Order

Michigan Supreme Court
Lansing, Michigan

November 28, 2023

163887

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 163887
COA: 351593
Clare CC: 17-005731-FH

ALEXANDER JAMES HAUPT,
Defendant-Appellant.

_____/

By order of May 3, 2022, the application for leave to appeal the September 23, 2021 judgment of the Court of Appeals was held in abeyance pending the decisions in *People v Posey* (Docket No. 162373), *People v Stewart* (Docket No. 162497), and *People v King* (Docket No. 162327). On order of the Court, *Posey* having been decided on July 31, 2023, 512 Mich ___ (2023), *Stewart* having been decided on July 31, 2023, 512 Mich ___ (2023), and *King* having been decided on July 28, 2023, 512 Mich ___ (2023), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals to the extent that it is inconsistent with our decisions in *King* and *Posey*, and REMAND this case to that court for reconsideration in light of *King* and *Posey*. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

We do not retain jurisdiction.

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I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 28, 2023

Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALEXANDER JAMES HAUPT,

Defendant-Appellant.

UNPUBLISHED
September 23, 2021

No. 351593
Clare Circuit Court
LC No. 17-005731-FH

Before: MURRAY, C.J., and M. J. KELLY and O'BRIEN, JJ.

PER CURIAM.

A jury convicted defendant of producing child sexually abusive activity, MCL 750.145c(2)(a); two counts of distributing or promoting child sexually abusive activity, MCL 750.145c(3)(a); possession of child sexually abusive material, MCL 750.145c(4)(a); four counts of using a computer to commit a crime, MCL 752.796; MCL 752.797(3)(d); and MCL 752.797(3)(f); and obstruction of justice, MCL 750.505. The trial court sentenced defendant to concurrent prison terms of 78 months to 20 years for the convictions of producing child sexually abusive activity and using a computer to commit the crime, 19 months to 7 years for the convictions of distributing or promoting child sexually abusive activity and using a computer to commit the crimes, 13 months to 4 years for the conviction of possession of child sexually abusive material and 19 months to 7 years for the conviction of using a computer to commit the crime, and 13 months to 5 years for the conviction of obstruction of justice.[1] Defendant appeals as of right. We affirm.

I. BASIC FACTS

As part of an investigation of a September 9, 2017 stalking complaint filed against defendant by his former girlfriend, AM, Sergeant Aaron Miller seized a cell phone from defendant. On September 12, 2017, Detective Donald VanBonn submitted an affidavit to search defendant's

[1] The sentences were ordered to be served concurrently with the sentences imposed for defendant's convictions in Clare Circuit Court No. 17-005730-FH pursuant to a *nolo contendere* plea to charges of interfering with electronic communications, MCL 750.540, and domestic violence, MCL 750.812, involving the same victim involved in this case.

cell phone for evidence related to the stalking allegations. The magistrate concluded that there was probable cause for the warrant and authorized police to search defendant's phone for specific evidence relating to the stalking complaint, including evidence of electronic communications between defendant and AM. In part, the warrant authorized a search of the metadata, file data, setting data, photographic and video data, and communication data for evidence of excessive amounts of communications between defendant and AM and for ownership of the phone.

Detective VanBonn extracted the digital data from the cell phone and loaded it into a software program called Cellebrite, which sorted the data into relevant categories such as contacts, call logs, calendars, e-mail, and photos, and each category of evidence was placed together. Cellebrite enabled the police to search for items outlined in the search warrant. On the basis of his experience and training, Detective VanBonn was aware that stalkers often take photos of their victims without their consent and that evidence of stalking might be found in the photo gallery of a phone. While searching the cell phone data for evidence related to stalking, Detective VanBonn observed what he believed to be child sexually abusive material. He terminated the search at that point. He submitted an affidavit for a second search warrant to search the device for evidence related to child sexually abusive material. The magistrate concluded that there was probable cause for the warrant on the basis of the attached affidavit and issued a warrant authorizing the police to search the cell phone data for evidence of child sexually abusive material. A search of the cell phone pursuant to the second warrant uncovered 42 images of AM naked or performing sexual acts, including vaginal-penile penetration and fellatio, that were taken by the cell phone on or within 24 hours of December 19, 2016, when AM was 17 years old, at the location where AM lived with her parents. The search also uncovered text messages and e-mails indicating that defendant took the images at the request of a third party and sold the images on at least two occasions. Additionally, the search uncovered an audio file containing a recording in which defendant tried to coerce AM to withdraw a pending criminal complaint that she had filed against him after he physically assaulted her and took her cell phone from her when she attempted to call police.

II. SIXTH AMENDMENT RIGHT TO COUNSEL

Defendant argues that the trial court denied him his Sixth Amendment right to counsel by allowing appointed counsel to withdraw without appointing substitute counsel. Defendant did not object when the court allowed counsel to withdraw and serve only in an advisory capacity, or when the court told defendant that he would have to represent himself. Therefore, this issue is unpreserved. See *People v Cain*, 498 Mich 108, 114-115; 869 NW2d 829 (2015). Although defendant's claim that he was denied the right of counsel at a critical stage of criminal proceedings constitutes a claim of structural error, *People v Russell*, 471 Mich 182, 194 n 29; 684 NW2d 745 (2004), a defendant is still not entitled to relief unless he or she can satisfy the four requirements set out in *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), see *Cain*, 498 Mich at 116, 117 n 4. The first three *Carines* prongs require establishing that (1) an error occurred, (2) the error was "plain"—i.e., clear or obvious, and (3) the error affected substantial rights—i.e., the outcome of the lower court proceedings was affected. *Carines*, 460 Mich at 763. If the first three prongs are satisfied, the fourth *Carine*s prong calls upon an appellate court to "exercise its discretion in deciding whether to reverse," and (4) relief is warranted only when the court determines that the plain, forfeited error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id.*

A criminal defendant who faces incarceration has a constitutional right to counsel at all critical stages of the criminal process under the Sixth Amendment, which is applicable to the states through the Fourteenth Amendment. *People v Williams*, 470 Mich 634, 640-641; 683 NW2d 597 (2004). Before allowing a criminal defendant to proceed pro se, the trial court must determine whether the request is unequivocal, whether the defendant is knowingly, intelligently, and voluntarily waiving the right to legal counsel, and whether the defendant's self-representation will disrupt, unduly inconvenience, or otherwise burden the court and the administration of justice. *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976). In addition, the trial court must comply with MCR 6.005(D), which provides:

> The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first
>
> (1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation.
>
> (2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

"[I]f the trial court fails to substantially comply with the requirements in *Anderson* and the court rule, then defendant has not effectively waived his Sixth Amendment right to the assistance of counsel." *Russell*, 471 Mich at 191-192. "Substantial compliance requires that the court discuss the substance of both *Anderson* and MCR 6.005(D) in a short colloquy with the defendant, and make an express finding that the defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures." *Russell*, 471 Mich at 191 (quotation marks and citation omitted).

The only period when defendant was without appointed counsel and proceeding *in propria persona* with advisory counsel was from the day appointed counsel was allowed to withdraw on June 10, 2019, until the day trial was to commence on July 23, 2019, when counsel was reappointed to represent defendant at trial. When appointed counsel was allowed to withdraw, defendant did not object to the withdrawal, but he also did not request to represent himself. The record indicates that the trial court failed to comply with the substance of *Anderson* and MCR 6.005(D).[2]

Nevertheless, even if the first three prongs of the plain error standard have been established, we conclude that reversal is not warranted under the fourth *Carines* prong. *Carines*, 460 Mich at 763-764. Defendant does not claim that he is actually innocent, and we are not convinced that the trial court's plain error seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence. *Id.* "[T]he fourth *Carines* prong is meant to be applied on a case-specific and fact-intensive basis," *Cain*, 498 Mich at 121, and reversal is not justified if the "underlying purposes" of the right at issue have been alternatively upheld. *Id.* at 119.

[2] The trial court did, however, go over these considerations when addressing defendant's decision in 2018 to represent himself, a decision defendant subsequently changed.

In *People v Kammeraad*, 307 Mich App 98, 130; 858 NW2d 490 (2014), this Court noted that "the right to assistance of counsel, cherished and fundamental though it may be, may not be put to service as a means of delaying or trifling with the court." *Kammeraad* recognized that a defendant may forfeit his right to counsel through "purposeful tactics and conduct that were employed to delay and frustrate the orderly process of the lower court's proceedings." *Id*. at 131, citing *State v Mee*, 756 SE2d 103, 114 (NC App, 2014). In other words, "willful conduct by a defendant that results in the absence of defense counsel constitutes a forfeiture of the right to counsel." *Kammeraad*, 307 Mich App at 131. Forfeiture is distinguishable from waiver. When a defendant forfeits the right to counsel, the court is not required to determine whether the defendant knowingly, understandingly, and voluntarily gave up his right. *Id*.

The defendant in *Kammeraad* forfeited his right to counsel by "refus[ing] to accept, recognize, or communicate with appointed counsel, . . . refus[ing] . . . self-representation, and . . . refus[ing] to otherwise participate in the proceedings." *Id*., at 131-132. Although in *Kammeraad* the defendant refused to get dressed and walk into the courtroom, requiring court officers to place him in a wheelchair, cover him up, and haul him in, *id*. at 112, we said that a forfeiture can be found on the basis of less outlandish conduct. A defendant might forfeit his right to counsel, for example, by refusing to accept appointed counsel while also failing " 'to retain counsel within a reasonable time,' " or by acting " 'abusive toward' " his retained or appointed counsel. *Id*. atn132, quoting *United States v McLeod*, 53 F3d 322, 325 (CA 11, 1995).

This Court also recognized "the hybrid situation of 'waiver by conduct,' " also known as " 'forfeiture with knowledge,' " "which combines elements of forfeiture and waiver." *Kammeraad*, 307 Mich App at 133-134, quoting *United States v Goldberg*, 67 F3d 1092, 1101 (CA 3, 1995). Waiver by conduct/forfeiture with knowledge occurs when "a defendant is warned that he or she will lose counsel if the defendant engages in dilatory tactics, with any misconduct thereafter being treated as an implied request for self-representation." *Kammeraad*, 307 Mich App at 133.

Here, the trial court seemingly found that defendant had given up his right to counsel through his conduct. Although the court should have (again) advised defendant of the charges against him, the sentencing consequences he faced, and the various risks of representing himself before allowing appointed counsel to withdraw, this failure is not outcome-determinative given defendant's conduct. As the trial court noted, defendant's actions delayed the case for over two years, in part by repeatedly terminating the services of his retained and appointed counsel. He initially waived his preliminary examination in 2017 because the prosecution made a plea offer, but defendant continually rejected plea offers that his attorneys recommended he should take. Just one week before his previously adjourned October 2018 trial, defendant moved to remand to district court for a preliminary hearing. He made his counsel's work impossible. He refused to communicate with his retained counsel, and his lack of communication continued with his appointed counsel. He threatened his retained counsel's professional license, while he accused his appointed attorney of lying and colluding with the prosecutor's office.

During the less than two months that defendant represented himself with advisory counsel, two hearings took place: (1) a final pretrial hearing and (2) a hearing on defendant's motion to suppress evidence and motion to dismiss, and on the prosecutor's motion to use AM's preliminary examination testimony at trial. Consistent with his demonstrated lack of communication throughout the case, defendant did not reach out to advisory counsel for any advice or counsel during this time. Under these circumstances, the trial court did not violate defendant's

constitutional right to counsel at a critical stage of the proceeding. Defendant has failed to show plain error.

III. ADJOURNMENT

Defendant requested an adjournment when advisory counsel was reappointed to represent defendant on the day trial was to begin on the ground that counsel was not prepared for trial. The trial court granted a one-day adjournment, and defense counsel told the court that the one-day agreement was acceptable to defendant. Defendant not only failed to preserve this issue, but he waived any error by expressly agreeing to the length of the adjournment. *People v Kowalski*, 489 Mich 488, 50; 803 NW2d 200 (2011). "A defendant waives an issue by expressly approving of the trial court's action." *People v Miller*, 326 Mich App 719, 726; 929 NW2d 821 (2019). "Waiver extinguishes any error, leaving nothing for this Court to review." *Id*. Thus, this issue is unpreserved and waived on appeal. See *id*.[3]

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Relatedly, defendant argues that as a result of the trial court's one-day adjournment, counsel had effectively no time to prepare for trial, constituting the sort of complete denial of counsel described in *US v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984). Defendant did not preserve this issue by raising it in a motion for a new trial or a *Ginther*[4] hearing. *People v Heft*, 299 Mich App 69, 80; 829 NW2 266 (2012). Therefore, this Court reviews the argument for errors apparent on the record. *People v Hoang*, 328 Mich App 45, 63; 935 NW2d 396 (2019).

When the ineffective assistance of counsel falls within one of the rare situations described in *Cronic*, 466 US at 658-660, an attorney's performance is so deficient that prejudice is presumed. *Kammeraad*, 307 Mich App at 125. Among other situations, prejudice is presumed "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Id*., quoting *Cronic*, 466 US at 659 (quotation marks omitted). This is what defendant argues happened here. But in order to invoke the *Cronic* standard, "the attorney's failure must be complete." *Bell v Cone*, 535 US 685, 697; 122 S Ct 1843; 152 L Ed 2d 914 (2002).

A brief time to prepare for trial can result in ineffective assistance of counsel where it is "demonstrate[d] that counsel failed to function in any meaningful sense as the Government's adversary." *Cronic*, 466 US at 688. Defendant's reliance on *Cronic* is sorely misplaced, because his argument regarding the one-day adjournment does not involve a *complete* failure to challenge

[3] Even if the issue was not waived, defendant fails to show plain error affecting his substantial rights. *Carines*, 460 Mich at 763. Counsel was originally appointed to represent defendant on October 26, 2018, and tried to work with defendant for nearly eight months until requesting to withdraw because of defendant's actions. During that time, counsel received discovery from the prosecutor and participated in the remand to district court for a preliminary examination. Counsel also made himself available to defendant while he served as advisory counsel from June 10, 2019 until July 23, 2019, when he was reappointed to represent defendant at trial. When trial commenced the following day, counsel did not say that he was not prepared to proceed.

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

the prosecution's case. In fact, the record reveals the opposite. Counsel cross-examined AM at the preliminary examination, subjected Detective VanBonn to voir dire regarding his qualification as an expert in the analysis of cell phones, and objected to his qualification as an expert witness. He objected to VanBonn's testimony that defendant had offered to sell the images of AM, vigorously challenged the chain of custody as to the cell phone seized from defendant, and subjected Sergeant Miller to voir dire in challenging the chain of custody. Counsel objected to admission of the report of the analysis of data obtained from defendant's cell phone, and cross-examined Detective VanBonn at length regarding the differences between the description of the case for defendant's cell phone in the affidavit for the search warrant and the phone case of the phone that was retrieved from the Faraday box and searched.

Outside the presence of the jury, counsel moved to suppress evidence obtained during the execution of the second search warrant. Counsel vigorously argued that the search warrant for evidence of child sexually abusive material exceeded the scope of the original search warrant for evidence of stalking, while also arguing that the search warrant did not describe with particularity the evidence to be seized within the scope of probable cause in the search warrant. He argued that the second search warrant authorized a search of the phone, but did not authorize a search of the images that had been extracted during the first search. Counsel argued that Detective VanBonn exceeded the scope of the second warrant. Counsel provided a thorough opening statement, and also moved for a directed verdict of all charges. Counsel was knowledgeable about the facts and clearly subjected the prosecution's case to meaningful adversarial testing. Defendant's argument under *Cronic* fails.[5]

V. PRIOR RECORDED TESTIMONY

With respect to defendant's argument that the trial court erred by admitting AM's preliminary examination testimony at trial, we review the evidentiary ruling for an abuse of discretion. *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010). A court abuses its discretion when its decision falls outside the range of principled outcomes. *People v Musser*, 494 Mich 337, 348; 835 NW2d 319 (2013). But when "the decision involves a preliminary question of law, which is whether a rule of evidence precludes admissibility, the question is reviewed de novo." *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). We review for clear error the trial court's findings of fact. MCR 2.613(C). Clear error occurs when the reviewing court is left with a definite and firm conviction that a mistake has been made. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). We also review for an abuse of discretion the trial court's determination that the prosecutor employed due diligence. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). And we review de novo whether the admission of this evidence violated defendant's Sixth Amendment right of confrontation. *People v Bruner*, 501 Mich 220, 226; 912 NW.2d 514 (2018).

MRE 804(b)(1) creates a hearsay exception, when the declarant is unavailable, for "[t]estimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." A declarant is unavailable when the declarant "is absent from the hearing and the proponent of a statement has been unable to

[5] Defendant does not argue that defense counsel's conduct was deficient under *Strickland*.

procure the declarant's attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown." MRE 804(a)(5). The test for due diligence is "one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." *Bean*, 457 Mich at 684.

The prosecutor established that AM was on active military duty training at the time of trial, which was sufficient to establish her unavailability. See *People v Boyles*, 11 Mich App 417, 421-423; 161 NW2d 448 (1968). Due diligence is an attempt to do everything reasonable, not everything possible, to obtain the presence of a witness. *Bean*, 457 Mich at 684. Although the prosecutor did not subpoena AM's commanding officer to testify as to her military orders as defendant suggests should have been done, the prosecutor was not required to exhaust all avenues to secure the witness's presence. Nothing in the record supports that AM could have been returned for trial. The trial court did not abuse its discretion by finding that the prosecutor employed due diligence and by admitting AM's preliminary examination testimony. MRE 804(a)(5); MRE 804(b)(1).[6]

Further, admission of AM's preliminary examination testimony did not violate defendant's right to confront the witnesses against him. The Confrontation Clause prohibits "the admission of testimonial statements by a witness who does not appear at trial unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness." *People v Dendel (On Second Remand)*, 289 Mich App 445, 453; 797 NW2d 645 (2010). Testimony given at a preliminary examination is a testimonial statement. *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). "The right of confrontation insures that the witness testifies under oath at trial, is available for cross-examination, and allows the jury to observe the demeanor of the witness." *People v Yost*, 278 Mich App 341, 370; 749 NW2d 753 (2008) (quotation marks and citations omitted). "The Confrontation Clause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Owens*, 484 US at 559. AM was unavailable for trial and defense counsel cross-examined her at the preliminary examination, which is all that the Confrontation Clause requires.

VI. MOTION TO SUPPRESS

For his next argument defendant asserts that the trial court erred by denying his motion to suppress the evidence obtained from his cell phone pursuant to the second search warrant because (1) the affidavit for the initial search warrant failed to show probable cause for the search of the device, and (2) the initial search warrant authorizing a search of defendant's cell phone related to stalking lacked particularity and was overbroad, leading to the discovery of the evidence that provided probable cause for the second search warrant related to child sexually abusive material. He also argues that the good-faith exception to the exclusionary rule did not apply.

[6] Defendant did not request an adjournment to procure AM's appearance at trial. Further, the trial court did not err by failing to give a missing witness instruction, as that instruction is appropriate only when the trial court finds that the prosecution failed to exercise due diligence to secure the witness's presence at trial. *People v Eccles*, 260 Mich App 379, 388-389; 677 NW2d 76 (2004).

We review de novo questions of constitutional law, *People v Hughes*, ___ Mich ___; ___ NW2d ___ (2021) (Docket No. 158652); slip op at 8, and a trial court's ultimate decision on a motion to suppress. *People v Mahdi*, 317 Mich App 446, 457; 894 NW2d 732 (2016). The trial court's factual findings on a motion to suppress are reviewed for clear error. *Id*.

The Fourth Amendment protection against unreasonable searches and seizures applies to cell phones. *Hughes*, ___ Mich at ___; slip op at 8-11. Unlike many other personal items, a person retains a privacy interest in the contents of his or her phone against searches even after the phone is validly seized. *Id*. at ___; slip op at 13-21. Therefore, "as with any other search conducted pursuant to a warrant, a search of digital data from a cell phone must be 'reasonably directed at uncovering' evidence of the criminal activity alleged in the warrant." *Id*. at ___; slip op at 21-22 (citation omitted). "Probable cause to issue a search warrant exists where there is a substantial basis for inferring a fair probability that contraband or evidence of a crime will be found in a particular place." *People v Kazmierczak*, 461 Mich 411, 417-418; 605 NW2d 667 (2000). "When reviewing courts assess a magistrate's conclusion that probable cause to search existed, courts are to consider the underlying affidavit in a common-sense and realistic manner." *People Russo*, 439 Mich 584, 604; 487 NW2d 698 (1992). In addition, reviewing courts must also pay deference to a magistrate's determination that probable cause existed. This deference "requires the reviewing court to ask only whether a reasonably cautious person could have concluded that there was a substantial basis for the finding of probable cause." *Id*. at 603. The magistrate's decision must be based only upon facts alleged in the supporting affidavit. *People v Sloan*, 450 Mich 160, 167-169; 538 NW2d 380 (1995), overruled in part on other grounds in *People v Wager*, 460 Mich 118, 123; 594 NW2d 487 (1999).

The affidavit for the initial search warrant included AM's statements to police about the various places that defendant had followed her on the evening of September 8, 2017. When a traffic stop was made on defendant's vehicle, he admitted to following AM and to wanting to discover the identity of the man that she was with. The affidavit further said:

> During contact with [AM], she allowed Sgt. Miller to view her text messages from Alexander. Sgt. Miller read several text messages that had come from Alexander during the evening where he asks her to stop at various places to speak with him. Sgt. Miller observed only two responses from [AM], one of which being a picture of her and another male. Sgt. Miller spoke with Alexander about the text messages. Alexander advised Sgt. Miller that [AM] was texting and calling him. Alexander accused her of erasing her messages. Sgt. Miller asked Alexander if he still had the messages on his phone. Alexander advised that he did, however, he advised Sgt. Miller he did not want him checking the texts between he and [AM]. Alexander did have Sgt. Miller check his call log, as he claimed [AM] had called him during the incident that began in Mount Pleasant. Sgt. Miller noted several calls Alexander made to [AM's] phone during the past few hours. The call timer showed these calls were all made in a close proximity of each other, and they only lasted a few seconds. Alexander's phone log showed seven outgoing calls made to [AM] around the time this event was called in.
>
> Your affiant believes the issuance of this search warrant will lead to the recovery of the items listed in section 2 of this affidavit and search warrant[.] Wherefore, Affiant has probable cause to believe and does believe that evidence of a crime is located in the place sought to be searched.

The affidavit also described the property to be searched for and seized:

Affiant is seeking specific evidence related to a case being investigated by Sgt. Aaron Miller, involving a stalking complaint MCL 750.411H. This complaint involves the male subject, Alexander Haupt, and his ex-girlfriend ,[ ]AM]. Sgt. Miller is seeking electronic communication that has taken place between Alexander and [AM].

Investigators wish to seek specific evidence related to this case. I believe the GPS locations, web history, search terms and internet search history, photos/videos, communications on digital devices and cellular devices may contain relevant evidence, such as pictures, videos, voice, or text communications.

Evidence of ownership: Affiant knows that ownership and control of a digital device can be placed at issue through simple denial i.e. "that is not my phone." Your affiant knows through training and experience some of the best ways to establish control and ownership are by searching the calendar, contacts, photo gallery, communications, setting, and social networking activity. The calendar often contains appointments specific to an individual such as birthdays and doctor's appointments. Contacts often contain friends and associates specific to an individual such as mom, dad, dentist, etc . . . . A photo gallery often contains selfie photos that clearly depict the owner/holder of the phone. Communications via text messages, emails, and voicemails, often identify the sender/recipient buy [sic] name, additionally the context of the communications often the sender and/or recipient. Settings often contain user names, addresses, and phone numbers, Wi-Fi network tables, associated wireless devices (such as known Wi-Fi networks and Bluetooth devices), associated connected devices (such as backup syncing), stored passwords, and user dictionaries that can identify the owner/user of the device. Applications used for social media/messaging such as, but not limited to: Facebook messenger, KIK, snapchat, Instagram, and tinder often provide personal identifying statements to other contacts as well as photographic and video evidence. Therefore, Affiant is seeking all the above information to establish ownership and control of device.

Evidence of Communications: Your Affiant knows through training and experience that associates communicate together via phone calls, text messages, emails, and social network posts. These communications often contain direct and indirect statements about crimes. Furthermore, Affiant knows that communications rarely explicitly mention intent to commit a crime. Instead they often allude to such an intent: "gonna go hustle" for instance may be a declaration of an intent to commit a theft crime, but without contexts it is meaningless. Through Affiants training and experience, Affiant knows it is possible for cellular phone users to use a variety of messaging platforms including SMS, MMS, iChat, WhatsApp, KIK and others. Therefore, your Affiant seeks to search all of the communications evidence on the device to understand not only what was said, but what was intended and to whom it was said.

Your Affiant is seeking specific evidence related to this case. In additional to the previous information, Affiant believes cookies, bookmarks, web history,

> search terms and intent search history, photos/video, communications on this cellular device may contain relevant evidence such as evidence of excessive amount of attempted communications. Therefore, Affiant is seeking permission to search all the metadata, file data, setting data, photographic and video data, and communication data on this cellular device.

The affidavit contained sufficient evidence for the magistrate to conclude that probable cause existed that a crime had been committed and that there was a fair probability that a search of particular data from defendant's cell phone would reveal evidence that defendant had been stalking AM. *Kazmierczak*, 461 Mich at 417-418. A reasonably cautious person could have concluded that there was a substantial basis for the finding of probable cause. *Adams*, 485 Mich at 1039.

With respect to a search warrant, a search or seizure is unreasonable when conducted pursuant to an invalid warrant. *People v Hellstrom*, 264 Mich App 187, 192; 690 NW2d 293 (2004). In additional to his probable cause argument above, defendant argues that the initial search warrant was invalid because it was overly broad and allowed officers to "search for evidence of other crimes for which there is no probable cause showing and no warrant."

Defendant relies primarily on *Hughes* in which the issue was whether, when the police obtain a warrant to search digital data from a cell phone for evidence of a crime, they are later permitted to review the same data for evidence of another crime without obtaining a second warrant. *Hughes*, ___ Mich at ___; slip op at 1. The Court concluded that

> in light of the particularity requirement embodied in the Fourth Amendment and given meaning in the United States Supreme Court's decision in *Riley v California*, 573 US 373; 134 S Ct 2473; 189 L Ed 2d 430 (2014) (addressing the "sensitive" nature of cell-phone data)—that a search of digital cell-phone data pursuant to a warrant must be reasonably directed at obtaining evidence relevant to the criminal activity alleged in *that* warrant. Any search of digital cell-phone that is not so directed, but instead is directed at uncovering evidence of criminal activity not identified in the warrant, is effectively a warrantless search that violates the Fourth Amendment absent some exception to the warrant requirement. Here, the officer's review of defendant's cell-phone data for incriminating evidence relating to an armed robbery was not reasonably directed at obtaining evidence regarding drug trafficking—the criminal activity alleged in the warrant—and therefore the search for that evidence was outside the purview of the warrant and thus violative of the Fourth Amendment. [*Id.*, slip op at 1-2.]

Here, the police did obtain a second warrant to review the same data for evidence of another crime. Defendant's reliance on *Hughes* pertains to the initial search warrant directed at obtaining evidence of stalking. He contends that the search warrant was overbroad and lacking in particularity because the warrant stated only that there " 'might' be evidence of stalking."

The Fourth Amendment only allows search warrants "particularly describing the place to be searched, and the persons or things to be seized." US Const, Am IV. "The purpose of the particularity requirement in the description of items to be seized is to provide reasonable guidance to the executing officers and to prevent their exercise of undirected discretion in determining what is subject to seizure." *People v Unger*, 278 Mich App 210, 245; 749 NW2d 272 (2008) (quotation

marks and citation omitted). Whether a particular warrant satisfied the particularity requirement depends on "the circumstances and the types of items involved." *Id*.

Regarding the particularity requirement, *Hughes* explained that a search warrant "must state with particularity not only the items to be searched and seized, but also the alleged criminal activity justifying the warrant." *Hughes*, ___ Mich at ___; slip op at 22. Here, the initial search warrant stated with particularity not only the items to be searched and seized, but also the alleged criminal activity justifying the warrant. The initial search warrant described the items to be searched for and seized as the "Apple I-Phone S cell phone described in above paragraph." The search warrant stated with particularity the alleged criminal activity, as it authorized officers to search defendant's cell phone for specific evidence of stalking and for evidence of ownership and control of the phone and described the various locations on the phone where evidence of stalking and of ownership and control of the phone might be found. The warrant satisfied the particularity requirement of the Fourth Amendment.[7] The trial court did not err by denying defendant's motion to suppress.[8]

VII. OBSTRUCTION OF JUSTICE CONVICTION

We also reject defendant's argument that the evidence was insufficient to support his conviction of obstruction of justice. "Challenges to the sufficiency of the evidence are reviewed de novo." *People v Wang*, 505 Mich 239, 251; 952 NW2d 334 (2020). "In evaluating defendant's claim regarding the sufficiency of the evidence, this Court reviews the evidence in a light most favorable to the prosecutor to determine whether any trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt." *Id*. (quotation marks and citation omitted). All conflicts in the evidence are resolved in favor of the prosecution, *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), and circumstantial evidence and reasonable inferences drawn therefrom can constitute satisfactory proof of the crime, *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). "Circumstantial evidence is evidence of a fact, or a chain of facts or circumstances, that, by indirection or inference, carries conviction to the mind and logically or reasonably establishes the fact to be proved." *Wang*, 505 Mich at 251 (quotation marks, citations, and alterations omitted).

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[7] To the extent that defendant argues that the officers exceeded the scope of the warrant by reviewing images on the phone that predated another criminal complaint filed by AM on June 30, 2017, the search of images on defendant's phone was directed toward evidence specified in the warrant and was reasonably directed at uncovering evidence related to the criminal activity identified in the warrant—stalking. See *Hughes*, ___ Mich at ___; slip op at 23. Nonetheless, Detective VanBonn stopped executing the search warrant when he saw evidence that he believed could be related to different criminal activity and he secured a second search warrant related to that criminal activity.

[8] Even assuming that the warrant was overbroad, Detective VanBonn reasonably relied on the search warrant in good faith, and the warrant was not so facially deficient that he could not reasonably presume it to be valid. *People v Goldston*, 470 Mich 523, 529; 682 NW2d 479 (2004).

MCL 750.505 is the statutory provision that includes obstruction of justice, and provides that "any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony." Obstruction of justice is a common-law offense, "defined as 'an interference with the orderly administration of justice.' " *People v Jenkins*, 244 Mich App 1, 15; 624 NW2d 457 (2000) (citation omitted). Coercion of witnesses to constitute obstruction of justice. *People v Ormbsy*, 310 Mich 291, 300; 17 NW2d 187 (1945); *People v Tower*, 215 Mich App 318, 320; 544 NW2d 752 (1996). Specifically, an "attempt through threats and coercion to dissuade a witness from testifying" constitutes common-law obstruction of justice. *Id*. at 320. This crime is complete with the attempt through threats and coercion to dissuade a witness from testifying. *People v Coleman*, 350 Mich 268, 274; 86 NW2d 281 (1957). Whether the attempt succeeds in dissuading the witness is immaterial. *Id*. at 281. Words alone may be sufficient to constitute the crime. *Id*. at 280.

The obstruction of justice charge stemmed from the statements defendant made to AM in his truck after the altercation that resulted in separate charges of interference with electronic communications and domestic violence. Specifically, defendant told AM that she would face criminal charges if she did not withdraw her complaint to police, and that she could leave the truck if she would drop the charges. Defendant also told her to go the prosecutor's office that day to inform them that she wanted to drop the charges. By telling AM to drop the charges, and telling her not to answer any questions about why she was dropping the charges, defendant attempted to "willfully hamper, obstruct or interfere with a criminal investigation." Viewed in a light most favorable to the prosecution, the evidence was more than sufficient to establish defendant's guilt of obstruction of justice. *Wang*, 505 Mich at 251.

VIII. SENTENCING ISSUES

Finally, defendant posits several sentencing arguments. Defendant first argues that the trial court erred when scoring offense variables (OVs) 10 and 12. "Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id*. "A trial court's findings of fact are clearly erroneous if, after reviewing the entire record, [this Court is] definitely and firmly convinced that the trial court made a mistake." *People v Carlson*, 332 Mich App 663, 666; 958 NW2d 278 (2020). "A trial court may consider all record evidence when calculating the sentencing-guidelines range." *People v Savage*, 327 Mich App 604, 617; 935 NW2d 69 (2019).

With respect to OV 10, defendant argues that the trial court improperly scored 10 points for exploitation of victim vulnerability because AM was not a vulnerable victim as she was in a consensual relationship with defendant. OV 10 is scored ten points when the "offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." MCL 777.40(1)(b). "The mere existence of 1 or more of factors described in subsection (1) does not automatically equate with victim vulnerability." MCL 777.40(2). MCL 777.40(3)(b) defines "exploit" as "to manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(c) defines "vulnerability" as "the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." Therefore, to merit a score of 10 points for OV 10, a defendant must have manipulated a young

victim for a selfish or unethical purpose and the victim's vulnerability must have been readily apparent.

Under these facts, OV 10 was easily scored 10 points. First, AM was clearly a victim, as she was the child victim portrayed in the material. *People v Althoff*, 280 Mich App 524, 536-537; 760 NW2d 764 (2008). Second, "[w]hen a person possesses child sexually abusive material, he or she personally engages in the systematic exploitation of the vulnerable victim depicted in that material. Evidence of possession therefore can support a score of 10 points for OV 10, reflecting that a defendant exploited a victim's vulnerability due to the victim's youth." *People v Needham*, 299 Mich App 251, 252; 829 NW2d 329 (2013). Here, defendant not only possessed the material, but also produced it and distributed it knowing that AM was 17 years old. Defendant exploited and manipulated AM for a selfish or unethical purpose by taking photos and videos of her engaging with him in sexual intercourse and fellatio and distributing the images to others for money. The trial court did not err by scoring 10 points for OV 10.

With respect to OV 12, defendant argues that the trial court erred by scoring 25 points because the large number of images taken by defendant within 24 hours should not have been separated and scored under both OV 12 and OV 13.

Under OV 12, MCL 777.42, the trial court had to determine whether defendant engaged in any "contemporaneous felonious criminal acts." If defendant did not engage in any contemporaneous felonious criminal acts, the trial court had to score OV 12 at zero points. MCL 777.42(1)(g). However, if defendant did engage in contemporaneous felonious criminal acts, the trial court has to evaluate the number of acts and whether the acts constituted crimes against a person or other crimes,[9] see MCL 777.42(1)(a) to (f), and then assign "the number of points attributable to the [corresponding subdivision of the statute] that has the highest number of points," MCL 777.42(1). A felonious criminal act is defined to be contemporaneous if the act occurred within 24 hours of the sentencing offense and will not result in a separate conviction. MCL 777.42(2)(a)(*i*) and (*ii*).

The trial evidence showed that defendant committed three or more acts of child sexually abusive material or activity within 24 hours of the child sexually abusive material or activity for which the trial court was not sentencing defendant. Detective VanBonn testified that he found 42 images of child sexually abusive material during the search. An extraction report exported from Cellebrite that identified the images was admitted at trial.[10] Thus, under the plain language of MCL 777.42(1)(a), the trial court had to score OV 12 at 25 points for three or more contemporaneous acts. And the trial court had to score both OV 12 and 13. See MCL 777.22(1) ("For all crimes against a person, score offense variables 1, 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, 14, 19, and 20"). Defendant conceded at sentencing that 25 points were properly scored for OV 13 for the sentencing offenses, and he does not specifically challenge the scoring of OV 13.[11] To the

[9] Defendant does not argue that the contemporaneous criminal acts were not acts against a person.

[10] Defendant does not argue that OV 11 applied to that conduct.

[11] Nonetheless, defendant's convictions for which he was sentenced were not and could not have been scored under OV 12 and were properly scored under OV 13 because the offenses were "part

extent that defendant suggests that OV 13 was improperly scored, defendant has failed to show plain error in the scoring of OV 13. *Carines*, 460 Mich at 763.

Defendant also argues that even if the guidelines were properly scored, his sentence of 78 months to 20 years for producing child sexually abusive activity is unreasonable and disproportionate.

Generally, "the proper inquiry when reviewing a sentence for reasonableness is whether the trial court abused its discretion by violating the 'principle of proportionality' set forth in *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990), 'which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender.' " *People v Steanhouse*, 500 Mich 453, 459-460; 902 NW2d 327 (2017). A trial court abuses its discretion when the sentence imposed by the trial court is disproportionate to the seriousness of the circumstances involving the offense and the offender. *Milbourn*, 435 Mich at 636. If the trial court selects a sentence that falls within the range recommended under the advisory guidelines, that sentence is presumptively proportionate. *Id*. at 658. The reviewing court must affirm a sentence that falls within the recommended sentencing range absent an error in scoring or reliance on inaccurate information. MCL 769.34(10); *People v Schrauben*, 314 Mich App 181, 196 n 1; 886 NW2d 173 (2016).

Here, defendant's sentence is at the bottom of the sentencing guidelines range of 78 to 130 months. Therefore, we must affirm defendant's sentences "absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence[s]." Because we have concluded that the challenge to the scoring of the sentencing guidelines lacks merit, and defendant does not allege that inaccurate information was relied upon in determining his sentence, MCL 769.34(10) directs that the sentence be affirmed. See *People v Posey*, ___ Mich App___, ___; ___ NW2d ___ (2020) (Docket No. 345491); slip op at 8-9.

"A defendant can only overcome the presumption of proportionality by presenting unusual circumstances that would render a presumptively proportionate sentence disproportionate," such as a sentence that constitutes cruel and unusual punishment. *Posey*, ___ Mich App at ___; slip op at 7-8. Defendant appears to be suggesting that the unusual circumstances that would allow this Court to conclude that his within-guidelines sentence was disproportionate are (1) the numerous plea offers offered by the prosecution that included various sentences of less than one year and no more than five months, and his consensual sexual relationship with AM, who he asserts "did not look like a child" and whose pictures "were not sold as child pornography." However, defendant repeatedly chose not to accept a plea offer that he now deems to include what is "illustrative of a fair sentence," and he acknowledges that consent is not a defense to the charges in this case. Defendant has failed to show unusual circumstances and has failed to overcome the presumption that his within-guidelines sentence was proportionate.

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of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c).

Affirmed.

/s/ Christopher M. Murray
/s/ Michael J. Kelly
/s/ Colleen A. O'Brien