STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 29, 2008
v	No. 269630 Macomb Circuit Court
JAMES RICHARD REISS II, Defendant-Appellant.	LC No. 2004-003378-FH

Before: Kelly, P.J., and Meter and Gleicher, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of child sexually abusive material, MCL 750.145c(4), and using a computer to commit a crime, see MCL 752.796 and MCL 752.797(3)(d). He was sentenced to three years' probation for each conviction. He appeals as of right. We affirm.

Defendant's convictions arose, in part, from evidence seized from defendant's home by Eastpointe police officers during the execution of a search warrant on June 4, 2004. Several police officers had contact with defendant earlier that day, at approximately 9:00 a.m., while arresting defendant during a break-in at a school. Detective Patrick Connor testified that defendant told him that he wanted to confess that he watched "kiddie porn." Detective Neil Childs recalled defendant stating that he had been looking at "kiddie porn" on a computer. Officer Todd Murdock testified that defendant told him that he was there to confess and, when asked what he wanted to confess to, stated that he had child pornography on his home computer.

Defendant was later questioned by the police officers. Although defendant did not make additional statements to Officer Murdock, he told Detectives Connor and Childs that he watched "kiddie porn" on his home computer. After the interview concluded, as the detectives were walking away, defendant stated that he was a "pedophile." A computer was later seized from defendant's home during the execution of a search warrant. Macomb County Sheriff's Detective Tom Gemel used a forensic software program to examine the hard drive on the computer. He extracted a number of web pages, which the prosecutor offered into evidence as depicting child sexually abusive material and showing that defendant signed on to the Internet to look at the web pages. The web pages were found in temporary Internet files, which automatically store images and graphics that would have appeared on the computer screen when a person used the Internet. Although there was no evidence that defendant knew about the existence of the temporary

Internet files, those files are accessible to a person, by using the computer's software tools, after the Internet pages are viewed using the computer.

We first address defendant's claim that the trial court erred in allowing his out-of-court statements to be admitted at trial. Defendant raised this issue in a pretrial motion to suppress the statements and in a motion for a new trial.

We review preserved challenges to a trial court's evidentiary rulings for an abuse of discretion, but preliminary questions of law involving the admissibility of evidence are reviewed de novo. *People v Lukity,* 460 Mich 484, 488; 596 NW2d 607 (1999). Unpreserved evidentiary issues are reviewed for plain error affecting the defendant's substantial rights. MRE 103(d); *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). We review a trial court's decision regarding a motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003), reh den 469 Mich 1235 (2003). A trial court "may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice." MCR 6.431(B). Findings of fact made in conjunction with a motion to suppress evidence or a motion for a new trial are reviewed for clear error. *Cress*, *supra* at 691; *People v Kaslowski*, 239 Mich App 320, 323; 608 NW2d 539 (2000).

The trial court made only a limited evidentiary ruling when deciding defendant's pretrial motion to suppress evidence. Although the motion sought suppression of defendant's statements on the ground that defendant's mental state rendered him unable to voluntarily, knowingly, and intelligently waive his *Miranda*[1] rights, and also sought suppression of the evidence seized during the execution of the search warrant at defendant's home on the ground that the search warrant was predicated on defendant's statements, the trial court only ruled on the validity of the search warrant. The court found probable cause for the search warrant, independent of any statements made by defendant during the police interrogation, based on its finding that defendant made unsolicited statements to police officers *before* the interrogation.

We find that defendant's initial statements, after first being apprehended and before a formal interrogation, were admissible. Initially, we note that we disagree with defendant's claim that the record at the suppression hearing is unclear with regard to whether he made any unsolicited statements before the custodial interrogation. Each of the three police officers who testified at the suppression hearing gave an account of defendant's statements when he was apprehended.

Detective Childs testified that he and Detective Connor responded to a report that a man was attempting to break into a school at St. Peter's Lutheran Church. He heard defendant say that he wanted to confess as he was pulling defendant out a window. While defendant was being handcuffed, he stated that he wanted to confess to watching "kidd[ie] porn" on a computer. Defendant was turned over to Officer Murdock, who had arrived to provide assistance. Detective Connor gave similar testimony, but did not hear anything about a computer.

