STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 3, 2009
v	No. 278214 Washtenaw Circuit Court
KENNETH RICHARD GOURLAY, Defendant-Appellant.	LC No. 06-000877-FH

Before: Hoekstra, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of child sexually abusive activity, MCL 750.145c(2), two counts of using a computer to communicate with another to commit child sexually abusive activity, MCL 750.145d(2)(f), two counts of distributing or promoting child sexually abusive material, MCL 750.145c(3), two counts of using a computer to communicate with another to commit distribution of child sexually abusive material, MCL 750.145d(2)(d), third-degree criminal sexual conduct (CSC), MCL 750.520d(1)(a), and soliciting a child for immoral purposes, MCL 750.145a. The trial court sentenced defendant to concurrent prison terms of 6 to 20 years for the child sexually abusive activity and using a computer to communicate with another to commit child sexually abusive activity convictions, 3 to 7 years for the distributing or promoting child sexually abusive material convictions, 4 to 10 years for the using a computer to communicate with another to commit distribution of child sexually abusive material convictions, 5 to 15 years for the CSC conviction, and 145 days for the soliciting a child conviction. Defendant appeals as of right his convictions and sentences. We affirm defendant's convictions, vacate his sentences, and remand for resentencing.

I. Basic Facts

Justin Berry, at the age of 13, obtained a web camera, which he soon used to broadcast pornographic images of himself over the Internet. Berry also created his own website, the "justinscam" website, which he used to broadcast the images.

Defendant, who owned Chain Communications, a web hosting company, contacted Berry, informing Berry that he was watching Berry over the Internet. Defendant and Berry began to communicate on a daily basis. They talked about computers, but Berry also informed defendant that he wanted to take his website to "the next level." He wanted to place his website

with a web hosting company and he wanted the website to have a members-only section. Defendant and Berry discussed different ideas for the new website.

In January 2002, the new website, the "JFWY" website, was created. The purpose of the website was to allow Internet viewers to watch Berry engage in pornographic acts. Chain Communications hosted the website. Defendant registered the domain name, created a members-only section, and programmed the website with a JAVA applet, which provided a near live streaming image. According to Berry, defendant watched the images broadcasted over the website.

In the spring of 2003, Berry moved into an apartment, which he set up with several web cameras so that his Internet viewers could watch him day and night. Berry discussed the apartment and the cameras with defendant. He also informed defendant that he was going to create a new website, the "mexicofriends" website. The purpose of this website was also to allow Internet viewers to watch Berry engage in pornographic acts. Chain Communications hosted the website, and defendant registered the domain name, created a members-only section, and programmed the website with the JAVA applet.

Defendant denied knowing that Berry was broadcasting pornographic images of himself over the JFWY and mexicofriends websites. He believed that the JFWY website was a "rouse." Berry explained to him that the website only contained pictures of Berry in "suggestive" poses and that the website's name stood for "just f****** with you." With the website, Berry "was just f****** with those pedophiles on the [I]nternet who thought they could get child pornography." When Berry created the mexicofriends website, defendant was led to believe that the website would only contain pornographic images of Berry's Mexican friends. When defendant learned that the website had pornographic images of Berry, he believed that Berry was over the age of 18.

II. 47 USC 230

Defendant argues that the trial court erred in failing to instruct the jury on federal law, 47 USC 230 (§ 230), and how it relates to whether defendant could be convicted of the pornography offenses. Specifically, defendant argues that the jury should have been instructed that he could not be convicted of the pornography offenses unless it found that he actually contributed to the creation of the child pornography. The jury also should have been instructed, defendant claims, that an Internet service provider does not create pornography by providing bandwidth or by providing technical or artistic assistance. This unpreserved claim of instructional error is reviewed for plain error affecting defendant's substantial rights. *People v Hill*, 257 Mich App 126, 151-152; 667 NW2d 78 (2003).

Pursuant to § 230, "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 USC 230(c)(1). An "information content provider" is "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 USC 230(f)(3). An "interactive computer service" is "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services

offered by libraries or educational institutions." 47 USC 230(f)(2). There is no dispute that Berry was an information content provider for the JFWY and mexicofriends websites and that defendant, acting as Chain Communications, was an interactive computer service provider.

