STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 7, 2010
v	No. 289379 Grand Traverse Circuit Court
KEVIN TODD ACTON, Defendant-Appellant.	LC No. 08-010597-FH

Before: WHITBECK, P.J., and SAWYER and BORRELLO, JJ.

PER CURIAM.

Defendant was convicted of three counts of possession of child sexually abusive material, MCL 750.145c(4), and one count of using a computer to commit a crime, MCL 752.797(3)(d). He was sentenced to prison for three concurrent terms of 18 months to four years on the possession counts, concurrent to a term of two to seven years for using a computer to commit a crime. Defendant appeals as of right. For the reasons set forth in this opinion, we affirm defendant's convictions and sentences.

I. FACTS AND PROCEDURAL HISTORY

The basis for defendant's convictions for possession of child sexually abusive material is five photographs that were located in temporary Internet folders (TIFs)[1] on defendant's personal

[1] In *People v Flick*, ___ Mich ___; ___ NW2d ___ (Docket No. 138258; July 27, 2010), slip op at 1 n 1, our Supreme Court explained what a TIF is:

> Temporary Internet files or TIFs are records of all the websites a computer user has visited. Every time a user visits a website, most web browsers will automatically send a record of that website to the hard drive so that the computer can access the website faster in the future. A user can access the stored TIF even if working off-line. The TIF remains on the computer permanently unless the user manually deletes that record or the computer deletes that record in accordance with its maintenance settings. Even after its deletion, evidence of the TIF remains in an imbedded index on the computer's hard drive. The "internet

laptop computer. Defendant purchased the laptop for the purpose of looking at pornographic images of teens. His wife discovered the laptop and suspected that defendant was using it to view pornography; she turned on the computer and observed several pictures depicting young girls, who appeared to be between the ages of 12 and 20, engaged in sexual activity. Defendant's wife thereafter consulted with an attorney and turned the laptop over to police.

Detective Todd Heller of the Grand Traverse Sherriff's Office is an expert in computer forensics. Heller obtained a search warrant and examined defendant's laptop. His examination of the laptop's hard drive focused on files containing images. Heller located on defendant's laptop 94 jpeg images, a common image format used for child pornography that appeared to contain nude depictions of individuals under the age of 18 years old engaging in sexual acts or advertisements. He also recovered 43 images that had been deleted within a TIF. According to Heller, the vast majority of the images located on defendant's laptop were child pornography.

Heller's examination of the laptop revealed that its internet history included searches for teen pornography. Search terms that had been used on the laptop included: teen lesbians, hairy teens, youngest teen, hot black teen, teen ass lick, tiny teen girls, tiny snatch, Lolita, and little girl. In addition, Heller's examination identified websites that had been visited on the laptop, which included: sosoyoung.com, youngamateurs.com, delicateteens.com, littletightgirls.com, and virginoff.com. Heller visited those sites to verify that they contained child sexually abusive material. According to Heller, most of the sites that had been visited contained some reference to federal law requiring that the models in the images to be over 18 years old, although he noted that such references are common on child pornography sites.

Following a two-day jury trial, the jury returned a guilty verdict on three of five counts of possession of child sexually abusive material and one count of using a computer to commit a crime. The jury acquitted defendant of two counts of possession of child sexually abusive material. Defendant appeals as of right.

II. ANALYSIS

A. SUFFICIENCY OF THE EVIDENCE REGARDING POSSESSION

Defendant argues that there was insufficient evidence to establish the possession element of the offense of possession of child sexually abusive material because his convictions were based on five photographs that were located in TIFs on his personal laptop, and there was no evidence that any of the pictures had been viewed, copied, or otherwise accessed or manipulated after they had been automatically downloaded.

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cache" or "internet temporary folder" is a "set of files kept by a web browser to avoid having to download the same material repeatedly. Most web browsers keep copies of all the web pages that you view, up to a certain limit, so that the same images can be redisplayed quickly when you go back to them." Douglas Downing, et al., *Dictionary of Computer and Internet Terms*, 8th ed, p 149 (Barron's, 2003).

"Whether conduct falls within the scope of a penal statute is a question of statutory interpretation." *Flick*, slip op at 7. We review de novo questions of statutory interpretation. *Id.* Similarly, we review de novo a sufficiency of the evidence claim. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

Due process prohibits a criminal conviction unless the prosecution establishes guilt of the essential elements of a criminal charge beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Circumstantial evidence and the reasonable inferences it engenders are sufficient to support a conviction, provided the prosecution meets its burden of proof. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). A reviewing court must examine the evidence in a light most favorable to the prosecution, and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond reasonable doubt. *Hawkins*, 245 Mich App at 457. All conflicts in the evidence must be resolved in the favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

MCL 750.145c(4) provides, in pertinent part, as follows:

> 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 person has not taken reasonable precautions to determine the age of the child.

The statute defines "child sexually abusive material" as including "any 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 . . . which is of a child or appears to include a child engaging in a listed sexual act[.]" MCL 750.145c(1)(m). The statute defines "child" as "a person who is less than 18 years of age[.]" MCL 750.145c(1)(b). The statute does not define possession.

In support of his argument that the prosecution failed to establish that he possessed child sexually abusive material, defendant relies on *People v Girard*, 269 Mich App 15; 709 NW2d 229 (2005). In *Girard*, this Court stated that "the prosecution had 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." *Id*. at 20. However, the Court in *Girard* specifically did *not* decide whether an image in a TIF constituted possession under MCL 750.145c(4), stating that it "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" because other evidence presented in the case was sufficient to demonstrate the defendant's possession. *Id*. at 23.

Furthermore, in *Flick*, a consolidated case involving two defendants, our Supreme Court recently addressed whether the presence of automatically created TIFs on a computer's hard drive may amount to "knowing possession" of child sexually abusive material under MCL

750.145c(4). In *Flick*, the defendants were charged with possession of child sexually abusive material after investigators found child pornography images stored in TIFs on their computers. The defendants argued that they did not "possess" the images as required by the statute because they merely accessed and viewed the material on the internet. *Flick*, slip op at 8. Our Supreme Court disagreed, concluding that the term "possesses" in MCL 750.145c encompasses both actual and constructive possession. *Id.* at 2. Furthermore, our Supreme Court ruled that:

> The Legislature reasonably selected the verb "possesses" to communicate that only a person who has the power to exercise a degree of dominion or control over "any child sexually abusive material" is sufficiently culpable to fall within the scope of MCL 750.145c(4). That is, the possessor holds the power or authority to control or exercise dominion over child sexually abusive material at a given time. [*Id.* at 11.]

The Supreme Court held that the evidence established that both defendants did more than passively view child sexually abusive material and that "the many intentional affirmative steps taken by defendants to gain access and control over child sexually abusive material belie their claims that they merely viewed the depictions." *Id.* at 15. The intentional affirmative steps by the defendants in *Flick* included purposely operating their computers to locate websites containing child sexually abusive material, voluntarily using their credit cards to purchase access to websites with depictions of such material, and intentionally accessing the depictions of child sexually abusive material contained on the websites. *Id.* at 14.

We find that under the reasoning of *Flick*, there was sufficient evidence that defendant possessed depictions of child sexually abusive material under MCL 750.145c(4). "Possession can be established with circumstantial or direct evidence, and the ultimate question of possession is a factual inquiry 'to be answered by the jury.'" *Id.* at 12, quoting *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989). Like the defendants in *Flick*, defendant in the present case also took intentional affirmative steps that gave him the power and the intention to exercise control or dominion over the depictions of child sexually abusive material that appeared on his computer. Defendant intentionally purchased a laptop computer for the purpose of viewing teen pornography, and he kept the laptop hidden in a closet or in his car so that his wife would not find it. Defendant also purposely operated the laptop to locate websites containing child sexually abusive material, as evidenced by the search terms that he used to locate such websites and the names of the websites that he had visited on the laptop. In addition, defendant's testimony that he clicked on thumbnails of some pictures and attempted to save some pictures to a thumb drive in order to look at them later is evidence that defendant intentionally accessed depictions of child sexually abusive material contained on the websites. According to defendant, the individuals in the images he was looking at appeared to be between 15 and 16 years of age and he "was looking towards the younger end of that spectrum . . . ."