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Officer Murdock testified that defendant had already been handcuffed when Murdock arrived at the scene. Officer Murdock was wearing a microphone. He did not recall when he turned on the microphone, but indicated that the audiotape did not contain defendant's statement that he wanted to confess. The first statement on the audiotape involved Officer Murdock saying "what do you want to confess to." Officer Murdock testified that defendant told him that he watched child pornography or "kidd[ie] porn" on his home computer and that defendant's statement was not responsive to any interrogation.

While there was testimony that Officer Murdock and another officer advised defendant of his *Miranda* rights after he was apprehended at the church, a *Miranda* warning is only required in cases involving custodial *interrogation*. *People v Anderson*, 209 Mich App 527, 532; 531 NW2d 780 (1995). The United States Supreme Court in *Miranda* was concerned with the inherent coerciveness of custodial interrogations. *People v Daoud*, 462 Mich 621, 632; 614 NW2d 152 (2000). Volunteered statements are not barred by the Fifth Amendment and are admissible without *Miranda*'s procedural safeguards. *Anderson*, *supra* at 532. As stated in *People v O'Brien*, 113 Mich App 183, 192-193; 317 NW2d 570 (1982):

> Statements that are volunteered by a defendant need not be suppressed at trial, even if the volunteered remark was not preceded by *Miranda* warnings. . . . A police officer's question, prompted by a defendant's volunteered remark, falls under the same exception.

Given the testimony at the suppression hearing, defendant has not demonstrated any basis for excluding his statements at the scene of his arrest. Because the testimony of the detectives and Officer Murdock show that the statements were volunteered, defendant's suggestion that they were inadmissible under *Miranda* fails as a matter of law.

Also, while defendant presented expert testimony at the suppression hearing that he was suffering from a psychotic episode when he was apprehended by the police, there was neither testimony, nor any finding by the trial court, that defendant was incapable of making an accurate statement regarding any past conduct of watching or looking at child pornography on his computer. Michele Hill, the forensic examiner from the Center for Forensic Psychiatry, testified that her overall conclusion was that defendant appeared confused and delusional, but that someone with defendant's mental state is usually confused about the current situation or recent events, rather than long-term memories. Additionally, the evidence later introduced by the prosecutor at trial regarding the materials found in the temporary Internet files on the computer tends to belie any claim that defendant was incapable of making an accurate statement.

With regard to the statements made after defendant was taken into custody and subjected to interrogation, we again find no basis for reversal. The prosecutor demonstrated beyond a reasonable doubt that any error was harmless because the same or substantially similar material evidence was established by defendant's properly admitted volunteered statements. *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005) (constitutional error is harmless if it is clear beyond a reasonable doubt that a rational juror would have found guilt absent the error); *People v Toma*, 462 Mich 281, 301, n 15; 613 NW2d 694 (2000) (noting that the admissibility of a defendant's involuntary confession is subject to harmless error analysis).

To the extent that defendant argues that his "pedophile" statement at the police station, or the earlier volunteered statements, should have been excluded under MRE 403, only his challenge to the "pedophile" statement was preserved by a specific objection on this ground at trial. MRE 103(a)(1). Because the "pedophile" statement was made at the police station and we have already determined that any error in the admission of those statements was harmless, it is unnecessary to address the trial court's ruling that the "pedophile" statement was relevant and was not inadmissible under MRE 403. In passing, we reject defendant's claim in his supplemental brief that the "pedophile" statement at the police station was so inflammatory that it became virtually inconceivable that the jury would seriously consider a not guilty verdict. The trial court instructed the jury not to let sympathy or prejudice influence its decision and that it must return a verdict "based only on the evidence and my instructions on the law." "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998); see also *People v Abraham,* 256 Mich App 265, 279; 662 NW2d 836 (2003).

Further, it is not apparent that defendant's volunteered statements at the scene of his arrest should have been excluded under MRE 403, so a plain error has not been shown. *Jones*, *supra* at 455; *Carines*, *supra* at 763. In any given case, parties attempt to introduce evidence that causes prejudice to another party. *Waknin v Chamberlain*, 467 Mich 329, 334; 653 NW2d 176 (2002). Evidence presents a danger of unfair prejudice only when it threatens the fundamental goals of accuracy and fairness embodied in MRE 403. *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995). "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998).

Here, defendant's volunteered statements were highly probative because the prosecutor was required to prove that defendant knowingly possessed child sexually abusive material. MCL 750.145c(4). The statements made it more probable than not that defendant had the requisite knowing possession. MRE 401. The statements were admissible as admissions of a party opponent under MRE 801(d)(2)(A); see also *McNair v State,* 75 SW3d 69, 73 (Tex App, 2002) (in a case where an insanity defense was claimed, the Texas Court of Appeals found a mentally ill defendant's statement admissible as an admission of a party opponent). Moreover, as discussed above, the evidence that defendant was suffering from a psychotic episode when he was apprehended by the police did not invalidate the probative value of his statements. Because defendant's volunteered statements constituted relevant evidence and the probative value of the evidence was not clearly outweighed by the danger of unfair prejudice, we find no basis for exclusion under MRE 403. The weight and credibility of the evidence were proper questions for the jury to decide.

Next, we consider defendant's claim that the evidence obtained from the execution of the search warrant should have been suppressed under *Franks v Delaware,* 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978), because the affiant, Detective Connor, did not disclose information about defendant's mental and emotional state at the time of his arrest. Defendant argues that it would have been obvious to the magistrate that his statements were insufficiently reliable to

justify a finding of probable cause to search a residential structure if information about his mental and emotional state was disclosed.[2]

Probable cause for a search warrant exists if there is a "substantial basis for the magistrate's conclusion that a there is a 'fair probability that contraband or evidence of a crime will be found in a particular place.'" *People v Russo,* 439 Mich 584, 604; 487 NW2d 698 (1992), quoting *Illinois v Gates,* 462 US 213, 238; 103 S Ct 2317; 76 L Ed 2d 527 (1983). All of the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons providing hearsay information, are considered in determining the validity of a search warrant. *People v Keller*, 479 Mich 467, 475; 739 NW2d 505 (2007). The search warrant and underlying affidavit must be read in a commonsense and realistic manner. *Russo*, *supra* at 604. Further, under MCL 780.653(a), the magistrate's finding of probable cause must be based on the facts related in the affidavit and, if the affidavit is based on information supplied by a named person, as in this case, it must include "affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information."

Under *Franks*, *supra*, evidence obtained pursuant to a search warrant must be suppressed if the search warrant affidavit contains false statements made knowingly or recklessly and the false information was necessary to a finding of probable cause. *People v Chandler*, 211 Mich App 604, 612; 536 NW2d 799 (1995), overruled on other grounds as stated in *People v Edgett*, 220 Mich App 686; 560 NW2d 360 (1996). To prevail on the suppression motion, "the defendant must show by a preponderance of the evidence that the affiant had knowingly and intentionally, or with reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary for a finding of probable cause." *People v Stumpf*, 196 Mich App 218, 224; 492 NW2d 795 (1992).

This standard also applies to material omissions. *Chandler*, *supra* at 612-613; *People v Kort*, 162 Mich App 680, 685-686; 413 NW2d 83 (1987), abrogated in part on other grounds by *Russo*, *supra*. In this case, the record does not disclose any omitted information within Detective Connor's knowledge that was material to a finding of probable cause. Defendant established only that Detective Connor did not include anything about his mental condition in the affidavit. "[T]he affidavit must contain facts within the knowledge of the affiant and not mere conclusions or beliefs." *People v Martin*, 271 Mich App 280, 298; 721 NW2d 815 (2006). Moreover, under MCL 780.653(b), it was not necessary that Detective Connor include affirmative allegations regarding defendant's credibility or the reliability of his information because this requirement only applies to information supplied by an unnamed person. See *Keller*, *supra* at 482. Because it is not apparent that Detective Connor knowingly and intentionally, or with reckless disregard for the truth, omitted material information from the affidavit, we reject defendant's claim of error.

---

[2] Defendant did not raise this precise issue below but instead argued that the detective's omissions gave a misleading impression regarding whether defendant waived his *Miranda* rights. We note, however, that physical evidence obtained as a fruit of an uncoerced statement is admissible, even if a *Miranda* warning was not provided. See *United States v Phillips*, 468 F3d 1264, 1265 (CA 10, 2006).

Next, we consider defendant's argument that the evidence was insufficient to support his convictions. Defendant challenges the element of knowing possession in MCL 750.145c(4). He argues that the evidence was insufficient because the statute punishes the possession, not the viewing, of child sexually abusive material, and there was no proof that he knew that child sexually abusive material was stored in the temporary Internet files on his computer. Defendant argues that the most that could be said is that he engaged in passive viewing of offending images on his computer screen.

When reviewing the sufficiency of the evidence, the evidence is examined in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential requirements of the crime were proven beyond a reasonable doubt. *People v Girard*, 269 Mich App 15, 21; 709 NW2d 229 (2005).

A conviction under MCL 750.145c(4) requires that a person knowingly possess "child sexually abusive material . . . ." Before the statute was amended in 2004, "child sexually abusive material" was broadly defined in MCL 750.145c(1)(l)[3] as

> *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, or sound recording which is of a child or appears to include a child engaging in a listed sexual act*; a book, magazine, computer, computer storage device, or other visual or print or printable medium containing such a photograph, picture, film, slide, video, electronic visual image, computer, or computer-generated image, or picture, or sound recording; or any reproduction, copy, or print of such a photograph, picture, film, slide, video, electronic visual image, book, magazine, computer, or computer-generated image, or picture, other visual or print or printable medium, or sound recording. [Emphasis added.]

Although the statute does not define "possession," this term has been defined in other criminal contexts as denoting dominion or control over an item or object. See *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995) (controlled substances); *People v Butler*, 413 Mich 377, 390 n 11; 319 NW2d 540 (1982) (weapons). In *Girard*, the Court considered the sufficiency of the evidence for a conviction under an earlier version of MCL 750.145c, which defined "child sexually abusive material," in pertinent part, to include "'a developed or undeveloped photograph, film, slide, electronic visual image, computer diskette, or sound recording of a child engaging in a listed sexual act . . . .'" *Girard*, *supra* at 22, quoting former MCL 750.145c(1)(i). The Court found the evidence sufficient because the prosecutor offered evidence that child pornography was contained in a temporary Internet file or a deleted file *and* witnesses testified that they saw the defendant look at "images of adolescents on his computer screen for extended periods, including during the course of engaging in sexual acts." *Id*. at 23.

[3] MCL 750.145c was amended by 2004 PA 478, effective December 28, 2004, which is after the incident underlying defendant's conviction. The definition of "child sexually abusive material" was moved to subsection (m), but was not substantively changed.

Similarly, the evidence in this case went beyond the discovery of materials in temporary Internet files because there was testimony that defendant admitted to watching or looking at child pornography on a computer and stated that he had child pornography on his home computer. Viewed in the light most favorable to the prosecution, the evidence was sufficient for a rational trier of fact to find beyond a reasonable doubt that defendant knowingly possessed child sexually abusive material within the meaning of former MCL 750.145c(1)(l) and MCL 750.145c(4). Indeed, we believe that *Girard* compels this result.

We reject defendant's alternative claim that the trial court erred in denying his motion for a new trial based on the great weight of the evidence. As noted earlier, we review a grant or denial of a motion for a new trial for an abuse of discretion. *Cress*, *supra* at 691. "A motion for new trial based on the great weight of the evidence should be granted only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result." *People v Akins,* 259 Mich App 545, 556 n 13; 675 NW2d 863 (2003). Because the verdict in this case was not against the great weight of the evidence, the trial court did not abuse its discretion in denying a new trial on this ground.

Defendant argues that he was denied the effective assistance of counsel at the pretrial suppression hearing and at trial, and he seeks a remand for a *Ginther*[4] hearing to present evidence in support of his claims.[5] Because the issue of ineffective assistance was not raised in the trial court, our review is limited to errors apparent from the record. *People v Rodgers*, 248 Mich App 702, 713-714; 645 NW2d 294 (2001).

> To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant must further demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *and* the attendant proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996) (emphasis in original). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). [*Rodgers*, *supra* at 714.]