Plaintiff claims that defendant was not entitled to a jury instruction on § 230 because the federal statute only provides immunity from civil liability. There is language in federal civil cases that could suggest Congress only intended to protect interactive computer service providers from civil liability. See, e.g., *Zeran v America Online, Inc*, 129 F3d 327, 330-331 (CA 4, 1997) ("Congress made a policy choice, however, not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages."). However, because the federal courts in those cases were not required to address whether § 230 provides immunity from a criminal prosecution, we do not find the statement from *Zeran* and other similar statements persuasive on the issue. Rather, to determine whether § 230 applies to criminal prosecutions, we look to the language of the statute. See *Walters v Nadell*, 481 Mich 377, 381-382; 751 NW2d 431 (2008) ("When interpreting a federal statute, [o]ur task is to give effect to the will of Congress . . . . To do so, we start, of course, with the statutory text.") (internal quotations and alterations omitted).

In § 230, Congress specified the effect the statute was to have on state laws:

> Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. *No cause of action may be brought and no liability may be imposed under* ***any*** *State or local law that is inconsistent with this section.* [47 USC 230(e)(3) (emphasis added).]

Undefined statutory terms should be afforded their common, generally accepted meaning. *People v Williams*, 256 Mich App 576, 581; 664 NW2d 811 (2003). The term "'[a]ny' means 'every; all.'" *Nat'l Pride At Work, Inc v Governor*, 481 Mich 56, 77; 748 NW2d 524 (2008), quoting *Random House Webster's College Dictionary* (1991). Accordingly, the phrase "any State or local law" includes civil and criminal laws. Thus, because Congress intended that no liability may be imposed under a state criminal law that is inconsistent with § 230, we reject plaintiff's argument that § 230 does not apply to criminal prosecutions.

Before trial, defendant moved to quash the pornography charges on the basis that they were "specifically preempted and exempted from state prosecution" by § 230. The trial court denied the motion to quash. It held that § 230 did not preempt the prosecution of the pornography offenses because MCL 750.145c was consistent with § 230. Defendant does not challenge the trial court's ruling on the motion to quash. He provides no argument that, based on the elements of MCL 750.145c(2) and (3), criminal prosecutions and resulting convictions for either crime would be inconsistent with § 230. Because the trial court held that MCL 750.145c was not inconsistent with § 230, and because defendant does not challenge this ruling, we find no plain error in the trial court's failure to sua sponte instruct the jury on § 230.

Nonetheless, defendant also claims that he was denied the effective assistance of counsel because counsel failed to request a jury instruction on § 230. Defendant argues that such an instruction was necessary because the prosecutor argued, and suggested through witnesses, that a failure to monitor and censor for child pornography triggered criminal liability.

To establish ineffective assistance of counsel, a defendant must show that (1) his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008). A reasonable probability is one sufficient to undermine confidence in the outcome. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Counsel is presumed to have provided effective assistance, and the defendant bears a heavy burden to prove otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Because the trial court did not hold a *Ginther*[1] hearing on defendant's claim of ineffective assistance, our review is limited to facts on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

Jury instructions must include all the elements of the charged offenses and must not exclude any material issues, defenses, and theories that are supported by the evidence. *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). Even if the instructions are imperfect, there is no error if the instructions fairly represented 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).

The immunity afforded to an interactive computer service provider by § 230 is broadly construed. *Universal Communication Sys, Inc v Lycos, Inc*, 478 F3d 413, 419 (CA 1, 2007). However, the immunity only applies when the information has been provided by another information content provider. *Id.* In other words, "an interactive computer service provider remains liable for its own speech." *Id.* Content distributed over the Internet is not the speech of the interactive computer service provider if the provider was only responsible for the general features and mechanisms of the service. See *id.* at 420; *Carafano v Metrosplash.com, Inc*, 339 F3d 1119, 1124-1125 (CA 9, 2003); *Ben Ezra, Weinstein, & Co, Inc v America Online Inc*, 206 F3d 980, 985-986, (CA 10, 2000). In addition, mere notice of the content is not enough to make the content the speech of the interactive computer service provider. *Universal Communication Sys, Inc*, *supra* at 420.