Detective Heller's testimony also showed that defendant intentionally accessed depictions of child sexually abusive material, as Heller had examined defendant's laptop and asserted that each of the images selected as a basis of each charge against defendant had been enlarged by the user, as evidenced by the size of the image file. In light of all of defendant's intentional affirmative steps to gain access and control over child sexually abusive material, we

find that there was sufficient evidence that defendant "possessed" such material under MCL 750.145c(4). See *Flick.*

In light of the abundance of evidence regarding the intentional affirmative steps that defendant took to gain access and control over child sexually abusive material, we reject defendant's argument that the statute impinges on First Amendment freedoms. Defendant was not convicted for merely visiting a website that he could not have known contained child sexually abusive material until visiting the site, but for possessing and manipulating those images.

Defendant's argument that his conviction cannot stand because the prosecutor failed to adequately prove that the images in question were of individuals under the age of 18 is also without merit.[2] Defendant argues that the lack of biographical evidence, expert testimony, or "other evidence probative of the subjects' age" related to the age of the individuals in the images requires a finding that insufficient evidence was presented below and that the pictures themselves cannot establish the age of the individuals pictured. This argument is without merit, as this Court has previously rejected it in *Girard*, 269 Mich App at 22, where we found that "the images themselves provided evidence of the ages of the persons depicted." Furthermore, MCL 750.145c(4) prohibits the possession of images that the "person knows, has reason to know, or should reasonably be expected to know" that the child is less than 18 years of age. Defendant testified that the individuals in the images he was looking at appeared to be between 15 and 16 years of age. Defendant's own testimony therefore constituted sufficient evidence that he "should reasonably be expected to know" that the individuals in the images were under the age of 18.

In sum, taken as a whole and viewed in a light most favorable to the prosecution, the evidence presented below and the reasonable inferences stemming from that evidence was sufficient to support defendant's convictions for possession of child sexually abusive material.[3] *Hawkins*, 245 Mich App at 457.

B. DOUBLE PUNISHMENT

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[2] The statute includes a provision requiring a defendant to provide timely notice of his intent to proffer a defense asserting that a depiction appearing to include a child was not created using any part of an actual person under the age of 18. MCL 750.145c(7). Defendant failed to provide such notice.

[3] To the extent that defendant argues that his conviction for using a computer to commit a crime should be reversed for want of sufficient evidence, we decline to address this argument. "A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim." *Nat'l Waterworks, Inc v Int'l Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007).

Defendant argues that two of his convictions for possession of child sexually abusive material must be vacated because each photograph should not have been considered a unit of possession; therefore, defendant asserts, his three convictions violate the constitutional prohibition against double punishment.

This issue is not preserved for appellate review because defendant raises it for the first time on appeal. *People v Eccles*, 260 Mich App 379, 385; 677 NW2d 76 (2004). Generally, double jeopardy issues constitute questions of law that this Court reviews de novo. *People v Calloway*, 469 Mich 448, 450; 671 NW2d 733 (2003). However, unpreserved double jeopardy issues are reviewed for plain error affecting a defendant's substantial rights. *People v Meshell*, 265 Mich App 616, 628; 696 NW2d 754 (2005). Under this standard, reversal is appropriate only where a plain error resulted in the conviction of an innocent defendant, or where a plain error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id*.

The Double Jeopardy clauses of the federal and state constitutions prohibit a criminal defendant from being placed twice in jeopardy for a single offense. US Const Ams V, XIV; Const 1963, art 1, §15; see also *People v Booker* (*After Remand*), 208 Mich App 163, 172; 527 NW2d 42 (1994). Defendant asserts that criminal prosecution for multiple counts of possession of child sexually abusive material based on multiple images found on his laptop violates this constitutional principle.

Defendant asserts that this Court's reasoning in *People v Smith*, 205 Mich App 69, 72-73; 517 NW2d 255 (1994), aff'd on other grounds *People v Peterson*, 450 Mich 349 (1995), is applicable to the instant case and supports his contention that two of his convictions must be vacated. In *Smith*, the defendant was convicted of four counts of producing child sexually abusive material, MCL 750.145c(2), based on multiple photographs taken on a single occasion. *Id*. We set aside three of the defendant's four convictions, reasoning that even though the defendant took multiple photographs, the victim only described one occasion when defendant took photographs. *Id.* Thus, we concluded that the evidence was insufficient to convict the defendant of four counts of child sexually abusive activity. *Id.* at 73.

However, this Court revisited this issue in *People v Harmon*, 248 Mich App 522, 524; 640 NW2d 314 (2001), where the defendant was convicted of four counts of violating MCL 750.145c(2) based on the introduction of four photographs, two depicting one victim, and two depicting a second victim, taken on the same day. The *Harmon* Court clarified the holding in *Smith*, and stated that the holding in *Smith* should not be interpreted to mean that a defendant could only be convicted once for multiple photographs taken of the same victim at one time. *Id*. at 527. The *Harmon* Court went on to conclude that the defendant's multiple convictions were permissible under the plain language of the relevant statutes. *Id*. at 528. *Harmon* constitutes binding precedent, despite defendant's assertions that its reasoning is unpersuasive and unsound. See MCR 7.215(C)(2).

Defendant further argues that even if *Harmon* is sound, it should not be applied in cases involving possession of, rather than production of, child sexually abusive material. Defendant specifically argues that because viewing a single Web page can result in multiple images being downloaded onto a defendant's hard drive automatically, the correct unit of prosecution should

be the act of possession, rather than each individual image. Defendant provides no citation to authority to support this assertion. "A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim." *People v Mackle*, 241 Mich App 583, 604, n 4; 617 NW2d 339 (2000). We therefore decline to address this argument.

Even if this Court accepts defendant's argument that images are sometimes downloaded to a computer without the user's actual knowledge, the evidence presented at trial demonstrates that this was not the case here. A forensic examination of defendant's computer revealed that multiple websites containing images of individuals who appeared younger than 18 years old were visited and that multiple search terms related to young women were used to find websites on the internet. The images randomly chosen to constitute the basis for each of the five counts against defendant were larger than thumbnail images, indicating that each image had been clicked on by the user to be viewed in a larger size. Thus, defendant's convictions were not based on a single act, but rather multiple acts of consciously choosing to view an image in a larger format.

Therefore, defendant fails to show the existence of a plain error, or that he is actually innocent. *Meshell*, 265 Mich App at 628. As a result, reversal is not appropriate.

C. PROSECUTORIAL MISCONDUCT

Defendant argues that numerous instances of prosecutorial misconduct deprived him of a fair trial. In order to preserve a claim of prosecutorial misconduct for appellate review, a defendant must have timely and specifically objected below, unless an objection could not have cured the error. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). Defendant did object to two of the claimed instances of prosecutorial misconduct—when the prosecutor questioned the computer forensic expert regarding how old the individuals in the images appeared, and when the prosecutor argued during closing argument that the jury could convict if the individuals in the images appeared younger than 18 years old. Thus, these arguments are preserved for review. However, defendant's remaining arguments are unpreserved as they were raised for the first time on appeal.

Preserved and unpreserved claims of prosecutorial misconduct are reviewed de novo to determine whether defendant was denied a fair trial. *People v Wilson*, 265 Mich App 386, 393; 695 NW2d 351 (2005); *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). However, unpreserved claims of prosecutorial misconduct must also withstand scrutiny under the plain error rule. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *Thomas*, 260 Mich App at 454. "Generally, prosecutors are accorded great latitude regarding their arguments and conduct." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (internal quotations and brackets omitted). Nevertheless, a prosecutor may not engage in conduct or make an argument that rises to the level of denying defendant a fair and impartial trial. *Dobek*, 274 Mich App at 63.

Defendant first argues that the prosecutor engaged in misconduct by arguing, in defiance of the trial court's earlier ruling, that it was only necessary to establish that the individuals in the photographs appeared younger than 18, rather than the individuals actually were younger than 18 years old. MCL 750.145c prohibits possession of child sexually abusive material, which is defined, in relevant part, as an "electronic visual image" or a "computer-generated image . . . which is of a child *or appears to include a child* engaging in a listed sexual act[.]" MCL 750.145c(1)(m) (emphasis added.) Thus, the prosecutor's argument, while perhaps contrary to the trial court's previous ruling, was in conformity with the applicable statute.