Addressing first defendant's claim regarding the suppression hearing, defendant has not substantiated his position that defense counsel performed deficiently by not presenting additional witnesses or by filing copies of the jail's medical records with his motion, but not formally introducing the records, at the suppression hearing. The failure to call witnesses or present evidence only constitutes ineffective assistance of counsel if it deprives a defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). A

---

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

[5] We note that defendant failed to file a proper motion to remand in accordance with MCR 7.211(C)(1).

substantial defense is one that might have made a difference in the outcome of the proceeding. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Here, defense expert Hill testified regarding the information in the jail's medical records describing defendant as "unresponsive, confused, [with] rambling speech, [and] unable to function [sic] the simplest task." Hill also testified that she was left with the impression that defendant acted irrationally based on her review of summaries of the witnesses' statements in a police report. There is no indication in the record that additional witnesses or a formal introduction of the jail's medical records would have affected the trial court's decision not to suppress evidence seized pursuant to the search warrant. Therefore, we reject defendant's claim of ineffective assistance of counsel relative to this proceeding.

We also reject defendant's claim that defense counsel was ineffective at trial. Defendant's reliance on *United States v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984), is misplaced because there is no record evidence that defense counsel entirely failed to subject the prosecutor's case to meaningful adversarial testing. *People v Frazier,* 478 Mich 231, 243; 733 NW2d 713 (2007). It is apparent from the record that defense counsel's strategy was to attack the sufficiency of the prosecutor's proofs that defendant knowingly possessed the materials found on his computer. Defense counsel successfully opposed the admission of evidence regarding the circumstances of defendant's arrest on a different matter on June 4, 2004, and, in particular, defendant's conduct at the church.

Because defense counsel's failure to present witnesses and other evidence to establish defendant's behavior on June 4, 2004, was not a complete failure to provide assistance, it is reviewed under the presumption that counsel was effective. See *Frazier*, *supra* at 243. "[D]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, which we will not second-guess with the benefit of hindsight." *Dixon*, *supra* at 398 (internal citation and quotation marks omitted).

Defendant has not overcome the strong presumption that defense counsel's trial strategy was sound. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999). The harm to the defense from presenting evidence that defendant attempted to break into a school at a church may have outweighed any possible beneficial use of this evidence to challenge the reliability of defendant's statements. Evidence regarding defendant's mental state would have provided a weak defense in light of the consistency between defendant's statements and the evidence seized from his home. A failed defense strategy does not constitute ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Therefore, we deny defendant's request for a new trial on this ground. Moreover, although defendant did not file a proper motion to remand for a *Ginther* hearing, based on our review of the record, we are unpersuaded that a remand is warranted. See *People v Avant,* 235 Mich App 499, 508; 597 NW2d 864 (1999) (appellate relief denied where the defendant demonstrated neither a basis for reversal nor that a remand for an evidentiary hearing was warranted).

Finally, defendant argues that he was denied the effective assistance of counsel if it is determined on appeal that defense counsel failed to obtain a ruling from the trial court regarding the admissibility of his statements. We presume, based on defendant's reliance on the prosecutor's response to his original brief, that this claim is predicated on the trial court's failure to address whether he knowingly and intelligently waived his *Miranda* rights at the police

station. As previously indicated, the trial court's failure to decide whether defendant validly waived his *Miranda* rights after interrogation began was harmless error. There being no showing of prejudice, defendant's claim of ineffective assistance of counsel on this ground cannot succeed. *Rodgers*, *supra* at 714.

Lastly, defendant seeks reversal of his convictions on the ground that the cumulative effect of the trial errors deprived him of a fair trial. Only actual errors are aggregated to determine their cumulative effect. *People v Bahoda,* 448 Mich 261, 292 n 64; 531 NW2d 659 (1995). "[T]he effect of the errors must have been seriously prejudicial in order to warrant a finding that defendant was denied a fair trial." *People v Knapp,* 244 Mich App 361, 387; 624 NW2d 227 (2001). Here, defendant has not shown the requisite prejudice from actual errors to warrant a new trial under a cumulative error theory.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Patrick M. Meter

S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES RICHARD REISS, II,

Defendant-Appellant.

UNPUBLISHED
May 29, 2008

No. 269630
Macomb Circuit Court
LC No. 2004-003378-FH

Before: Kelly, P.J., and Meter and Gleicher, JJ.

GLEICHER, J. (*dissenting*).

I respectfully dissent. In my view, the prosecution failed to prove beyond a reasonable doubt that defendant *knowingly* possessed the child sexually abusive material found on his computer.

The statute under which defendant was prosecuted, MCL 750.145c(4), states in pertinent part, "A person who knowingly possesses any child sexually abusive material is guilty of a felony . . . ." In *People v Girard*, 269 Mich App 15, 20; 709 NW2d 229 (2005), this Court observed that the statute's knowing possession requirement is not satisfied solely by evidence that child sexually abusive materials existed within the recesses of a defendant's computer. "[T]he prosecution [has] 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*. To establish the knowing possession of child sexually abusive material, a prosecutor must prove beyond a reasonable doubt that a defendant knew of the continuing presence of the contraband within his or her computer

The central issue in this case involves whether the prosecution carried its burden of proving beyond a reasonable doubt that defendant knowingly possessed child sexually abusive material. The majority concedes that the contraband in the instant case resided only in defendant's temporary Internet files, and that "there was no evidence that defendant knew about the existence of the temporary Internet files . . . ." In my view, this fact requires the reversal of his conviction under MCL 750.145c(4).

Michigan law, embodied in the plain language of subsection 145c(4), does not prohibit the mere *viewing* of child sexually abusive material on a computer. Rather, the statutory offense at issue punishes a defendant's *knowing* possession of this contraband. *Girard*, *supra* at 20. Defendant confessed to having viewed the child sexually abusive materials, but the prosecution

failed to prove beyond a reasonable doubt that defendant possessed any knowledge that after he viewed the images, they continued to remain available within his computer.

Michigan's "knowing possession" statute is similar to many enacted in other jurisdictions, and this Court's discussion of the knowledge element in *Girard* is entirely consistent with other state and federal courts' interpretations of laws requiring knowing possession of child pornography. For example, in *United States v Romm*, 455 F3d 990 (CA 9, 2006), the Ninth Circuit explained that "to possess the images in the cache,[1] the defendant must, at a minimum, know that the unlawful images are stored on a disk or other tangible material in his possession." *Id*. at 1000. The court in *Romm* affirmed the defendant's conviction because the defendant exercised control over the images stored within his computer's cache, specifically by enlarging or erasing some of the saved images. *Id*. at 1000-1001.

In a subsequent Ninth Circuit case, *United States v Kuchinski*, 469 F3d 853 (CA 9, 2006), the Court observed that

> [w]here a defendant lacks knowledge about the cache files, and concomitantly lacks access to and control over those files, it is not proper to charge him with possession and control of the child pornography images located in those files, without some other indication of dominion and control over the images. To do so turns abysmal ignorance into knowledge and a less than valetudinarian grasp into dominion and control. [*Id*. at 863.]

In *United States v Stulock*, 308 F 3d 922, 925 (CA 8, 2002), the Eighth Circuit observed that the district court properly had acquitted the defendant of knowing possession of child pornography because "one cannot be guilty of possession for simply having viewed an image on a web site, thereby causing the image to be automatically stored in the browser's cache, without having purposely saved or downloaded the image." Another federal district court reached precisely the same result, holding that to satisfy the requirement of knowing possession, a defendant must have "purposely saved or downloaded the image." *United States v Perez*, 247 F Supp 2d 459, 484 n 12 (SDNY, 2003), quoting *Stulock*, *supra* at 925.

The Georgia Court of Appeals reversed a defendant's conviction of knowing possession of child pornography because although the defendant viewed the contraband images on his

---

[1] Deputy Tom Gemel, the prosecution's forensic computer expert, explained that the temporary Internet file "is a location on your hard drive that stores images and graphics from when you visit … and surf the internet." In *United States v Luken*, 515 F Supp 2d 1020, 1027 (D SD, 2007), the district court explained that the terms "cache" and "temporary Internet files" are synonymous:

> Files stored in the "Temporary Internet Files" folder or cache are created automatically by the Microsoft web browser Internet Explorer so that if the site is revisited it comes up more quickly. These files are created by the Internet Explorer during the normal course of web browsing without any action of the computer user, or unless a sophisticated computer user is involved, without even any knowledge of the computer user.

computer screen, he had not taken any affirmative action to save the images on his computer's hard drive. *Barton v State*, 286 Ga App 49; 648 SE2d 660 (2007). The court in *Barton* explained, "In any criminal prosecution for possession … the State must prove that the defendant was *aware* he possessed the contraband at issue. Thus, in this case, the State was required to show that Barton had knowledge of the images stored in his computer's cache files." *Id*. at 52 (emphasis in original). The *Barton* court determined that the prosecution failed to prove that the defendant "was aware that the computer was storing these images, but instead established only that these files were stored automatically, without Barton having to do anything." *Id.*

Here, the evidence revealed solely the presence of child sexually abusive material in defendant's temporary Internet files. Deputy Tom Gemel admitted that defendant did not purposefully place the images in the temporary Internet files; rather, the computer's operating system automatically sent the material there "[b]y default." Gemel also conceded that no proof existed that defendant ever again viewed the offensive material after the computer automatically stored the web pages in its temporary Internet files. And the prosecution produced no other evidence tending to establish that defendant intentionally saved the material in his computer, sent it to another computer user, traded the child sexually abusive images, purchased them, sold them, accessed the computer's temporary Internet files, or could have accessed or even knew how to access the temporary Internet files.

According to the majority, defendant's statements to the investigating detectives "made it more probable than not that defendant had the requisite knowing possession." In my view, however, these statements prove only that defendant passively viewed the child sexually abusive material. Detective Patrick Conner testified that defendant admitted that he "*watched* kiddie porn on his computer at home" (emphasis added), and Detective Neil Childs testified that around the time of defendant's arrest, he "stated *he had been looking* at kiddie porn on the computer" (emphasis added).[2] These statements do not tend to prove that defendant knew that his computer continually saved and stored the child sexually abusive material after he viewed it.

Officer Todd Murdock, who arrested defendant, testified that after defendant received his *Miranda* rights, he stated that he "wanted to confess that he had child pornography on his home computer." I believe that this single and fundamentally ambiguous statement does not suffice to prove beyond a reasonable doubt that defendant *knowingly possessed* the contraband images, but only that defendant had previously viewed them on his computer.

In *People v Wolfe*, 440 Mich 508; 489 NW2d 748, amended 441 Mich 1201 (1992), our Supreme Court held that to sustain a conviction, an appellate court must determine whether sufficient record evidence existed "to justify a rational trier of fact in finding guilt beyond a reasonable doubt." *Id*. at 513-514 (internal quotation omitted). This standard, articulated in *Jackson v Virginia*, 443 US 307; 99 S Ct 2781; 61 L Ed 2d 560 (1979), reflects "an attempt to give 'concrete substance'" to a criminal defendant's due process rights. *Id*. at 514. The beyond

[2] Conner's affidavit for a search warrant states that after being taken into custody, defendant "blurted out[,] 'I need to confess. I've been watching kiddie porn.'"

a reasonable doubt standard requires that the fact finder "reach a subjective state of near certitude of the guilt of the accused . . . ." *Jackson*, *supra* at 315.

In *Jackson*, the United States Supreme Court specifically rejected the "no evidence" test of evidentiary sufficiency set forth in *Thompson v Louisville*, 362 US 199, 206; 80 S Ct 624; 4 L Ed 2d 654 (1960), which permitted a reviewing court to reverse a conviction only if "no evidence" supported it. The Supreme Court in *Jackson* characterized the "no evidence" doctrine as "simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt." *Id*. at 320. According to the Supreme Court, the fact that "a mere modicum" of evidence could satisfy the "no evidence" standard illustrated its constitutional inadequacy: "Any evidence that is relevant—that has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence … could be deemed a 'mere modicum.' But it could not seriously be argued that such a 'modicum' of evidence could by itself rationally support a conviction beyond a reasonable doubt." *Id*.

Although the majority is satisfied that the mere modicum of evidence supplied by defendant's vague statement "that he had child pornography on his home computer" suffices to prove knowing possession beyond a reasonable doubt, I disagree. Viewed in the light most favorable to the prosecution, the statement demonstrates only that defendant had viewed child pornography on his computer. The statement does not suggest that defendant knew that his computer saved and stored the images after he ceased viewing them. Fairly construed, defendant's three consistent postarrest statements prove that he watched child sexually abusive material, but not that he purposefully saved them within his computer, or even knew that they remained stored there after he had viewed them. Because defendant's statements do not amount to proof of knowing possession beyond a reasonable doubt, I would reverse his conviction under MCL 750.145c(4).

/s/ Elizabeth L. Gleicher