

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID WILLIAM QUILLAN,

Defendant-Appellant.

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UNPUBLISHED

July 19, 2012

No. 300340

Ionia Circuit Court

LC No. 2009-014420-FJ

Before: SHAPIRO, P.J., and HOEKSTRA and WHITBECK, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of seven counts of possession of child sexually abusive material, MCL 750.145c(4), and one count of using a computer to commit a crime, MCL 752.796(1); MCL 752.797(3)(d). Defendant was sentenced to 12 months to four years' imprisonment for each possession of child sexually abusive material conviction, and to 17 months to seven years' imprisonment for using a computer to commit a crime. For the reasons stated in this opinion, we affirm.

Federal Bureau of Investigations (FBI) Special Agent Adam VanDeuren was involved in the investigation of computer-related crimes. During the course of a different investigation, defendant was identified as an individual who may be involved in the possession of child pornography.<sup>1</sup> Vandeuren and another FBI agent went to defendant's place of employment where they approached defendant and asked if they could speak to him. Defendant agreed, and brought the agents back to his home. At defendant's home, the agents informed defendant the investigation involved child pornography, and defendant allowed the agents to take his computer. Defendant admitted the agents may find some sexually abusive materials on his computer. After performing a forensic examination on the computer, FBI agents discovered 349 images depicting possible child pornography. Agents also discovered 60 stories involving incest and minors engaging in sexual activity on defendant's computer. The images and stories were turned over to a federal prosecutor and the Michigan State Police. Eventually, the Michigan State Police took over the case and defendant was arrested.

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<sup>1</sup> Although our state statute refers to "child sexually abusive materials," the FBI uses the term "child pornography." Both terms reference the same type of material.

During the jury trial, all the images were admitted as evidence and a forensic pathologist was qualified as an expert regarding the age range of the individuals pictured in the images. He testified that many of the images depicted individuals under the age of 18. Over defendant's objection, testimony regarding the sexual stories discovered on defendant's computer was also permitted, and a summary of the stories was admitted as an exhibit. Defendant testified on his own behalf, and maintained that he had difficulty using his computer and his internet searches often yielded unwanted results, including "bad pictures." Defendant denied ever looking at such images, and denied saving the images to his computer. Defendant admitted that he informed the FBI agents that they may find questionable images on his computer. At the conclusion of the trial, the jury returned a verdict of guilty on all the charges, and defendant now appeals his convictions as of right.

## I. UNANIMITY ISSUES

Defendant argues that the trial court erred by failing to give the jury a specific unanimity instruction; he also argues that he was denied his right to a unanimous verdict.

Defendant did not object to the instruction of the jury during trial; accordingly, the issue is not properly preserved for appeal. See *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000). "Absent an objection or request for an instruction, this Court will grant relief only when necessary to avoid manifest injustice." *Id.* Defendant also failed to raise any challenge to the unanimity of the jury's verdict in the trial court. Accordingly, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-764; 597 NW2d 130 (1999). "Under the plain error rule, defendant must show that (1) error occurred, (2) the error was plain, i.e., clear and obvious, and (3) the plain error affected a substantial right of the defendant." *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006).

In a criminal case, a jury's verdict must be unanimous. MCR 6.410(B). "In order to protect a defendant's right to a unanimous verdict, it is the duty of the trial court to properly instruct the jury regarding the unanimity requirement." *People v Cooks*, 446 Mich 503, 511; 521 NW2d 275 (1994). Generally, a trial court may meet this requirement through a general instruction on unanimity, but where multiple acts are presented as evidence of the actus reus of a single offense, the court may be required to issue a specific unanimity instruction. *Id.* at 510-512. The Court in *Cooks* concluded that:

[A] specific unanimity instruction is not required in *all* cases in which more than one act is presented as evidence of the actus reus of a single criminal offense. The critical inquiry is whether either party has presented any evidence that *materially* distinguishes any of the alleged multiple acts from the others. In other words, where materially identical evidence is presented with respect to each act, and there is no juror confusion, a general unanimity instruction will suffice. [*Id.* at 512-513 (emphasis in original).]

Defendant argues that a specific unanimity instruction should have been given based on *People v Yarger*, 193 Mich App 532; 485 NW2d 119 (1992), overruled in part *Cooks*, 446 Mich at 530. *Yarger* is factually distinguishable from this case. In *Yarger*, the defendant faced a

single charge of third-degree criminal sexual conduct, but the complainant testified to two separate sexual encounters with the defendant that occurred about a month apart and were factually distinct. *Id.* at 533-534. This Court held that the trial court erred in failing to give a specific unanimity instruction, and that as a result, it was possible that the jury did not unanimously agree as to which alleged act of sexual penetration formed the basis of the conviction. *Id.* at 536-537.

In this case, no evidence materially distinguishes any of the alleged multiple acts of possession of child sexually abusive material from the others. All seven charged counts under MCL 750.145c(4) arise from the same evidentiary basis. There were 349 images of child sexually abusive material on defendant's personal computer. At trial, defendant did not seek to distinguish among the images, and did not produce any evidence that some of the images did not constitute child sexually abusive material. Instead, defendant maintained that he did not knowingly possess the images. There was nothing materially distinguishable about the evidence presented with respect to each act of possession; the evidence presented was identical. Consequently, the trial court was not required to give a specific unanimity instruction. See *Cooks*, 446 Mich at 512-513.

Further, there is nothing in the record to indicate that the jury's verdict was not unanimous. The jury was polled after the verdict was received, and all the jurors affirmed that their vote was accurately represented. Because defendant failed to offer any evidence that the verdict was not unanimous, he failed to demonstrate plain error affecting his substantial rights.

## II. PROOF BEYOND A REASONABLE DOUBT

Defendant also argues that his right to proof of guilt beyond a reasonable doubt was violated because the prosecution only had to prove that any seven out of the 349 images constituted child sexually abusive material, and each juror's verdict may have relied on different images.

Because defendant did not raise this issue in the trial court, our review is for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 761-764. "Under the plain error rule, defendant must show that (1) error occurred, (2) the error was plain, i.e., clear and obvious, and (3) the plain error affected a substantial right of the defendant." *Pipes*, 475 Mich at 279.

In this case, the jury was properly instructed that its verdict must be unanimous. It was also instructed that it must find defendant guilty beyond a reasonable doubt. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Thus, the jury presumably reached unanimous agreement that there was no reasonable doubt that seven of the proffered images represented child sexually abusive material. Defendant did not challenge the prosecution's allegation that all of the photographs depicted child sexually abusive material; accordingly, he has failed to demonstrate plain error affecting his substantial rights.

## III. NOTICE

Defendant argues that he received inadequate notice of the charges against him. Specifically, he argues that he lacked adequate notice because the prosecution introduced 349

images of alleged child sexually abusive material, but only brought seven counts against him, thereby making it impossible to determine which images constituted the basis of the charges.

Because defendant did not object to the notice he received in the trial court, we review his claim of error on appeal for plain error. *Carines*, 460 Mich at 761-764. “Under the plain error rule, defendant must show that (1) error occurred, (2) the error was plain, i.e., clear and obvious, and (3) the plain error affected a substantial right of the defendant.” *Pipes*, 475 Mich at 279.

The Due Process Clause of the Fourteenth Amendment requires that the prosecution’s method of charging a crime provide a defendant with fair notice of the charge against him in order to permit the defendant to adequately prepare a defense. *People v Chapo*, 283 Mich App 360, 364; 770 NW2d 68 (2009). “Prejudice is essential to any claim of inadequate notice.” *Id.*

In this case, defendant does not allege that the state’s charging procedure was defective, nor does he claim that he did not receive an information or actual notice of the charges against him. Moreover, defendant’s theory at trial was that he did not knowingly possess any of the images. This defense was not dependent on which specific images the charges were based on. Indeed, the prosecution maintained that all 349 images depicted child sexually abusive materials, and ostensibly, defendant could have been charged with 349 counts. The fact that the prosecution exercised its discretion and charged defendant with only seven counts did not prejudice defendant’s ability to prepare a defense. Accordingly, there is no evidence that suggests defendant was unable to adequately prepare a defense based on the provided notice. Consequently, defendant has failed to demonstrate plain error affecting his substantial rights.

#### IV. SUFFICIENCY OF THE EVIDENCE

Defendant argues that there was insufficient evidence to sustain his convictions of possession of child sexually abusive material. Specifically, defendant argues that the evidence was insufficient to sustain his convictions of possession of child sexually abusive material because a juror could have had reasonable doubt that at least seven of the 349 images constituted child sexually abusive material. Specifically, defendant argues that the expert testimony as to the ages of the individuals depicted was unreliable. Defendant does not contest that the images at issue depicted listed sexual acts, nor does he argue that there was insufficient evidence that he knowingly possessed the images.

The sufficiency of the evidence is a question of law that we review de novo. *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). The evidence is viewed in a light most favorable to the prosecution to determine whether a rational jury could find that each element of the crime was proved beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). It is up to the finder of fact to make decisions about credibility of witnesses and the probative value of evidence. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

A person is guilty of possession of child sexually abusive material when:

[a] person who knowingly possesses any child sexually abusive material is guilty of a felony . . . if that person knows, has reason to know, or should reasonably be

expected to know the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that a person has not taken reasonable precautions to determine the age of the child. [MCL 750.145c(4).]

Further, for purposes of the statute, “child sexually abusive material” is defined as:

[A]ny depiction, whether made or produced by electronic, mechanical, or other means, including a developed or undeveloped photograph, picture, film, slide, video, 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; a book, magazine, computer, computer storage device, or other visual or print or printable medium containing such a photograph, picture, film, slide, video, electronic visual image, computer, or computer-generated image, or picture, or sound recording; or any reproduction, copy, or print of such a photograph, picture, film, slide, video, electronic visual image, book, magazine, computer, or computer-generated image, or picture, other visual or print or printable medium, or sound recording. [MCL 750.145c(1)(m).]

Finally, a “listed sexual act” includes “sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, or erotic nudity.” MCL 750.145c(1)(h).

In this case, the prosecution submitted 349 images discovered on defendant’s computer. The images depicted young individuals engaged in listed sexual acts. Dr. Ljubisa Dragovic was qualified as an expert capable of determining the age range of individuals. He testified that approximately 15 different images depicted individuals under the age of 18. Defendant’s argument that Dr. Dragovic’s testimony was not credible does not demonstrate that there was insufficient evidence because questions regarding credibility of the witnesses are left to the finder of fact. *Wolfe*, 440 Mich at 514-515. Viewing this evidence in the light most favorable to the prosecution, a rational trier of fact could have found that at least seven images constituted child sexually abusive material.

Defendant also argues that there was an insufficient factual record to provide an evidentiary basis for challenging the sufficiency of evidence because he could not determine which of the images his convictions were based upon. This argument ignores the fact that all of the images obtained from his computer were introduced into evidence; and accordingly, all of the images upon which his convictions could be based were introduced as evidence. Therefore, we conclude that the record was sufficient for defendant to challenge the sufficiency of the evidence.

Lastly, defendant argues that because his convictions of possession of child sexually abusive material must be reversed, his conviction of using a computer to commit a crime must also be reversed. However, because we find that defendant’s convictions of possession of child sexually abusive material need not be reversed, his conviction of using a computer to commit a crime must also stand.

## V. ADMISSION OF EVIDENCE OF OTHER ACTS

Defendant argues that the trial court abused its discretion by admitting other-acts evidence of sexual stories found on his computer. Before trial, a hearing regarding the prosecution's notice to introduce evidence of other acts pursuant to MRE 404(b) was held and defendant argued that the trial court should bar the admission of the evidence. The other-acts evidence consisted of approximately 60 stories of a sexual nature found on defendant's computer describing sexual acts between children or between children and adults. After hearing arguments from both parties, the trial court ruled that the evidence was admissible to demonstrate defendant's intent and knowledge.

On appeal, defendant specifically argues that the evidence should not have been admissible to show intent because intent was not an element of either charged crime and that the evidence was not probative of his knowledge of the images because there was no expert testimony linking possession of adult-child sexual stories to possession of child sexually abusive images. Finally, defendant maintains that any probative value of the evidence was substantially outweighed by the risk of unfair prejudice.

A trial court's determination regarding the admissibility of evidence is reviewed for an abuse of discretion. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). An abuse of discretion occurs where the result falls outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

MRE 404(b)(1) permits evidence of other crimes, wrongs, or acts for specified purposes. MRE 404(b)(1) provides that:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case. [MRE 404(b)(1).]

This Court has held that MRE 404(b)(1) is a rule of inclusion, and that as a result, other-acts evidence should be admitted as long as the admission is not being offered solely to demonstrate criminal propensity. *People v Martzke*, 251 Mich App 282, 289; 651 NW2d 490 (2002). In *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000), the Court explained the approach to the admissibility of other-acts evidence:

First, the prosecutor must offer the other acts evidence under something other than a character to conduct or propensity theory. MRE 404(b). Second, the evidence must be relevant under MRE 402, as enforced through MRE 104(b), to an issue of fact of consequence at trial. Third, under MRE 403, a determination must be made whether the danger of undue prejudice [substantially] outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decision of this kind under Rule 403. Finally, the trial court, upon request, may provide a limiting instruction under MRE 105. [quotation and citation omitted.]

In this case, the trial court admitted the evidence for the limited purpose of proving intent and knowledge. Intent and knowledge are proper purposes under MRE 404(b). Defendant presented a defense based on the theory that he did not intend to possess the material, and that he did not do so knowingly. According to defendant, the alleged child sexually abusive material was on his computer as a result of viruses and pop-ups that were out of his control. Accordingly, defendant's theory of the case put intent at issue. Moreover, knowledge is an element of possession of child sexually abusive materials, MCL 750.145c(4). Accordingly, defendant's argument that intent and knowledge were not at issue and therefore not relevant is unavailing.

Defendant contends that expert testimony should have been introduced showing a link between possession of child sexually abusive material and stories of child-adult sexual relationships, and that in the absence of such testimony, the evidence lacked probative value and was irrelevant. However, defendant cites no authority in support of this proposition, and it is logical that possession of child-adult sexual stories would have probative value in disproving defendant's claim that he did not intend to possess child sexually abusive material.

Moreover, in ruling to admit the evidence, the trial court specifically determined that the probative value of the evidence was not substantially outweighed by the risk of unfair prejudice. The evidence was admitted only for the purpose of proving intent and knowledge, and the trial court specifically limited the evidence to summaries of the stories, thereby limiting the prejudicial effect. Further, it was highly probative of defendant's intent and knowledge as to possession of child sexually abusive material. Under these circumstances, we do not find that the trial court's determination regarding the risk of unfair prejudice was outside the range of principled outcomes. Therefore, we conclude that the trial court did not abuse its discretion in finding that the other-acts evidence was admissible.

## VI. JURY INSTRUCTION

Defendant also challenges the jury instruction limiting the use of the other-acts evidence. Specifically, defendant argues that the instruction improperly allowed the jury to consider the other-acts evidence for the purpose of establishing motive when the trial court specifically stated that the evidence would only be admitted to show intent and knowledge.

Defendant did not object to the jury instruction at trial; therefore, this issue is unpreserved. *People v McCrady*, 244 Mich App 27, 30; 624 NW2d 761 (2000). An unpreserved claim of instructional error is reviewed for plain error affecting defendant's substantial rights. *Id.* Generally, we review challenged jury instructions in their entirety. *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). A conviction will not be reversed "if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Id.* In addition, "[i]t is well established that jurors are presumed to follow their instructions." *Graves*, 458 Mich at 486.

In the instant case, the trial court read the following limiting instruction to the jury:

You have heard evidence that was introduced to show that the defendant committed an improper act for which he is not on trial. If you believe this evidence, you must be very careful only to consider it for certain purposes. You

may only think about whether this evidence tends to show that the defendant had a reason to commit the crime, that the defendant specifically meant to possess child sexually abusive material, that the defendant knew what the things found on his computer in his possession were, or that defendant acted purposefully, that is, not by accident or mistake or because he misjudged the situation.

You must not consider this evidence for any other purpose. For example you must not decide that it shows that the defendant is a bad person or that he is likely to commit crimes. You must not convict the defendant here because you think he is guilty of other bad conduct. All the evidence must convince you beyond a reasonable doubt that the defendant committed the alleged crime, or you must find him not guilty.

Arguably, the instruction does allow the jury to consider the evidence to establish motive. However, even if this constituted error,<sup>2</sup> defendant has failed to demonstrate how allowing the jury to consider the evidence for purposes of establishing motive resulted in plain error affecting his substantial rights. When read as a whole, the instruction fairly presented the issue, and protected defendant's rights by significantly limiting the jury's use of the evidence of other acts and informing the jury that it may not consider the evidence for any improper purpose. Therefore, we conclude that defendant has failed to demonstrate plain error affecting his substantial rights.

## VII. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues defense counsel was ineffective because he failed to object to inadequate notice, failed to object to the prosecutor's comments regarding what the prosecution had to prove, and failed to object to the jury instruction regarding unanimity. Defendant also argues that defense counsel was ineffective for failing to move for a bill of particulars. All of defendant's arguments rely on the premise that it was error for the prosecution to admit all 349 images without specifying which images served as the basis for the seven counts of possession of child sexually abusive material.

Because no evidentiary hearing was held in regard to defendant's claims of ineffective assistance of counsel, our review is limited to errors apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

In order to prevail on an ineffective assistance of counsel claim, the burden is on the defendant to demonstrate that defense counsel's performance fell below an objective standard of reasonableness, and that the deficiency so prejudiced defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Prejudice occurs if there is a "reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 312 (quotation and citation omitted).

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<sup>2</sup> We note that motive is also a proper purpose for admission of other-acts evidence pursuant to MRE 404(b).



As discussed *supra*, the prosecution was not required to specify which of the 349 images should serve as the basis for each charge. Accordingly, any objection to defendant's notice of the charged crimes and the prosecutor's comments regarding what the prosecution had to prove on the basis of the introduction of all 349 images without specifying which images resulted in the charged crimes would have been futile. Defense counsel is not ineffective for failing to make futile objections. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004). Therefore, defendant has failed to demonstrate that defense counsel's actions fell below an objective standard of reasonableness.

Similarly, defendant's argument that defense counsel was ineffective for failing to object to the jury instruction regarding unanimity is unavailing. As discussed *supra*, the given jury instruction was adequate to protect defendant's rights. Moreover, defendant offers no evidence to demonstrate that he was prejudiced by the failure of the trial court to give a specific unanimity instruction. Therefore, even if defense counsel should have requested a specific instruction, defendant has failed to demonstrate that there is a reasonable probability that the result of the proceedings would have been different but for defense counsel's failure.

Finally, defendant has not demonstrated that defense counsel's failure to move for a bill of particulars fell below an objective standard of reasonableness. Defendant does not argue that there was a defect in the felony information, and the record does not support a finding that defendant was improperly apprised of the essential facts of the alleged offenses. Moreover, defendant does not explain how a bill of particulars would have changed the outcome of the proceedings. Therefore, we conclude defendant has failed to demonstrate ineffective assistance of counsel.

Affirmed.

/s/ Douglas B. Shapiro  
/s/ Joel P. Hoekstra  
/s/ William C. Whitbeck