Moreover, the trial court instructed the jury that it must take the law as provided by the trial court, even if a lawyer represented the law differently, and that the lawyers' statements are not evidence. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

Defendant also claims that the prosecutor engaged in improper burden shifting when she made the following statement during closing argument: "So, unless you honestly believe that when the Defendant's looking at this picture, he thought she was 18 and he—shouldn't have known that these individuals weren't under 18, the Defendant is guilty of possessing child sexually abusive material." Prosecutors are not permitted to attempt to shift the burden of proof to a defendant. *Id.* at 273. However, a prosecutor is permitted to ask the jury to convict defendant based on the evidence. *Bahoda*, 448 Mich at 282. When the prosecutor's statement is viewed in context, it is apparent that rather than attempting to shift the burden of proof to defendant, the prosecutor charged the jury to convict defendant because the evidence established his guilt unless it found that his assertions that he believed the individuals in the images were over the age of 18 were credible.

Defendant next argues that the prosecutor engaged in misconduct by misrepresenting earlier testimony or arguing facts not in evidence. Defendant specifically takes issue with the prosecutor's summary of the expert witness's testimony related to TIFs and the prosecutor's statement that defendant had purchased a thumb drive.

Defendant argues that the prosecutor's "mischaracterization" of the expert's testimony was "critical because it directly impacted on the defense contention that one or more of the images at issue could have been automatically downloaded when [defendant's] wife was using the computer." The prosecutor's conduct in this regard was not improper, and defendant's argument on this issue is confusing. The distinction between the downloading of all of the pages an individual uses as opposed to some of the pages viewed does not have any bearing on who might have actually viewed them.

Moreover, it appears that defendant himself mischaracterizes the prosecutor's statements during closing argument. Defendant states that the prosecutor informed the jury that Detective Heller testified that if an individual accesses a website, then all of the pages accessed would be automatically saved to a TIF, whereas Heller actually testified that not necessarily all of the pages would be saved. However, the prosecutor stated that all of the pages would be downloaded if the individual visiting the website scrolled to the bottom, which conforms with Heller's testimony.

Nor is defendant's claim that the prosecutor mischaracterized evidence related to the thumb drive borne out by the record. According to defendant, the prosecutor asserted that he had purchased a thumb drive to use with the laptop. In fact, defendant testified that he was using a thumb drive in connection with the laptop and that he could not remember if he purchased it around the same time that he purchased the laptop. The prosecutor did not mischaracterize defendant's testimony in this regard.

Defendant next argues that reversal is required because the prosecutor improperly elicited testimony from Detective Heller related to his opinion regarding the ages of the individuals in the images. "MRE 701 provides that opinion testimony by a lay witness is admissible if it is rationally based on the perception of the witness and helpful to a clear understanding of his testimony or a fact in issue." *People v Smith*, 152 Mich App 756, 764; 394 NW2d 94 (1986). Detective Heller's observation that the individuals in the images appeared younger than 18 years old was not related to his expertise in computer forensics. Instead, it was based on his observation as lay person. Expert testimony is not required for an adult to opine regarding the age of a certain individual; such determinations fall within common expertise.

Further, defendant himself provided testimony similar to that which he is now challenging on appeal, namely that the individuals in the images appeared younger than 18 years old. Thus, any possible misconduct is harmless since the same testimony was properly admitted through defendant's own statements. And, as noted above, the images themselves can be used to establish the age of the individuals depicted. *Girard*, 269 Mich App at 22.

Defendant next argues the prosecution improperly questioned defendant regarding the credibility of another witness. At trial, the prosecutor asked defendant if his wife was lying when she testified that he had initially denied looking at pornography when she confronted him, and he responded that she apparently was lying. It is improper to ask a witness to comment on the credibility of another witness. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). However, even if the question was improper, it does not require reversal because there is no indication that said error resulted in conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Thomas*, 260 Mich App at 454.

Defendant also argues that the prosecutor engaged in deliberate misconduct when she referred to the ages and appearance of defendant's daughters during cross-examination and that such references were made for the sole purpose of stigmatizing defendant and inflaming the passions of the jury. Defendant asserts that these questions had nothing to do with the issues of the case.

The prosecutor was required to prove beyond a reasonable doubt that defendant knew, had reason to know, or should reasonably have been expected to know that the images found on his computer were of a child or appeared to include a child, or that defendant had not taken reasonable precautions to determine the age of the child in the images in order to sustain a conviction. The record revealed that defendant had daughters who were teenagers. The prosecutor's questions to defendant relative to his daughters were arguably aimed at establishing that defendant knew or should have known that the individuals depicted in the images on his laptop were younger than 18 years old, regardless of the notifications posted on the websites,

given his familiarity with teenage girls. Thus, when viewed in context, these statements cannot be said to have deprived defendant of a fair trial, and they did not result in the conviction of an innocent defendant or seriously affect the fairness and public reputation of the judicial proceedings.

In light of the foregoing, defendant's final argument that he was denied a fair trial as a result of cumulative effect of the errors alleged above should fail. Only one of the claimed errors arguably constituted misconduct; therefore, there were not multiple errors to aggregate.

D. MCL 750.145c

Defendant next argues that MCL 750.145c should be interpreted to only prohibit possession of images of children under the age of 16 because the age of consent is 16. In the alternative, defendant argues that the statute in question, as applied in this case, violates his First Amendment rights.

The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature. *People v Davis*, 468 Mich 77, 79; 658 NW2d 800 (2003). Where the language of the statute is clear and unambiguous, further construction is unnecessary and unwarranted, and the statute will be applied as written. *Id*. Here, the statute's definition of a child, "a person who is less than 18 years of age," MCL 750.145c(1)(b), is clear and unambiguous. In light of this clarity, this Court is not permitted to go beyond the statutory language to seek or infer another meaning, such as defendant's assertion that it should be read to allow possession of images of 16- and 17-year-olds. See *People v Wilcox*, 486 Mich 60, 78 n 11; 781 NW2d 784 (2010).

According to defendant, there is a conflict between MCL 750.145c and MCL 750.520b because the criminal sexual conduct statute establishes the age of consent at 16, but the possession of child sexually abusive material statute criminalizes sexual activity involving individuals under the age of 18. Defendant suggests that this conflict can be rectified by interpreting MCL 750.145c as not applying to images involving individuals who are 16 or 17 years old because it is lawful for such individuals to engage in sexual relations. In *People v Wilkens*, 267 Mich App 728, 737; 705 NW2d 728 (2005), this Court held that consent is not a defense to producing child sexually abusive material in violation of MCL 750.145c(2). This holding arguably contains an implicit recognition that there is a distinction between an individual consenting to sexual relations and consenting to appearing in child sexually abusive material. See also *People v Skovera*, unpublished opinion per curiam of the Court of Appeals, issued September 11, 2007 (Docket No. 272186), slip op at 3 (where this Court explicitly recognized that there is a distinction between consenting to sexual relations and consenting to appearing in child sexually abusive material: "while a person between 16 and 18 years of age may be able to

consent to sexual relations, he or she cannot, unless emancipated, consent to appearing in child sexual abusive material.")[4]

Defendant's alternative argument that the statute as applied violates his First Amendment freedoms should also fail. "Statutes are presumed constitutional and are so construed unless their unconstitutionality is clearly and readily apparent." *People v Hill*, 269 Mich App 505, 525; 715 NW2d 301 (2006). A statute may be challenged for vagueness on grounds that it (1) is overbroad and impinges on First Amendment rights, (2) does not provide fair notice of the proscribed conduct, or (3) is so indefinite that it confers unstructured and unlimited discretion on the fact-finder to determine whether the law was violated. *Id*.

Defendant asserts that "because it is not unlawful to engage in consensual sexual activity with a person 16 years old or older, it is a violation of his First Amendment rights to criminalize his possession of images of lawful sexual conduct." This argument has been previously addressed and rejected by this Court in *Skovera*. An unpublished opinion admittedly has no precedential value. MCR 7.215(C)(1). However, an appellate court may follow the result of an unpublished opinion if it finds the reasoning persuasive. *Slater v Ann Arbor Pub Schools Bd of Ed*, 250 Mich App 419, 432; 648 NW2d 205 (2002). Because we find the reasoning in *Skovera* to be persuasive, we follow its result in this case.

E. RESENTENCING

Defendant argues that he should be resentenced because the trial court misscored offense variable (OV) 12 and OV 19.

An appellate court reviews a sentencing court's decision for an abuse of discretion, and must determine whether the record evidence adequately supports a particular score. *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005). Questions of statutory interpretation are reviewed de novo. *People v Schaub*, 254 Mich App 110, 114-115; 656 NW2d 824 (2002).

Michigan's sentencing guidelines generally require a sentencing court to impose a minimum sentence within the appropriate sentence range as determined by the OV and prior record variable (PRV) points assigned to the defendant. MCL 769.34(2); *People v McCuller*, 479 Mich 672, 684-685; 739 NW2d 563 (2007). "A sentencing court may consider all record evidence before it when calculating the guidelines, including, but not limited to, the contents of a presentence investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial." *People v Ratkov* (*After Remand*), 201 Mich App 123, 125; 505 NW2d 886 (1993), remanded 447 Mich 984 (2004). Scoring decisions for which there is any evidence in support will be upheld. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

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[4] But see Justice Kelly's dissent in *People v Wilkens*, 475 Mich 899, 900; 716 NW2d 268 (2006), where Justice Kelly observed that there is a conflict between MCL 750.520b and MCL 750.145c.

The trial court scored 25 points for OV 12. OV 12 requires the assessment of 25 points when "[t]hree or more contemporaneous felonious criminal acts involving crimes against a person were committed[.]" MCL 777.42(1)(a). A felonious criminal act is "contemporaneous" when it occurs within 24 hours of the sentencing offense and where the act has not and will not lead to a separate conviction. MCL 777.42(2)(a)(*i*) and (*ii*).

Defendant argues that OV 12 was improperly scored because the prosecution failed to establish the specific date upon which the conviction offense occurred, thereby rendering it impossible to determine if other felonious acts occurred within 24 hours of the conviction offense. In the alternative, defendant argues that OV 12 should not have been assessed at 25 points because the prosecution elected to charge defendant with five counts of violating MCL 750.145c despite locating nearly 100 images of suspected child sexually abusive material on his laptop.

Defendant's claim that OV 12 was improperly scored is without merit. Defendant's own testimony demonstrates that he was searching for and viewing websites that contained images of young girls who often looked to be approximately 15 to 16 years old, and that he would click on those images and sometimes save them to a thumb drive for later viewing. While defendant did not provide specific dates that he engaged in such activity, the evidence supports the score in this case. According to defendant's own testimony, he used the laptop approximately four times to view pornography. Those four uses resulted in 94 jpeg images containing nude depictions of individuals under the age of 18 engaging in sex acts or advertisements on TIFs on defendant's computer. Thus, each of defendant's four uses of his laptop resulted in an average of 23.5 child sexually abusive images in TIFs on his laptop. Thus, there is sufficient evidence that three or more contemporary felonious acts occurred within 24 hours of the sentencing offense and there was ample evidence to support the 25 point score for OV 12.

We reject defendant's argument that OV 12 should not have been assessed at 25 points because the prosecutor's decision to charge defendant with five counts of violating MCL 750.145c when there were nearly 100 images of suspected child sexually abusive material on his laptop should "estop the prosecution from arguing that additional felonious criminal acts occurred which would not result in a separate conviction." Defendant has failed to cite legal authority to support his argument, and his argument in this regard is undeveloped. "A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim." *Mackle*, 241 Mich App at 604 n 4. We therefore decline to address this argument.

OV 19 requires that 10 points be assessed when an offender interferes or attempts to interfere with the administration of justice. MCL 777.49(c). The sentencing court assessed 10 points under this OV because defendant encouraged his wife to refuse to testify by asserting marital privilege. Defendant argues that the sentencing court clearly erred in assessing these points where the trial court appeared to acknowledge that defendant's conduct did not rise to the level of actual interference with the administration of justice because defendant's wife did testify. Defendant further argues that the points should not have been assessed for the attempt to interfere with the administration of justice on the facts of the instant case.

If a correction of an asserted scoring error would make no difference in the sentencing guidelines range, appellate review is unnecessary. *People v Jarvi*, 216 Mich App 161, 164; 548

NW2d 676 (1996). Defendant concedes in his brief on appeal that there would be no difference in the sentencing guidelines range if OV 19 was misscored. "Where a scoring error does not alter the appropriate guidelines range, resentencing is not required." *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006). Thus, defendant is not entitled to resentencing.

Affirmed.

/s/ William C. Whitbeck
/s/ Stephen L. Borrello