To convict a defendant of child sexually abusive activity, a prosecutor is required to prove that the defendant "*persuade[d], induce[d], entice[d], coerce[d], cause[d], or knowingly allow[ed]* a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material." MCL 750.145c(2) (emphasis added).[2] The statute does not define the six emphasized words. The common, generally accepted meaning of a term may be ascertained by consulting a dictionary. *People v Perkins*, 473 Mich 626, 639; 703 NW2d 448 (2005). To "persuade" means "to prevail on (a person) to do something, as by advising or

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

[2] MCL 750.145c(2) also imposes criminal liability on persons "who arrange[] for, produce[], make[], or finance[] . . . any child sexually abusive activity or child sexually abusive material" and persons "who attempt[] or prepare[] or conspire[] to arrange for, produce, make, or finance any child sexually abusive activity or child sexually abusive material." See *People v Adkins*, 272 Mich App 37, 41; 724 NW2d 710 (2006). Defendant was not charged with these activities.

urging." *Random House Webster's College Dictionary* (1992). To "induce" means "to lead or move by persuasion or influence, as to some action or state of mind." *Id.* To "entice" means "to lead on by exciting hope or desire; allure; tempt; inveigle." *Id.* To "coerce" means "to compel by force or intimidation." *Id.* Pursuant to these definitions, when a person persuades, induces, entices, or coerces another, the person is actively and intentionally attempting to bring about a particular action or result. However, the definitions of "cause" and "allow" do not necessarily have the actively and intentionality elements that are contained in the definitions of the other four words. To "cause" means "to be the cause of; bring about." *Id.* To "allow" means "to give permission to or for; permit," "to let have," "to permit by neglect or oversight." *Id.* But, the term "allow" is preceded by the word "knowingly," which this Court has stated is a synonym for "intentionally." *People v Maynor*, 256 Mich App 238, 241; 662 NW2d 468 (2003), aff'd on other grounds 470 Mich 289 (2004). Moreover, when words are grouped together, the words are to be given related meaning. *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521, 533; 697 NW2d 895 (2005). In accordance with this rule of statutory construction, we construe the terms "cause" and "knowingly allow," as used in MCL 750.145c(2), to include that actively and intentionally requirements that are contained within the definitions of "persuade," "induce," "entice," and "coerce." Consequently, a criminal prosecution, and a subsequent conviction, of MCL 750.145c(2), requires proof that the defendant actively and intentionally took action directed toward a child to engage the child in a sexually abusive activity for the purpose of producing child sexually abusive material.

Because MCL 750.145c(2) requires this intentional action, a conviction of MCL 750.145c(2) is not inconsistent with § 230. An interactive computer service provider, by providing bandwidth, by publishing content that was generated by an information content provider's use of the service's general features and mechanisms, or by knowing of the nature of the published content, has not taken an intentional action directed toward a child to engage the child in child sexually abusive activity. Accordingly, an instruction on § 230 was not necessary to avoid a conviction of child sexually abusive activity, MCL 750.145c(2), and using a computer to communicate with another to commit child sexually abusive activity, MCL 750.145d(2)(f), that was inconsistent with § 230. Thus, counsel was not ineffective for failing to request an instruction on § 230 as it related to MCL 750.145c(2) and MCL 750.145d(2)(f).[3]

To convict a defendant of distributing or promoting child sexually abusive material, MCL 750.145c(3), the prosecution is required to establish that (1) the defendant distributed or promoted child sexually abusive material, (2) the defendant knew the material was child sexually abusive material at the time of distribution or promotion, and (3) the defendant distributed or promoted the material with criminal intent. *People v Tombs*, 472 Mich 446, 465; 697 NW2d 494 (2005) (opinion by Kelly, J). The distribution or promotion of child sexually abusive material is not a strict liability offense; it requires proof of criminal intent to distribute or promote child

[3] Any prejudice resulting from the testimony of any witness suggesting that defendant was guilty if he knew that Chain Communications hosted a website that contained child pornography was cured by the trial court's instruction that the jury was to take the law as given by the trial court. A jury is presumed to follow its instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

sexually abusive material. *Id.* at 456-459 (opinion by Kelly, J.), 466 (opinion by Taylor, C.J.). This criminal intent includes the intent that others will discover or view the child sexually abusive material. *Id.* at 461 (opinion by Kelly, J.).

We can imagine a prosecution for MCL 750.145c(3) that would be inconsistent with § 230. Such a prosecution would be based on the theory that an interactive computer service provider distributes child sexually abusive material with the intent that it be seen by others when, after receiving notice of the material, keeps the material available to be viewed or discovered by others. However, the prosecution of defendant for distributing or promoting child sexually abusive material was not based on such a theory.

The prosecution of defendant was based on the theory that defendant, knowing that the purpose of the JFWY and mexicofriends websites was to allow Internet viewers to watch Berry engage in pornographic acts, was an active participant in the creation of the two websites. The prosecution produced substantial evidence to the jury to support its theory. For example, the prosecution presented evidence (1) that defendant knew Berry hosted his own pornographic website, that Berry wished to take this website, the justinscam website, to the "next level," and that the purpose of both the JFWY and mexicofriends websites was for others to see pornographic images of Berry, (2) that defendant hosted the two websites with Chain Communications and registered the domain names, (3) that defendant programmed the websites with the JAVA applet to create a near live streaming video image, (4) that defendant created the members-only sections for the websites, and (5) that defendant provided Berry with an advanced web camera when he visited Berry in Mexico. In addition, in online conversations, defendant told Berry that Berry should "milk the cam for all its worth," that Berry "got the money shots right before" Berry turned the web cam off, and that some high resolution images of the "money shots" would be nice in the website's members-only section. This was the same theory presented by the prosecution during closing arguments. In addition, defendant did not admit to knowing that Berry used the JFWY and mexicofriends websites to broadcast pornographic images of himself over the Internet. Rather, defendant testified that he believed the JFWY website only contained images of Berry in "suggestive" poses and that the mexicofriends website only contained pornographic images of friends of Berry. Because the prosecution of defendant for distributing or promoting child sexually abusive material, as tried and argued before the jury, was based on defendant's active involvement in the creation of the JFWY and mexicofriends websites,[4] and because defendant claimed that he did not know the content of the two websites, an instruction that defendant could not be convicted of MCL 750.145c(3) for providing bandwidth or for publishing material that Berry created using the general services and mechanisms provided by Chain Communications was not necessary in order to avoid a conviction that was inconsistent with § 230. Thus, counsel was not ineffective for failing to

[4] We note that, although defendant claims on appeal that he was merely providing standard web hosting duties to Berry for the JFWY and mexicofriends websites, there was no evidence presented at trial that many of the services defendant provided to Berry for the two websites, such as use of the applet, the creation of members-only pages, the technical assistance given to members of the two websites, and the registration of domain names, were provided for any of Berry's other websites or to other clients of Chain Communications.

request a jury instruction on § 230 as it related to distributing or promoting child sexually abusive material, MCL 750.145c(3), and using a computer to communicate with another to commit distribution of child sexually abusive material, MCL 750.145d(2)(d).

III. Motion for New Trial

Defendant argues that he is entitled to a new trial on the basis of newly discovered evidence. This newly discovered evidence includes PayPal payments from Kurt Eichenwald to Greg Mitchell, which were accompanied by notes suggesting that Eichenwald was downloading and paying for child pornography, and admissions from Eichenwald that he suffers from memory problems. Defendant maintains that, because the newly discovered evidence establishes that Berry and Eichenwald conspired to keep the PayPal payments hidden, the newly discovered evidence would have convinced the jury that the testimony of Berry and Eichenwald was motivated solely by the two men's greed.

To receive a new trial on the basis of newly discovered evidence, a defendant must show that "(1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial." *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003) (internal quotations omitted). "Whether to grant a new trial is in the trial court's discretion, and its decision will not be reversed absent an abuse of that discretion." *People v Brown*, 279 Mich App 116, 144; 755 NW2d 664 (2008). A trial court abuses its discretion when its decision falls outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). For the reasons articulated below, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

First, the motion for a new trial is grounded in much speculation. Defendant's conclusion that Berry and Eichenwald conspired to keep the PayPal payments secret is speculation. Eichenwald made the PayPal payments to Mitchell, and there is no evidence to suggest with any certainty that Berry knew of the payments. In addition, defendant's conclusion that, because of the timing of the $2,000 payment, Eichenwald may have commissioned the "Taylor video" is speculation, as is defendant's conclusion that Berry launched a new website, the "justinsfriends" website, in June 2005 to keep Eichenwald, "the big player," satisfied.

Second, evidence of the PayPal payments is not directly relevant to whether defendant committed the charged offenses. The PayPal payments had no connection to the JFWY and mexicofriends websites. Compare *People v Mechura*, 205 Mich App 481, 484; 517 NW2d 797 (1994) (granting the defendant a new trial because the newly discovered testimony would have provided corroboration of the defendant's theory of self-defense and there were many reasons to believe the testimony). In addition, evidence of the PayPal payments shows no direct bias by either Eichenwald or Berry against defendant. Rather, as acknowledged by defendant, the evidence of the PayPal payments only affects the credibility of Eichenwald and Berry. While the credibility of a witness is always relevant, *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995); *People v Coleman*, 210 Mich App 1, 8; 532 NW2d 885 (1995), when newly discovered evidence is useful only to impeach a witness, the evidence is deemed cumulative, *People v Barbara*, 400 Mich 352, 363; 255 NW2d 171 (1977). Indeed, at

trial, defendant presented to the jury the theory that Eichenwald was, at all times during his investigation, motivated by greed.

Third, Eichenwald provided the story as to how Berry's pornographic endeavors were discovered. His testimony was minimally relevant to whether defendant committed the charged offenses. Thus, placing before a jury issues concerning whether Eichenwald was viewing and paying for child pornography and whether Eichenwald, because of his failure to take notes when he first decided to attempt to locate Berry or because of the effects of his epilepsy, forgot about the PayPal payments, could easily divert the jury's attention from the actual issue before it, whether defendant committed the charged offenses. If defendant were allowed to present and argue the newly discovered evidence as it was presented in his motion for a new trial, the issues concerning and relating to the PayPal payments would overshadow the issue of defendant's guilt. Pursuant to MRE 403, which permits a trial court to exclude relevant evidence on the basis that the evidence could result in confusion of the issues or mislead the jury, we are convinced that a trial court would, in some manner, restrict or limit the evidence defendant could present to show that Eichenwald and Berry conspired to keep the PayPal payments secret. Newly discovered evidence, to entitle a defendant to a new trial, must be admissible. *People v Darden*, 230 Mich App 597, 606; 585 NW2d 27 (1998).

Defendant also claims that the omission of evidence of Eichenwald's PayPal payments from trial denied him his constitutional right of confrontation. We disagree.

A defendant has a constitutional right to confront the witnesses against him. US Const, Am VI; Const 1963, art 1, § 20; *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998).

> The right to confront one's accusers consists of four separate requirements: (1) a face-to-face meeting of the defendant and the witnesses against him at trial; (2) the witnesses should be competent to testify and their testimony is to be given under oath or affirmation, thereby impressing upon them the seriousness of the matter; (3) the witnesses are subject to cross-examination; and (4) the trier of fact is afforded the opportunity to observe the witnesses' demeanor. [*People v Pesquera*, 244 Mich App 305, 309; 625 NW2d 407 (2001).]

A defendant does not have a constitutional right to a successful cross-examination. *People v Watson*, 245 Mich App 572, 584; 629 NW2d 411 (2001).

Defendant cross-examined Berry and Eichenwald. No limitations were placed on his ability to cross-examine them. See *Ho, supra* at 189 ("If a defendant has been limited in his ability to cross-examine the witnesses against him, his constitutional right to confront witnesses may have been violated."). Defendant's argument is simply that, because he did not know of the PayPal payments, he was unable to successfully cross-examine Berry and Eichenwald. Because defendant did not have a right to a successful cross-examination, *Watson, supra*, defendant's right of confrontation was not violated.

IV. Accomplice Instruction

Defendant next claims that the trial court erred in denying his request to instruct the jury that Berry was an accomplice to the pornography offenses and that, because Berry was an

accomplice, his testimony should be closely examined. We disagree. The decision to give a cautionary accomplice instruction is within the trial court's sound discretion, and the trial court's decision whether to give such an instruction is reviewed for an abuse of discretion. *People v Young*, 472 Mich 130, 135; 693 NW2d 801 (2005).

At trial, defendant requested the trial court to instruct the jury, pursuant to CJI2d 5.4, that Berry was an accomplice to the pornography offenses. The trial court denied the request on the basis that Berry was not an accomplice because, at the time of the conduct charged in the information, Berry was under the age of 18.[5] See MCL 750.145c(1)(b), which defines "child" as "a person who is less than 18 years of age." Consequently, the trial court also denied defendant's request to instruct the jury, pursuant to CJI2d 5.6, that Berry's testimony should be closely examined.

On appeal, defendant assumes that Berry was an accomplice to the pornography offenses and, therefore, argues that the trial court should have instructed the jury that it could only accept Berry's testimony after closely examining it. By assuming that Berry was an accomplice, defendant has failed to address the basis of the trial court's decision to refuse to instruct the jury pursuant to CJI2d 5.4 and 5.6. He has provided no argument that Berry, even though he was under the age of 18 when the crimes occurred, could be considered an accomplice to the pornography offenses. Because defendant has failed to address the basis of the trial court's ruling, we need not consider granting him the relief he seeks. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004).

Nonetheless, we do not believe that the trial court abused its discretion in refusing to instruct the jury that Berry was an accomplice to the pornography offenses. A person is an accomplice if he could be charged with the same offense the defendant is charged with committing. *People v Threkeld*, 47 Mich App 691, 696; 209 NW2d 852 (1973). The offense of "child sexually abusive activity focuses on protecting children from sexual exploitation, assaultive or otherwise[,] and . . . the purpose of the statute is to combat the use of children in pornographic movies and photographs, and to prohibit the production and distribution of child pornography." *People v Riggs*, 237 Mich App 584, 591; 604 NW2d 68 (1999) (internal quotations omitted). A child cannot consent to child sexually abusive activity. *People v Wilkens*, 267 Mich App 728, 737; 705 NW2d 728 (2005). It would be paradoxical to label Berry an accomplice to the pornography offenses where MCL 750.145c was for the protection of Berry and where Berry could not legally consent to the child sexually abusive activity or to defendant's distribution of the child pornography over the JFWY and mexicofriends websites. For this reason, the trial court chose a principled outcome by refusing to instruct the jury that Berry was an accomplice to the pornography offenses. *Babcock, supra*.

Even if the trial court abused its discretion in refusing to instruct the jury pursuant to CJI2d 5.4 and 5.6, defendant has failed to establish that the error was not harmless. Defendant has the burden to persuade this Court that it is more probable than not that the trial court's error

[5] The trial court granted the prosecutor's motion to amend the information to charge only conduct that occurred before Berry turned 18 years of age.

affected the outcome of the proceedings. *Young, supra* at 141-142. Berry's involvement with the JFWY and mexicofriends websites, along with his commission of other crimes, was revealed to the jury, his credibility was challenged by defendant during closing arguments, and the trial court instructed the jury on how to judge the credibility of witnesses. Under these circumstances, any error by the trial court was harmless. See *id.* at 143-144.

V. Joinder

Defendant argues that the trial court erred in failing to sever the pornography offenses and the CSC offense for separate trials. This unpreserved claim of error is reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A prosecutor may file an information that charges a single defendant with any two or more offenses. MCR 6.120(A). However, "[o]n the defendant's motion, the court must sever for separate trials offenses that are not related as defined in subrule (B)(1)." MCR 6.120(C). Under MCR 6.120(B)(1), offenses are related if they are based on "the same conduct or transaction," "a series of connected acts," or "a series of acts constituting parts of a single scheme or plan."

Here, even if we were to conclude that the pornography offenses and the CSC offense were not related, because defendant did not move for a severance, the trial court was under no obligation to sever the offenses for separate trials. MCL 6.120(C). Consequently, defendant cannot establish plain error in not having these charges severed by the trial court.

Additionally, when a defendant does not move to sever offenses charged in one information, a trial court has the discretion, on its own initiative, to sever the charges "when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense." MCR 6.120(B)(1). Factors to be considered by the trial court include "the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial." MCR 6.120(B)(2).

Consideration of the above factors would not require severance of the offenses. At the time of trial, Berry and his mother, who was also a witness, lived in Bakersfield, California. Accordingly, it was most convenient for Berry and his mother for the offenses to be joined for one trial. In addition, much of Berry's testimony, and specifically how his relationship with defendant began and was cultivated, would be required at trials for the pornography offenses and the CSC offense. Thus, joinder of the offenses conserved the resources of the parties and the court. Further, the evidence presented at trial was not voluminous or complex, minimizing the potential for confusion. Although defendant argues that joinder of the offenses was "uniquely" and "obviously" prejudicial to him because of the testimony of Tim Horn and Corey Blake, which was admitted as MRE 404(b) evidence to prove that defendant acted with a plan or scheme, neither Horn nor Blake were involved with the creation or maintenance of the JFWY and mexicofriends websites or with the websites' content. Horn and Blake were not linked to the websites. Thus, the jury would have encountered no trouble in not considering the testimony of Horn and Blake in deliberating on the pornography offenses. Based on these factors, the potential prejudice to defendant did not necessarily outweigh the benefits of a consolidated trial.

Thus, the trial court did not abuse its discretion by failing to sua sponte sever the pornography and the CSC offenses.

Defendant also claims that defense counsel's failure to move for a severance of the charges constituted ineffective assistance of counsel. We disagree.

In *People v Tobey*, 401 Mich 141, 151-152; 257 NW2d 537 (1997),[6] the Supreme Court, citing commentary from the ABA Standards Relating to Joinder and Severance, explained the three phrases contained in MCR 6.120(B)(1):

> "[S]ame conduct" refers to multiple offenses "as where a defendant causes more than one death by reckless operation of a vehicle". "A series of connected acts together" refers to multiple offenses committed "to aid in accomplishing another, as with burglary and larceny or kidnapping and robbery". "A series of acts * * * constituting parts of a single scheme or plan" refers to a situation "where a cashier made a series of false entries and reports to the commissioner of banking, all of which were designed to conceal his thefts of money from the bank[.]"

The pornography offenses and the CSC offense were "a series of connected acts," MCL 6.120(B)(1)(b), because the pornography offenses aided in the accomplishment of the CSC. The conduct related to the CSC offense occurred in June 2002. On defendant's suggestion and encouragement, Berry attended Camp CAEN, and while attending the camp, Berry spent several hours with defendant and during those hours, defendant performed oral sex on Berry. Before June 2002, defendant had been watching Berry over the Internet and learned that Berry was interested in computers. Upon learning that Berry wanted to take his first website, the justinscam website, to "the next level," defendant discussed with Berry the new website and helped Berry setup and create the JFWY website. By helping Berry create the website, defendant strengthened his relationship with Berry. Berry believed that defendant was his friend. By having a strong relationship with Berry, defendant was able to convince Berry to attend Camp CAEN. Under these circumstances, the offenses were related because the pornography offenses aided in the accomplishment of the CSC. *Tobey*, *supra*.

Counsel is not ineffective for failing to make a futile motion. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). A motion for a severance would have been properly denied. First, because the pornography offenses and the CSC offense were related, defendant did not have a right to a severance. Second, because the potential prejudice to defendant did not necessarily outweigh the benefits of a consolidated trial, the trial court would have properly exercised its discretion by denying a motion to sever. Accordingly, defendant has not established that a motion to sever would not have been futile.

Further, even if the charges were not related, we cannot conclude that counsel's failure to request a severance fell below an objective standard of reasonableness under prevailing professional norms. *Uphaus, supra*. A defendant must overcome a strong presumption that

[6] MCR 6.120 is a codification of the *Tobey* decision. *People v Daughenbaugh*, 193 Mich App 506, 509; 484 NW2d 690 (1992), modified in part on other grounds 441 Mich 867 (1992).

counsel's performance constituted sound trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). This Court will not substitute its judgment for that of defense counsel regarding matters of trial strategy. *Id.* The decision whether to move for a severance of multiple offenses contained in one information is a matter of trial strategy. Here, defense counsel may have reasonably concluded that defendant had a better chance of obtaining an acquittal on all of the offenses in a trial before a single jury. "A particular strategy does not constitute ineffective assistance of counsel simply because it does not work." *Id.* at 61. Accordingly, defendant has failed to overcome the strong presumption that counsel's action in not requesting a severance of the offenses was sound trial strategy.

VI. Ineffective Assistance of Counsel

Defendant claims that defense counsel was ineffective for failing to investigate and to present expert testimony to explain the possibility that, as testified by defendant, someone else placed the three videos of Berry having sex with a prostitute on his hard drive. We disagree. Defendant raised this claim of ineffective assistance of counsel in his motion for a new trial, but because the trial court did not hold a *Ginther* hearing, our review of defendant's claim is limited to facts on the record. *Wilson, supra*.

The failure to reasonably investigate may constitute ineffective assistance of counsel, *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005), but the defendant must show prejudice resulting from the failure to investigate, *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). Failure to call a witness may also constitute ineffective assistance, but the defendant must show that the failure deprived him of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). A substantial defense is one that might have made a difference in the outcome of the trial. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996).

Defendant has failed to identify what an investigation of his hard drive would have revealed regarding how the three videos came to be on the hard drive. Likewise, defendant has failed to indicate the substance of an expert witness's testimony. Defendant has, therefore, failed to establish that an investigation into his hard drive and the testimony of an expert witness would have supported defendant's testimony that someone other than him uploaded the three videos to his hard drive. Accordingly, defendant has failed to establish that counsel's failure to investigate the hard drive prejudiced him and that counsel's failure to call an expert witness deprived him of a substantial defense. Defendant was not denied the effective assistance of counsel.

VII. OV 11

Finally, defendant argues that he is entitled to be resentenced because the trial court erred in scoring 25 points for offense variable (OV) 11, MCL 777.41. We agree. A sentencing court has discretion in determining the number of points to be scored, provided that record evidence adequately supports the scoring. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). This Court will uphold a scoring decision for which there is any evidence in support. *Id.*

The number of points to be scored for OV 11 is determined by the number of "sexual penetrations of the victim by the offender arising out of the sentencing offense." MCL 777.41(2)(a). 50 points are to be scored if "[t]wo or more criminal sexual penetrations

occurred;" 25 points are to be scored if "[o]ne criminal sexual penetration occurred;" and zero points are to be scored if "[n]o criminal sexual penetration occurred." MCL 777.41(1). The trial court scored 25 points for OV 11 because it found that defendant's sexual penetration of Berry, which was the basis of defendant's CSC conviction, arose out of the sentencing offense, which was defendant's conviction for child sexually abusive activity relating to the JFWY website.

Defendant's argument that the trial court's scoring of OV 11 violates his right to a jury as articulated in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004) is without merit. Our Supreme Court has definitely ruled that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v McCuller*, 479 Mich 672, 676-678; 739 NW2d 563 (2007); *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006).

Regardless, there is no evidence in the record to support the trial court's scoring of OV 11. In *People v Johnson*, 474 Mich 96, 101; 712 NW2d 703 (2006), the Supreme Court defined the phrase "arising out of" as used in MCL 777.41:

> [W]e have previously defined "arising out of" to suggest a causal connection between two events of a sort that is more than incidental. . . . Something that "aris[es] out of," or springs from or results from something else, has a connective relationship, a cause and effect relationship, of more than an incidental sort with the event out of which it has arisen."

As already stated, the sentencing offense was the child sexually abusive activity conviction relating to the JFWY website. A person who "persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material" is guilty of child sexually abusive activity. MCL 750.145c(2). The sexual penetration occurred while Berry was with defendant in Michigan. There is no evidence in the record indicating that at the time of the sexual penetration, or even before or after the penetration, defendant was persuading, inducing, or enticing Berry to engage in a child sexually abusive activity for the purpose of producing child sexually abusive material. Accordingly, there was not a cause and effect relationship that was more than incidental between the sexual penetration and the sentencing offense. *Johnson, supra*. The trial court improperly scored 25 points for OV 11.

Because the trial court's scoring error altered the appropriate guidelines range, defendant is entitled to be resentenced. *People v Francisco*, 474 Mich 82, 88-92; 711 NW2d 44 (2006). We, therefore, vacate defendant's sentences and remand for resentencing in accordance with a correct scoring of OV 11.

We affirm defendant's convictions, vacate his sentences, and remand for resentencing. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra