STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 18, 2007
v	No. 272404 Kalamazoo Circuit Court
SHAWN MICHAEL VESCOSO, Defendant-Appellant.	LC No. 05-001350-FH

Before: Davis, P.J., and Murphy and Servitto, JJ.

PER CURIAM.

Defendant Shawn Michael Vescoso appeals as of right his jury trial convictions for six counts of distributing or promoting child sexually abusive material, MCL 750.145c(3); six counts of possession of child sexually abusive material, MCL 750.145c(4); and two counts of using a computer to commit a crime, MCL 752.796, MCL 752.797(3)(d). Defendant was sentenced to 12 months in jail and 5 years' probation for each of the fourteen criminal counts. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

In October of 2003, an investigator in Wyoming was conducting an Internet investigation related to the downloading of child pornography on computers. His investigation revealed that child pornography had been downloaded to an Internet address, later determined to be used by defendant. The software installed and used on defendant's computer to download the child pornography also allowed the images to be downloaded onto other computers through peer-to-peer file sharing networks (allowing one computer to share information with another without having to go through a central server). After the investigator downloaded the images from defendant's computer to his own using the file sharing, he informed police in Michigan of his findings. Michigan police went to the residence defendant shared with his girlfriend and defendant indicated to police that he had downloaded file-sharing software and was using it to download both adult and child pornographic images. The police confiscated the computer and, after determining that the computer contained a significant amount of child pornography, charged defendant in the instant matter.

Defendant first argues that the trial court improperly instructed the jury about the elements of the crime of distributing or promoting child sexually abusive activity. Specifically, defendant contends that the trial court did not instruct the jury on an essential element of the charges of distributing or promoting child sexually abusive activity that must be proven by the

prosecution; to wit, that the defendant must have distributed or promoted the material with criminal intent. Defendant thus contends he is entitled to a reversal of his convictions for those crimes.

To preserve an instructional issue, a party must object to the instruction before the jury deliberates. MCR 2.516(C). By affirmatively expressing satisfaction with the trial court's jury instructions, a party waives review of those instructions to which he accedes at trial. *People v Taylor*, 159 Mich App 468, 488; 406 NW2d 859 (1987). See also, *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (expressing satisfaction with the trial court's instructions constitutes a waiver that extinguishes any error regarding the instructions).

At the close of the instructions in the present matter, the trial court asked the parties whether they had "any corrections" regarding the instructions. Neither party offered any corrections. The trial court then specifically asked each party whether they had "any objection to the instructions as read" by the trial court. Defendant's trial counsel stated, "[n]one, your Honor." At first blush, it would appear, then, that defendant waived any right to appellate review on this issue.

In *People v Allensworth*, 401 Mich 67; 257 NW2d 81 (1977), and *People v Reed*, 393 Mich 342; 224 NW2d 867 (1975), the trial courts effectively removed from the juries' consideration some elements of the crimes by instructing that a felony murder in *Allensworth* and a premeditated murder in *Reed* had indeed taken place, with the jurors simply needing to determine whether it was the defendants who committed the murders. Our Supreme Court reversed the convictions in both cases because the trial courts had intruded on the province of the juries to determine all the elements of the crimes, thereby depriving the defendants of their constitutional rights. In both cases, there was some indication in the record that defense counsel had agreed or conceded that the crime of murder did occur, but reversal was nevertheless mandated where there was no "understandingly tendered waiver." *Allensworth, supra* at 69-70; *Reed, supra* at 349. Here, it is readily apparent that defense counsel, as well as the trial court, were unaware of the full extent of the elements of the crime as previously and recently enunciated in *People v Tombs*, 472 Mich 446, 465; 697 NW2d 494 (2005), which we shall address below. Therefore, while there was technically a waiver, it was ineffective because it was not an "understandingly tendered waiver." Without an effective waiver, the appropriate analysis would entail application of the plain-error test under *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).[1]

[1] While defendant claims that automatic reversal would be warranted because the lacking instruction presents a "structural error," only a failure to instruct on the elements of a crime altogether constitutes a structural defect warranting automatic reversal (See *People v Duncan*, 462 Mich 47; 610 NW2d 551 (2000). An instructional error regarding one element of a crime, whether by an incorrect description or by omission, is nonstructural. *Duncan, supra* at 51, citing *Neder v US*, 527 US 1; 119 S Ct 1827 (US Fla, 1999) and *People v Carines*, *supra*.

To avoid forfeiture of a constitutional right under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. *Id.* Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error " 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Id. at* 763-764. Even if jury instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Clark*, 274 Mich App 248, 255-256; 732 NW2d 605 (2007). And no error results from the omission of an instruction if the instructions as a whole covered the substance of the omitted instruction. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

MCL 750.145c(3), which prohibits the distribution or promotion of child sexually abusive material, requires that an accused be shown to have had criminal intent to distribute or promote. *Tombs, supra*. Due process requires proof of this intent beyond a reasonable doubt. *Id* at 459, 465.

In this matter, the trial court instructed the jury, in relevant part:

> The defendant is charged with the crime of child sexually abusive material distributing or promoting. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> First, that the material in question is child sexually abusive material;
>
> Second, that the defendant distributed the material in question;
>
> Third, that the defendant knew or had reason to know or should reasonably be expected to know the subject of the image was a child or that the defendant did not take reasonable precautions to determine the age of the child in the image.

The court did not instruct the jury that in order to convict defendant of distributing or promoting child sexually abusive material it must find beyond a reasonable doubt that defendant possessed the requisite criminal intent to distribute or promote the material. That an error occurred and that the error was plain is thus beyond dispute. Remaining for resolution, then, is whether the error affected defendant's substantial rights.

In *Tombs, supra*, our Supreme Court discussed at great length the necessity of criminal intent to support a conviction of promoting or distributing child sexually abusive activity. In that case, an employee leaving his employment was required to return a company-issued laptop computer. The employee had downloaded child pornography onto the laptop and did not delete the material before the laptop was returned. At his trial on charges of, among other things, distributing or promoting child sexually abusive activity, evidence revealed that the images had been "buried" in the computer and that when company laptops were returned, the hard drives were deleted without anyone viewing what was contained within them (a policy known by the defendant). The Court, in reversing the defendant's conviction of the charge expressed its concern that criminal liability could attach even though the action of distribution or promotion was inadvertent or unknowing: "For instance, a person might accidentally attach the wrong file to an e-mail sent to another. The person might intend to send an innocent photograph, but

accidentally send a pornographic photograph of a child instead. Also, the person might not intend that the recipient recognize or even see the material that he transferred." *Tombs* thus announced that it must be proven beyond a reasonable doubt that a defendant criminally intended that the materials be distributed or promoted in order to sustain a conviction for distributing or promoting child sexually abusive activity.

The instructions in this matter, as given, would allow for the jury to convict defendant of the crime at issue, even if he inadvertently or unknowingly allowed the pornography contained on his computer to be downloaded by other computer users—the very type of conviction that concerned the *Tombs* court. According to the given instructions, that images were able to be shared and that the Wyoming investigator did, in fact, obtain the images from defendant's computer through a file sharing program, would be sufficient to support a conviction regardless of whether defendant knew the files were obtainable by others or intended that they be so available.

On the record, it is impossible for this Court to determine whether the jury did or could have found that defendant intended to distribute the images to others. The lack of an instruction regarding intent was magnified during closing arguments, when the prosecutor stated:

> Now you're going to notice that the judge isn't going to say that the person had to knowingly distribute. All he's going to say is that the person distributed. Now he's going to tell you later on that the person had to know the nature of the material that they [sic] were distributing; that they [sic] knew that it was child sexually abusive material; that it involved somebody. But he's not going to tell you that the defendant had to know that he was distributing. So I suspect that maybe defense [sic] might try and convince you that that's something that you have to find in this case, that he knew that he was actually sending it out to people; but that's not something that has to happen. You only have to find, number one, that it was distributed and, number two, that it was child pornography or child sexually abusive material.

Notably, the jury later sent out a note during deliberations requesting a more concise definition of the charge of distributing or promoting child sexually abusive material. It is impossible to say that had the jury been properly instructed, the outcome would be the same, particularly given that little, if any, evidence concerning defendant's knowledge of the mechanics and abilities of the file sharing software was introduced at trial. Because the lack of appropriate instruction regarding defendant's intent sent the jury to deliberate without the benefit of knowing, and thus being able to consider, perhaps the most essential element of the charged crime, this error seriously affected the fairness and integrity of the verdict. Defendant's convictions for distributing or promoting child sexually abusive material, MCL 750.145c(3), must therefore be reversed and defendant granted a new trial on these charges. Defendant's conviction for using a computer to commit the crime of distribution or promotion of child sexually abusive activity (Count XIV) arising from the same facts of the conviction for distributing or promoting child sexually abusive material, it too must be reversed.

Next, defendant argues that the prosecutor failed to present sufficient evidence for a rational jury to determine beyond a reasonable doubt that defendant possessed the child sexually abusive images that formed the basis for counts VII, IX through XIII, and XV. We review de

novo claims of insufficient evidence**.** *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In so doing, we view the evidence in a light most favorable to the prosecution in order to determine whether a rational trier of fact could have found the elements of the charged offenses beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

MCL 750.145c(4)[2] provides, in relevant part:

> A person who knowingly possesses any child sexually abusive material is guilty of a felony punishable by imprisonment for not more than 4 years 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 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 person has not taken reasonable precautions to determine the age of the child.

Defendant argues on appeal that the images that form the basis of the possession of child sexually abusive material charges were found either in the area of Burger's computer containing the "temporary Internet files," or in the area of Burger's computer containing deleted material. Defendant, citing *People v Girard,* 269 Mich App 15, 20-21; 709 NW2d 229 (2005), argues that the prosecutor was required to show more than "just the presence of child sexually abusive material in a temporary Internet file or a computer recycle bin to prove that defendant knowingly possessed the material." Defendant, however, mischaracterizes the evidence that was presented at trial.

The police officer who examined the computer used by defendant testified that he found the images that formed the basis of the counts of possession of child sexually abusive material in compressed files that were "available to a user." We note, however, that even if the material had been found only in the temporary Internet file or in the area of the computer containing deleted material, *Girard, supra,* does not support defendant's argument. In that case, this Court explicitly avoided ruling whether the presence of a document in a temporary Internet file or recycle bin (the area where deleted material is stored) constituted knowing possession:

> We need not address whether the mere presence of a document or image in a temporary Internet file or in the computer recycle bin would be sufficient to prove knowing possession beyond a reasonable doubt because the evidence adduced below, viewed in a light most favorable to the prosecution, showed that defendant's possession reached beyond such circumstances. [*Id.* at 23.]

Here, there was ample evidence presented at trial supporting that defendant knowingly possessed child sexually abusive material. A Federal Special Agent who conducted an investigation of the distribution of child sexually abusive material on "peer-to-peer" file sharing networks testified that defendant distributed child sexually abusive material to him over the

[2] Count XV, using a computer to commit a crime, MCL 752.796, MCL 752.797(3)(d), was derivative of the convictions for possessing child sexually abusive material. Therefore, this Court's determination of the issue regarding those counts is applicable to Count XV.

Internet, by making it available to users of the Kazaa software program. When police confiscated the computer used by defendant, he admitted that he used the Kazaa software to "download pornographic images," including one image "of a girl [defendant] believed to be about ten years old that was holding a male penis." Defendant admitted that he did not delete that image. Furthermore, the officer who searched the computer observed "approximately 714" images that he identified as "potentially being suspected child pornography" in the area of the computer containing deleted material, and 225 "suspected child pornographic images" in the "compressed files" of the computer. In addition, in the Kazaa registry of the computer, there was a list of the 25 most recently used "search terms" affiliated with the user account titled "Shawn," including the terms "pedo boys," "Vicki and kiddy," and "very young teens," which were similar to search terms that an officer observed in previous cases involving child sexually abusive material. The recovered images that formed the basis of the charges, were "available to a user," according to Sergeant Cruz, who testified at trial. On the record, this evidence constituted sufficient evidence that defendant knowingly possessed the child sexually abusive material that formed the basis of his convictions.

Defendant next argues that the computer used by defendant was illegally seized by the police. Because defendant failed to preserve this issue, this Court reviews for plain error affecting defendant's substantial rights. *People v Carines, supra*, 460 Mich 750, 763. Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines, supra* at 763, 774.

The federal and state constitutions protect against unreasonable searches and seizures, and a search conducted without a warrant is generally considered unreasonable. *People v Brzezinski*, 243 Mich App 431, 433; 622 NW2d 528 (2000). A consent to search, however, permits a warrantless search and seizure when the consent is unequivocal, specific, and freely and intelligently given. *People v Galloway*, 259 Mich App 634, 648; 675 NW2d 883 (2003). The validity of a consent search is determined by the totality of the circumstances, and the prosecutor has the burden of proving that the person granting consent was authorized to do so and did so freely. *People v Malone*, 180 Mich App 347, 356; 447 NW2d 157 (1989); *Galloway, supra*, at 648. Generally, consent must come from the person whose property is being searched, or from a third party who possesses common authority over the property. *People v Jordan*, 187 Mich App 582, 587; 468 NW2d 294 (1991).

On the record before us, defendant has not shown that the computer was seized illegally. The evidence produced at trial showed that defendant granted the police consent to take the computer and search its contents. A police detective testified to this fact. Defendant acknowledged at trial that he granted the police consent to take the computer. During the direct examination of defendant, the following exchange occurred:

> *Q.* All right. And at some point did you allow [the police] to take the computer?
>
> *A.* Yes.
>
> *Q.* And were you threatened in any manner, or was it completely voluntary on your part?

A. No, it was voluntary.

The record does not support that defendant consented to the taking of the computer but not the subsequent search. Moreover, we note that the subsequent search was conducted only after a search warrant was issued.

Defendant also argues that the initial investigation involving the distribution of child sexually abusive material on peer-to-peer file sharing networks constituted an illegal search of the computer. However, defendant has provided no legal support of his position. Moreover, the Federal officer who conducted the initial investigation testified that his search involved material that was available for anybody using the Kazaa software over "peer to peer" networks, over the Internet. Defendant's argument on this issue thus fails.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Deborah A. Servitto