STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 4, 2001
v	No. 223715 Kent Circuit Court
MICHAEL BRIAN HOFFER, Defendant-Appellant.	LC No. 98-007383-FH

Before: Holbrook, Jr., P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction of child sexually abusive activity, MCL 750.145c(2), possession of child sexually abusive material, MCL 750.145c(4), and possession of marijuana, MCL 333.7403(2)(d). He was sentenced to eight to thirty years' imprisonment for the child sexually abusive activity conviction, and to time served for the possession of marijuana and possession of child sexually abusive material convictions. We affirm.

Defendant contends that the trial court erred in denying his motion to quash his bindover on the child sexually abusive activity charge. Specifically, defendant asserts that because there was no evidence that he was actually involved with a child at any point, there was insufficient evidence to support the bindover. We disagree. The standard of review for this issue was discussed in *People v Hudson*, 241 Mich App 268, 276: 615 NW2d 784 (2000):

> A circuit court's decision with respect to a motion to quash a bindover order is not entitled to deference because this Court applies the same standard of review to this issue as the circuit court. This Court therefore essentially sits in the same position as the circuit court when determining whether the district court abused its discretion. In other words, this Court reviews the circuit court's decision regarding the motion to quash a bindover only to the extent that it is consistent with the district court's exercise of discretion. The circuit court may only reverse an abuse of discretion. Thus, . . . we review the district court's original exercise of discretion.
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> Because the question whether to dismiss the information is inextricably connected to whether the district court erred in binding over a defendant, the

> circuit court's decision *not* to dismiss the information may be reversed only if the district court abused its discretion in binding over the defendant.

We review for an abuse of discretion the district court's finding of probable cause. *People v Brown*, 239 Mich App 735, 739; 610 NW2d 234 (2000). The probable cause threshold is met when, "'by a reasonable ground of suspicion, [it is] supported by circumstances sufficiently strong to warrant a cautious person in the belief that the accused is guilty of the offense charged.'" *Hudson, supra* at 279, quoting *People v Woods*, 200 Mich App 283, 288; 504 NW2d 24 (1993).

On appeal, the prosecution concedes that there was no evidence produced at trial that defendant had actually had contact with any child. However, the prosecution argues that this is irrelevant because its theory of the case was that defendant attempted or prepared to arrange for child sexually abusive activity. As this Court noted in *People v Thousand*, 241 Mich App 102, 115; 614 NW2d 674 (2000), aff'd in part, rev'd in part on other grounds ___ Mich ___; ___ NW2d ___ (2001), the child sexually abusive activity statute does not apply only to actual abusive activity. Rather, the statute also punishes preparation for such activity. A defendant's "criminal responsibility . . . is not premised on his success, but on his preparations." *Thousand, supra*, 241 Mich App at 116.[1]

After reviewing the evidence presented at the preliminary hearing, we conclude that the district court did not abuse its discretion in binding defendant over for trial. The evidence presented established probable cause to believe that defendant attempted or prepared to arrange for child sexually abusive activity. A list of names of young boys, their home addresses, phone numbers, schools, physical descriptions, and medications they were taking was found in defendant's munitions trunk along with a list explaining how defendant should go about abducting a child. Defendant's notes about disorienting his subject with LSD or marijuana were also in the trunk, as were nude pictures of men and boys engaging in sexual intercourse, hand drawings depicting young boys performing oral sex, and child-sized sex toys.

We also reject defendant's related argument that insufficient evidence was presented at trial to support his conviction on this charge. "When reviewing a claim regarding the sufficiency of the evidence, this Court examines the evidence in a light most favorable to the prosecution to determine if a rational jury could find that the essential elements of the offense were proved beyond a reasonable doubt." *People v Joseph*, 237 Mich App 18, 20; 601 NW2d 882 (1999). Defendant's argument that there was no evidence adduced that he had actually had contact with

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[1] MCL 750.145c(2) provides in pertinent part:

> A person who persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material, or a person who arranges for, produces, makes, or finances, *or a person who attempts or prepares or conspires to arrange for*, produce, make, or finance *any child sexually abusive activity* or child sexually abusive material is guilty of a felony . . . . [Emphasis added.]

any child fails for the same reasons noted above. Further, viewed in the appropriate light, we believe the above evidence, also introduced at trial, was sufficient to establish beyond a reasonable doubt that defendant had attempted or prepared to arrange for child sexually abusive activity.

Defendant also argues that he was denied effective assistance of counsel because his trial counsel failed to object to a detective's testimony in which the detective referred the aforementioned list of boys' names as a "kidnap list." We disagree. "To prove a claim of ineffective assistance of counsel . . . , a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense so as to deny defendant a fair trial." *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998). Defendant must overcome the presumption that the challenged action constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Because defendant failed to move for either a new trial or a *Ginther*[2] hearing, our review of his claim of ineffective assistance of counsel is limited to the existing record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

Defendant has misconstrued the trial testimony. Erlandson's trial testimony never characterized the list of children's names as a "kidnap list." The only lists the witness referred to as "kidnap lists" were two lists that described the materials to be used and the method by which a person should proceed when abducting an individual. Because the witness never referred to the list with children's names as a "kidnap list" at trial, trial counsel's failure to object to such a characterization could not have amounted to ineffective assistance. Defense counsel is not required to raise a futile objection. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

We also reject defendant's argument that the trial court erred when it denied his motion to suppress evidence obtained as the result of a search of his apartment. Defendant asserts that because the affidavit supporting the search warrant did not establish the requisite probable cause, the trial court's ruling was in error. We disagree. Reading the warrant and the affidavit in a commonsense and realistic manner, we believe that a reasonably cautious person could have concluded there was a "substantial basis" for the magistrate's finding of probable cause. *People v Russo*, 439 Mich 584, 604; 487 NW2d 698 (1992). The affidavit indicated that the marijuana found in defendant's car, as well as the marijuana defendant voluntarily retrieved from his apartment, "was compacted as if it had come off a larger quantity." The detective further averred that marijuana for personal use is not typically so compacted, but is much more "crumbly and leafier." The affidavit also provided that "considerable pornographic material" was found in the trunk of defendant's car. Included in this material were nude pictures of children, some provocatively posed. Several pairs of children's underwear and specifically identified child-sized sexual toys were also found in the trunk. The affidavit states that defendant admitted owning the pornographic magazines found in the trunk of his car and told the detective "that he was on a mailing list to receive these magazines." We believe that these facts provide the basis for the issuing magistrate's conclusion that there was a fair probability the evidence of a crime would be

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

found in defendant's apartment. *People v Brake*, 208 Mich App 233, 241; 527 NW2d 56 (1994). Thus, we see no error in the trial court's denial of defendant's motion to exclude evidence obtained as a result of this search.

Finally, defendant argues that the trial court abused its discretion when it ruled that certain prior acts evidence could be introduced at trial. However, the record indicates that the evidence was never presented at trial and never reached the jury. Because the non-presentation of the proposed MRE 404(b) evidence could not have affected the outcome of the trial, we decline to review the trial court's ruling.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter