STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROLAND DALE COLEMAN,

Defendant-Appellant.

UNPUBLISHED
December 11, 2008

No. 280051
Genesee Circuit Court
LC No. 06-018880-FH

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

PER CURIAM.

Defendant appeals as of right his jury trial conviction for possession of child sexually abusive material, MCL 750.145c(4)(a).[1] Defendant was sentenced to 36 months' probation, with the first six months to be served in jail. We affirm in part, but we remand for further proceedings to resolve an issue insufficiently developed in the present record for us to resolve.

Defendant argues that the trial court erred in denying his motion to suppress evidence. We agree. A trial court's ultimate decision on a motion to suppress the evidence is reviewed by this Court de novo. *People v Dunbar* (*After Remand*), 264 Mich App 240, 243; 690 NW2d 476 (2004). The trial court's findings of fact in a suppression hearing are reviewed for clear error. *Id*. "A finding of fact is clearly erroneous if, after review of the entire record, an appellate court is left with a definite and firm conviction that a mistake had been made." *People v Wilkens*, 267 Mich App 728, 732; 705 NW2d 728 (2005), quoting *People v Frohriep*, 247 Mich App 692, 702; 637 NW2d 562 (2001). A trial court's decision regarding the validity and scope of a consent to search is reviewed for clear error. *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999). Additionally, this Court affords deference to the trial court's decisions with respect to conflicting evidence and the credibility of witnesses. *Id*.

The police in this case became aware of the possibility of child pornography on defendant's computer through defendant's son. They contacted defendant's wife and obtained her consent to search the computer at issue.[2] Police officers then traveled to defendant's house.

[1] The jury acquitted defendant of an additional charge of use of a computer program, computer system, or computer network to commit a crime, MCL 752.796.

[2] Defendant contends that his wife had no authority to do so. However, the family's internet
(continued…)

There was some difference in testimony regarding exactly how events transpired thereafter. However, defendant's wife arrived home first and asked defendant to lock up his dogs because the police were there regarding "pornography." Defendant did so, and he then met a police officer at the door. The officer also explained that he was there for "pornography," in response to which defendant demanded a warrant. The officer explained that no warrant was required because of defendant's wife's consent. Defendant and the officer then went into the house; apparently, another officer was already inside at that point. Defendant testified that he felt he had no business arguing, and he showed officers the computer[3] that was connected to the internet.

Defendant sat down at the computer and offered to show officers "his directory," at which point an officer physically restrained defendant. Defendant was apparently offended by the deputy's act of physical restraint, and defendant "stood up and [] said, that's enough; let's get a warrant." The officers again told him that they had permission, so they did not need a warrant. The officers then proceeded to take the computer. Defendant argues that the search and seizure of the computer[4] was unlawful because defendant had objected and the police would not have been burdened by obtaining a warrant.

Both the Michigan and United States Constitutions afford protection against unreasonable searches and seizures, and, as a general rule, a warrantless search is considered unreasonable. *People v Brzezinski*, 243 Mich App 431, 433; 622 NW2d 528 (2000). However, a grant of consent to conduct a search obviates the warrant requirement, so long as the consent is granted freely, unequivocally, and intelligently. *People v Galloway*, 259 Mich App 634, 648; 675 NW2d 883 (2003). Consent is valid if granted by the person whose property is subject to the search, or from a third party possessing common authority over the property. *Illinois v Rodriguez*, 497 US 177, 181; 110 S Ct 2793; 111 L Ed 2d 148 (1990). The consent of a party authorized to consent to the search is invalid, however, if another authorized party is present and expressly objects to the search. *Georgia v Randolph*, 547 US 103, 106; 126 S Ct 1515; 164 L Ed 2d 208 (2006); *People v Lapworth*, 273 Mich App 424, 427; 730 NW2d 258 (2006).

In *Randolph*, the United States Supreme Court explained that its decision was based on social norms: no social caller would feel wholly invited into premises where there was an expressed disagreement between two tenants as to whether the caller was welcome. However, this only held true where the objecting tenant happened to be present. Therefore, "[s]o long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection, there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant's permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant's

(…continued)

access was billed in her name, and defendant himself testified that he and she both had access to the computer. We find it clear that either of them had the authority to consent to a search of the computer. See *People v Goforth*, 222 Mich App 306, 311-312; 564 NW2d 526 (1997).

[3] The police were not interested in other computers that had no internet connection.

[4] Defendant apparently does not object to the officers' entry into the residence or any specific room therein. Our analysis is limited, therefore, to the search and seizure of the computer itself.

contrary indication when he expresses it." *Randolph*, *supra* at 121-122. In *Lapworth*, this Court further explained that a defendant does not "express" a denial of permission for officers to enter a residence merely by invoking his rights to remain silent and to counsel; the objection must be express rather than tacit. *Lapworth*, *supra* at 428. It is readily apparent that defendant did not, in this case, explicitly tell officers in so many words that he wished to forbid them from accessing the computer.

However, "where a person 'permits' a search in the face of an assertion by the police that they have a warrant, there is no consent that can support the validity of the search." *Farrow*, *supra* at 207. This extends to situations where the police merely act in a way that would lead the defendant to reasonably believe that they have a warrant. *Id*. at 208. Although the police did not tell defendant that they had a warrant, they told him the equivalent: that they did not need one. Consent "given under circumstances which indicate[] that [his] refusal would be futile" is not considered voluntary, and it is therefore not "consent." *People v Mullaney*, 104 Mich App 787, 792; 306 NW2d 347 (1981).

We do not, and could not, expect police officers to read minds. *Randolph* and *Lapworth* rationally require a defendant who wishes to override the consent of another person with shared access to property[5] by manifesting some kind of objectively perceivable, external display of that wish. They do not require of the defendant any talismanic words or invocation, particularly in the face of police officers who are in the process of informing the defendant that such objections would, in any event, be futile. Defendant's demands for a warrant would constitute a sufficient external manifestation of his "contrary indication" under the circumstances that the consent to conduct the search was invalidated.

However, we do not reverse because the testimony regarding the conduct of officers was conflicting. The police officers' testimony was that defendant was compliant and offered no objection whatsoever; to the contrary, they testified that he was consistently helpful. Defendant contended that he twice demanded the warrant. Unfortunately, the trial court resolved this issue on the basis of a legal analysis; no credibility or factual determination was placed on the record. In light of the conflicting evidence and the fact that its resolution turns exclusively on a credibility assessment, which the trial court is in a superior position to render, we have no choice but to remand this matter to the trial court for an evidentiary hearing or, as the trial court sees fit, placement on the record of its credibility and factual findings.

Defendant also argues that he received ineffective assistance of counsel. We disagree.

---

[5] The *Randolph* majority only discussed residences, although the dissenting opinion of Justice Roberts, joined by Justice Scalia, indicated their understanding that Fourth Amendment privacy analyses of "shared space" included containers. *Randolph*, *supra* at 131, 136 (Roberts, J., Dissenting). Furthermore, this Court has recognized that a person's "reasonable expectation of privacy" in a computer is similar to that in "the contents of a safety-deposit box or leased storage space." *People v Mungo*, 277 Mich App 577, 582; 747 NW2d 875 (2008). We conclude that the *Randolph* analysis regarding consent searches of shared residences where one co-resident objects applies equally to any other "place" in which one can have a "reasonable expectation of privacy" that is recognized under the Fourth Amendment.

Defendant did not bring a motion for a new trial on the basis of ineffective assistance of counsel, and failed to request a *Ginther*[6] hearing before the trial court. Accordingly, his claim of ineffective assistance of counsel is unpreserved,[7] and our review is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). An ineffective assistance of counsel claim is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact, if any, are reviewed for clear error, and the ultimate constitutional issue arising from an ineffective assistance of counsel claim is reviewed by this Court de novo. *Id*. Defendant must demonstrate that trial counsel's performance "fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Moreover, "this Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight." *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Defendant first argues that defense counsel failed to object to the introduction of several child pornographic images as evidence. Defendant's theory of the case was either (1) that his son had downloaded the child pornography onto the computer in order to exact revenge on defendant for prior disputes or (2) that the images had been surreptitiously and without defendant's knowledge attached to other files defendant had downloaded. Either theory tacitly concedes that the images were, in fact, present on the computer; it would not have advanced the case for counsel to have objected to the images. Furthermore, had defense counsel objected to the admissibility of the four images, the objection would have properly been overruled. The images were relevant to show that defendant did, in fact, possess child sexually abusive material. MRE 401. The officer's testimony with regard to each of the images involved an explanation of where the file was located on the computer, when the image was obtained, and the identity of the user, and not a description or opinion regarding the content of the images. Accordingly, the record does not demonstrate that the danger of unfair prejudice substantially outweighed the probative value of the images. MRE 403.

Defendant next argues that defense counsel failed to object to Genesee Township Police Sergeant Terry Clemons's testimony regarding the contents of defendant's son's note that accompanied the DVD that Jason turned over to the police. To the extent defendant raises a hearsay argument, the notes are indeed hearsay, but Clemons's testimony was properly offered to assist the jury in understanding why the police took further steps in their investigation, rather than for the truth of anything asserted in the notes. *City of Westland v Okopski*, 208 Mich App 66, 77; 527 NW2d 780 (1994); *People v Knolton*, 86 Mich App 424, 429; 272 NW2d 669 (1978). Furthermore, it could have been sound trial strategy not to object to admission of the notes because the fact that defendant's son contacted the police could support the theory that defendant's son had falsely implicated him.

Defendant next argues that his defense counsel failed to adequately prepare defendant and his wife to testify at trial. However, defendant cannot demonstrate that prejudice resulted

---

[6] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[7] Additionally, defendant has waived review of two of his assertions of error

from the alleged lack of preparation. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). Rather, the record demonstrates that defendant was well versed in both of the major defense theories. Defendant testified regarding his alleged physical altercation with his son, and explained the reasons why the altercation took place. Defendant also testified that one of the computer's storage devices belonged to his son, and his son used it to transfer files to the computer in question. Defendant also explained his second theory, that illegal files can be hidden within legitimate files, and that while he intended to download the legal files, when he discovered that the files also contained child pornographic material, he would delete the abusive images. Defendant's wife's testimony also effectively supported the theory that defendant's altercation with Jason caused Jason to falsely implicate defendant. Both theories accounted for child pornography actually being on the computer, but had either been believed by the jury, it would have negated the element of knowing possession necessary for a conviction under MCL 750.145c(4). Defendant and his wife both articulated these defenses and testified effectively, so we find no prejudice.

Defendant also argues that trial counsel erred in failing to procure his son as a witness. However, we perceive trial counsel's decision not to call defendant's son as a witness as sound trial strategy. Defendant's son might have supported defendant's theory, but defendant's son might also have responded to the allegations of falsely implicating defendant by further damaging defendant's position. Defendant finally argues that trial counsel erred in failing to object to the qualifications of Tom Pyles, one of the police officers, as an expert witness, but defendant does not actually assert that the trial court improperly qualified the officer. In any event, we would disagree with any such assertion; the officer testified that he had sufficient training and experience that any objection to qualifying the officer would have been futile. We find, in sum, that defendant received effective assistance of counsel.

Defendant argues that MCL 750.145c, which proscribes the private possession of child sexually abusive material, violates defendant's First Amendment rights under the United States Constitution. We disagree. In order to preserve defendant's constitutional argument for review, defendant was required to have first challenged the constitutionality of the statute in the trial court. *People v Sands*, 261 Mich App 158, 160; 680 NW2d 500 (2004). Defendant failed to preserve his first amendment challenge to the statute proscribing the possession of child sexually abusive material at the trial court level; consequently, this issue is unpreserved on appeal. *Id*. This Court reviews an unpreserved challenge to the constitutionality of a statute for plain error affecting substantial rights. *Carines, supra* at 763-764.

The constitutionality of statutes is presumed, and this Court will construe them as such, unless the constitutional infirmity of the statute is readily apparent. *People v Harper*, 479 Mich 599, 621; 739 NW2d 523 (2007); *People v Hayes*, 421 Mich 271, 284; 364 NW2d 635 (1984). Our Supreme Court has recognized that: "We exercise the power to declare a law unconstitutional with extreme caution, and we never exercise it where serious doubt exists with regard to the conflict." *Harper, supra* at 621, quoting *Phillips v Mirac, Inc*, 470 Mich 415, 422; 685 NW2d 174 (2004).

As a preliminary matter, defendant failed to include a claim that the statute criminalizing the possession of child sexually abusive material is unconstitutionally overbroad as applied to hypothetical third persons[8] in his statement of the question presented, and as such, defendant has waived the issue. *Chapman, supra*, at 132. Further, this Court will not unnecessarily decide constitutional questions. *People v Riley*, 465 Mich 442, 447; 636 NW2d 514 (2001). Moreover, constitutional issues should not be entertained if the case may be decided on other grounds. *People v Mercer*, ___ Mich ___; 752 NW2d 470 (2008). Accordingly, we decline to consider defendant's argument that MCL 750.145c is unconstitutionally overbroad as applied to hypothetical third persons.

To the extent that defendant argues that MCL 750.145c is unconstitutional as applied to him based on his contention that the prosecution presented no evidence regarding the ages of the subjects of the images recovered from the computer, and his conviction may have been based on images depicting the sexual activity of minors above the age of consent, his challenge lacks merit. MCL 750.145c(5) provides:

> Expert testimony as to the age of the child used in a child sexually abusive material or a child sexually abusive activity is admissible as evidence in court and may be a legitimate basis for determining age, if age is not otherwise proven.

Pyles, the officer qualified by the trial court as an expert witness in computer forensics relating to child pornography investigations, testified that defendant's computer contained child sexually abusive images, the subjects of which were between eight and nine years old. Moreover, defendant admitted during a recorded interview at the sheriff's department that he had downloaded images of girls under the age of 16 that were engaged in sexual activity. Thus, defendant's theory, that his convictions could have arisen from images depicting sexual activity involving persons between the ages of 16 and 18, is unsupported by the record. While it may be true that defendant downloaded and possessed images containing persons aged 16 or 17 engaged in activity proscribed by MCL 750.145c, the testimony of both Pyles and defendant himself show that defendant was actually prosecuted for, and convicted of, possession of materials depicting minors aged eight or nine years engaged in the abusive conduct enumerated under MCL 750.145c. Because defendant does not contend that MCL 750.145c is unconstitutional because it prohibits private possession of images featuring subjects aged eight or nine years

[8] The First Amendment "substantial overbreadth doctrine" is an exception to the general rule of standing which allows a person to whom a statute can be constitutionally applied to challenge the statute on the grounds that the statute may be unconstitutionally applied to persons not before the court. *Massachusetts v Oakes*, 491 US 576, 581; 109 S Ct 2633; 105 L Ed 2d 493 (1989). "The doctrine is predicated on the danger that an overly broad statute, if left in place, may cause persons whose expression is constitutionally protected to refrain from exercising their rights for fear of criminal sanctions." *Id.*, citing *Schaumburg v Citizens for a Better Environment*, 444 US 620, 634; 100 S Ct 826; 63 L Ed 2d 73 (1980). The United States Supreme Court has cautioned that the substantial overbreadth doctrine is "manifestly strong medicine" that is used "sparingly, and only as a last resort." *Oakes, supra* at 581, quoting *Broadrick v Oklahoma*, 413 US 601, 603; 93 S Ct 2908; 37 L Ed 2d 830 (1973).

engaged in the conduct described under the statute, we conclude that the statute is constitutional as applied to him, and defendant's argument to the contrary fails.

Defendant finally argues that the cumulative effect of several minor errors operated to deprive defendant of a fair trial. We disagree. Because defendant did not raise a cumulative error objection below, we review the issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Defendant must show that: "(1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected a substantial right of the defendant." *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006). However, "only actual errors are aggregated to determine their cumulative effect." *LeBlanc, supra* at 592 n 12. As discussed, we find only one possible error, so there are simply no actual errors for this Court to consider in the aggregate. *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004). Because there are no actual errors to aggregate, there can be no cumulative effect of such errors. Accordingly, defendant is not entitled to relief.

We remand to the trial court to resolve the outstanding factual question of whether defendant presented the police officers who conducted the consent search and seizure of the computer with an outwardly perceivable indication that doing so was contrary to his own wishes. If so, the trial court erred in denying the motion to suppress, but if not, the denial was proper. Because we cannot resolve the matter on appeal, we leave it to the trial court on remand to conduct proceedings as it sees fit. We affirm in all other respects. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Alton T. Davis
/s/ Elizabeth L. Gleicher