the time of the arrest and even after the arrest, I'd ask you to continue to look at what was done and also what was not done by people that are in the law enforcement community that were… working on this file.

Because defendant put Corey's truthfulness at issue by criticizing the police decision to concentrate solely on defendant as a suspect, we conclude that the trial court did not clearly abuse its discretion in permitting Officer Filimon to opine regarding the boys' truthfulness at the time the investigation began, which testimony had probative value toward rebutting the defense theory. MRE 401; *Starr*, *supra* at 494.

Even assuming that the trial court improperly admitted Officer Filimon's testimony, nothing in the record suggests that his opinion unduly influenced the jury's ability to form a conclusion regarding Corey and Richard's general credibility. Because the question and answer regarding their credibility constituted only a brief moment during a lengthy trial, we find it highly unlikely that a different verdict would have resulted but for the admission of Officer Filimon's opinion testimony. Moreover, regardless of Filimon's opinion of the boys' credibility at the time he interviewed them, substantial evidence corroborated the prosecution's theory that defendant created and possessed the child sexually abusive material: defendant owned the computers in the home and set up the home network; defendant's personal, password-protected laptop computer contained multiple child sexually abusive images and videos, as well as several different software and video editing programs; and defendant's laptop computer was connected directly to the hidden camera in the victim's bedroom. In light of this evidence, we conclude

that Filimon's statements were not "outcome determinative," and thus cannot serve as a basis for reversing his conviction. *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001); *Lukity*, *supra* at 495-496.

Defendant also contends that the trial court committed plain error when it allowed Detective Shutter to testify regarding Corey's credibility. During cross examination of Detective Shutter, defense counsel inquired at length regarding the extent to which the police had investigated defendant, including whether the police had ever regarded Corey as a suspect in the creation of the child sexually abusive material found on the home computer network. On redirect, the prosecution elicited Detective Shutter's testimony that he "did not consider [Corey] a suspect at all," and that Corey seemed "a very credible individual" who had revealed information to Officer Filimon "in confidence." Given defendant's attack on both Corey's credibility and the propriety of the initial investigation, we cannot conclude that the trial court abused its discretion by permitting Detective Shutter's testimony. Even assuming some impropriety, in light of the considerable evidence of defendant's guilt already discussed, any error flowing from Detective Shutter's opinion testimony did not determine the trial's outcome, or affect the fairness, integrity, or public reputation of the judicial proceedings.

C. Offense Variable 4

Defendant next challenges the trial court's scoring of ten points for offense variable (OV) 4, which addresses psychological injury to a victim. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). "Scoring decisions for which there is any evidence in support will be upheld." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002) (internal quotation omitted). We review de novo, as a question of law, the interpretation of the statutory sentencing guidelines. *People v Babcock*, 469 Mich 247, 253; 666 NW2d 231 (2003).

According to MCL 777.34(2), a sentencing court should "[s]core 10 points if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive." In this case, the trial court premised its decision to assess 10 points for OV 4 on the fact that the victim's grades dropped after defendant's arrest, as well as the trial court's belief that the victim had been "manipulated" by her mother and defendant. The victim's father told the probation agent who prepared defendant's presentence investigation report (PSIR) that "since the offense," the victim's grades have fallen sharply. He opined that she "is in need of psychological treatment," but provided no other evidence that the victim had sustained a "serious psychological injury," and did not directly attribute her falling grades to defendant's conduct. The victim insisted that her lower grades "ha[d] nothing to do with this case," that defendant "never did anything bad" to her, and that she believed defendant to be innocent. The trial court explained that it found 10 points warranted for serious psychological injury because (1) even though the parties took "great pains to protect [the victim]'s emotional status," the court "was embarrassed for her to have to see these photos. And to say that down the road it's not going to have a psychological impact and it hasn't to this day, I believe is erroneous," (2) the victim's "grades speak for themselves," and (3) although the victim denied experiencing any psychological injury, the court remained "suspect of how [the victim]'s been manipulated."

We conclude that the trial court properly scored 10 points for OV 4. MCL 777.34(1)(a). We recognize that neither the victim nor any other witness employed the specific phrase "serious psychological injury" in describing her condition after defendant victimized her, and that the victim herself denied experiencing any ill effects arising from defendant's charged crimes. But the victim's father observed that "since the offense" her "grades have fallen sharply," which the victim did not dispute, and the father expressed his opinion that "the victim is in need of psychological treatment." Although no indication exists that the father possessed expert training to render a reliable opinion concerning the victim's psyche, a reasonable inference arises from his statements that defendant's conduct, revealed in December 2004, subsequently caused the victim some significant emotional or mental disturbance that substantially affected her ability to function, at least at school. Furthermore, the trial court accurately took into account the apparent manipulation of the victim by her mother and defendant. The available record substantiates the potentially psychologically damaging situation that the victim denied defendant's involvement in any illegal actions and expressed loyalty to her mother, who was continuing her relationship with defendant. Applying the general evidentiary principles regarding circumstantial evidence and the reasonable inferences arising therefrom, we cannot conclude that the trial court abused its discretion by finding that defendant's actions caused or contributed to a serious psychological injury of the victim. *People v Hardiman*, 466 Mich 417, 423-428; 646 NW2d 158 (2002); *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

III. Defendant's Standard 4 Brief

Defendant raises several issues in a supplemental pro se Standard 4[1] brief, none of which have merit.

A. Jury Selection

Defendant first complains that the trial court committed error requiring reversal when it failed to remove a juror for cause. During voir dire, the juror admitted that about five years before trial commenced, she lived next door to defendant's brother, Richard Quatrine, and Richard's ex-wife, and that she possibly had babysat for Richard's children "on emergency occasions." The juror denied that her acquaintance with and knowledge of the Quatrine family would influence her verdict. Defense counsel did not question this juror during voir dire, and did not challenge her for cause. Contrary to the allegations in defendant's brief, his counsel did have remaining peremptory challenges at the time, and exercised one shortly after declining to remove the juror at issue.

Defendant waived any complaints regarding the relationship between the challenged juror and his brother's family because he failed to either challenge her for cause or to exercise available peremptory challenges to dismiss the juror. *People v Daniels*, 192 Mich App 658, 667; 482 NW2d 176 (1992). Moreover, after reviewing the record we conclude that the inclusion of this juror did not serve to deny defendant his right to a fair trial before an impartial jury. The

[1] Supreme Court Administrative Order 2004-6, Standard 4.

juror's relationship with Richard's family was tenuous at best, and the juror affirmed her impartiality during voir dire. Furthermore, the record provides no basis whatsoever for challenging this juror for cause. MCR 2.511(D). "An impartial jury is all that a party is entitled to, and when he has obtained that he has no valid ground for complaint." *People v Badour*, 167 Mich App 186, 190; 421 NW2d 624 (1988) (internal quotation omitted), rev'd on other grounds sub nom *People v Beckley*, 434 Mich 691; 456 NW2d 391 (1990).

B. "Witness Tampering and Juror Intimidation"

Defendant next complains that the following instances of witness tampering and intimidation deprived him of a fair trial: (1) his ex-wife violated the trial court's order sequestering witnesses by contacting defendant's girlfriend's oldest daughter by telephone, (2) his nephew and former sister-in-law deliberately sat in the courtroom to intimidate the juror who once lived next door to them, and (3) defendant's ex-wife handled Corey's computer before it was turned over to the police.

The prosecutor agreed to reinstruct defendant's ex-wife to refrain from contact with any potential witnesses. To avoid any potential for juror intimidation, the trial court required anyone who had previous contact with the juror to depart from the courtroom and observe the trial from a conference room. And defendant has failed to explain with specificity what his ex-wife allegedly did to Corey's computer, if anything, that forms the basis for his complaint. Because the various unsupported allegations raised by defendant do not support a claim of either witness tampering or intimidation, none of the events described denied him a fair trial.

C. Prosecutorial Misconduct

Defendant additionally argues that prosecutorial misconduct prevented him from receiving a fair trial. Defendant cites a number of instances of alleged misconduct, including Detective Blackwell's reexamination of defendant's computer without notice to the trial court or defense counsel, the prosecutor's alleged mispresentation of evidence regarding the functioning of the hidden camera, and the prosecutor's failure to comply with the portion of the trial court's discovery order applicable to Corey's laptop computer. Defendant also claims that the prosecutor improperly gave interviews to the media. Defendant objected to the introduction of evidence obtained after the reexamination of his computer, but did not object to testimony regarding the camera, or concerning the prosecutor's handling of evidence pertaining to Corey's computer.

This Court reviews preserved claims of prosecutorial misconduct de novo to determine if the defendant was denied a fair or impartial trial. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004). This Court reviews unpreserved claims of prosecutorial misconduct for plain error that affected the defendant's substantial rights, and "will reverse only if we determine that, although [the] defendant was actually innocent, the plain error caused him to be convicted, or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings, regardless of his innocence." *Id*. at 453-454.

Detective Blackwell reexamined defendant's computer after defendant testified that his computer could be accessed without a password. In rebuttal, Detective Blackwell explained that on reexamining defendant's computer, the computer's "boot process halted at a . . . password-

prompt." Detective Blackwell admitted that this reexamination of the computer may have changed the "time stamp" on its "system files," but denied that his investigation could have changed or altered anything within the computer's data files. Furthermore, Detective Blackwell had previously created a protected, forensic copy of defendant's hard drive, evidence from which formed the basis of the charges against defendant. Consequently, the record reveals no indication that Detective Blackwell's reexamination of the computer altered in any respect the evidence used to convict defendant.

Defendant's additional claims of prosecutorial misconduct also lack merit. During trial, the prosecutor tested the functionability of the hidden camera by attaching it to a television monitor. The record contains no factual basis, however, for defendant's claim that the prosecutor deliberately elected not to use the camera with a computer monitor because he "knew . . . the camera would not work on Defendant's computer."

Similarly, the record contains no information supporting defendant's claim that the prosecution withheld exculpatory information contained in Corey's laptop computer. According to the trial record, the police never forensically examined Corey's computer because it was inoperable when supplied to them. Because the record reveals no substantiation that Corey's computer contained any exculpatory information, defendant's claim of prosecutorial misconduct in this regard fails.

There is also no information in the record or defendant's Standard 4 brief regarding the prosecutor's alleged interviews with the media. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Defendant "may not leave it up to this Court to search for a factual basis to sustain or reject his position." *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). In summary, we reject as entirely unfounded defendant's several complaints of prosecutorial misconduct.

D. Double Jeopardy

Defendant next maintains that his conviction of six counts of making or producing child sexually abusive material place him in double jeopardy under the United States and Michigan Constitutions. Generally, a double jeopardy claim presents a question of law, which we review de novo. *People v Peña*, 224 Mich App 650, 657; 569 NW2d 871 (1997), mod in part on other grounds 457 Mich 885 (1998). But because defendant did not raise this claim in the trial court, we review it only to ascertain whether any plain error affected his substantial rights. *People v Scott*, 275 Mich App 521, 524; 739 NW2d 702 (2007).

Defendant submits that the six counts of making or producing child sexually abusive material of which the jury convicted him constitute "carbon copies" of each other, and were "not differentiated by a bill of particulars." According to defendant, this "lack of specificity deprived [him] of the ability to raise a double jeopardy" argument at trial. Defendant further contends that the statute under which he was prosecuted does not authorize multiple convictions for "a single transaction."

Contrary to defendant's claims, the record reveals that each of the six charges submitted to the jury involved a separate and distinct computer image file created between March 22, 2003 and November 20, 2004. Each file contained a different depiction of a nude child, or a child performing a sexual act. Under the plain language of MCL 750.145c(2), the presence of at least six illegal files on defendant's computer supported six separate counts and convictions of making or producing child sexually abusive material. *People v Harmon*, 248 Mich App 522, 528; 640 NW2d 314 (2001).

E. Defendant's Sentence

Defendant argues that the trial court erred when it scored OV 4 and OV 10. As previously discussed, *infra*, we disagree that the trial court improperly scored OV 4. The trial court scored OV 10 at 15 points. Pursuant to MCL 777.40, OV 10 involves "exploitation of a vulnerable victim," and should be scored 15 points if the offense involved "predatory conduct." The statute defines "predatory conduct" as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). The trial court determined that defendant's use of the hidden camera qualified as predatory conduct, and we agree. Because a substantial factual basis existed for the trial court's scoring of OV 10, we reject defendant's claim of error. To the extent defendant contends that he is entitled to resentencing pursuant to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), this argument also fails. The Michigan Supreme Court and this Court have held that *Blakely* does not apply to sentences imposed in Michigan. *Endres*, *supra* at 423.

F. Assessment of Attorney Fees

Defendant finally argues that the trial court improperly assessed him attorney fees for his court-appointed counsel. The record is unclear whether the trial court actually assessed attorney fees. An "Amended Sentence Disposition Order," entered by the trial court on April 5, 2007, states that defendant must repay attorney fees in an amount "to be determined." Other orders in the record indicate that the court may, in fact, have assessed defendant attorney fees in specific amounts. Assuming that the trial court ordered defendant to reimburse attorney fees, however, we have located in the record no indication that the court ever considered defendant's financial ability to repay the fees incurred by his court-appointed attorney. If the court assessed, or intends to assess, defendant for the fees of his court-appointed counsel, we emphasize that it may do so only after taking into account, on the record, defendant's ability to pay the amount assessed. *People v Dunbar*, 264 Mich App 240, 254-255; 690 NW2d 476 (2004). We therefore remand this case to the trial court for consideration on the record of defendant's current and future financial circumstances and his foreseeable ability to reimburse the county for attorney fees, consistent with *Dunbar*, *supra* at 254-256.

We affirm defendant's convictions and the concomitant periods of incarceration imposed by the trial court. We remand this case, however, solely for a *Dunbar* hearing if the trial court entered, or intends to enter, an order requiring defendant to reimburse court-appointed attorney fees. We do not retain jurisdiction.

/s/ Bill Schuette
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher