STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 12, 2010
v	No. 283061 Cass Circuit Court
JOHN EDWARD MCNEELEY, Defendant-Appellant.	LC Nos. 07-010165-FH; 07-010253-FH

Before: Beckering, P.J., and Wilder and Davis, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(a); three counts of child sexually abusive activity for the purpose of producing any child sexually abusive material, MCL 750.145c(2); and one count of possession of child sexually abusive material, MCL 750.145c(4)(a). He was sentenced to concurrent terms of 25 to 40 years' imprisonment for his first-degree criminal sexual conduct, 85 months to 20 years' imprisonment for each conviction for child sexually abusive activity, and 201 days' in jail for the possession of child sexually abusive material. Defendant appeals as of right. We affirm.

KG and her family lived next-door to defendant in a home purchased from defendant. KG considered defendant a friend, and often socialized with him. Defendant seemed particularly friendly with KG's eight-year-old daughter, who would from time to time go over to defendant's house, by herself, to play games on his computer. At such times, there were no adults present other than defendant. KG's daughter testified that on more than one occasion, defendant touched her private parts, including digital penetration, and she identified herself in three naked photographs that were seized from defendant's house. She also identified defendant's bedroom in some of the photographs.

Another girl, who lived across the street from defendant, testified that she was 15 years old when she was victimized by defendant. This girl testified that she had known defendant since she was 11 years old, and would often go to his house, sometimes alone, and would play games, use the hot tub and pool, and use the computer. She identified herself in a photograph in which she was lying naked on defendant's bed, and testified in that particular photo, she appeared to be passed-out. While she could not recall that photograph being taken, she did recall previously drinking alcohol while in defendant's hot tub.

Police also seized numerous photographs and digital images from defendant's home. Two of the images "alerted" as known child pornography when run through forensic software. Over 1000 images recovered from defendant's computer hardware were termed by the investigating detective as "child erotica," in that the way the child was posed for the focus of the particular picture or image were such that they would not be considered pornography.

Defendant argues that the prosecution produced insufficient evidence to support his conviction of first-degree criminal sexual conduct. This Court reviews sufficiency of the evidence claims de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). We view the evidence "in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). To secure a conviction for first-degree criminal sexual conduct, the prosecution must establish that defendant engaged in sexual penetration with a person less than 13 years of age. MCL 750.520b(1)(a); *In re Hawley*, 238 Mich App 509, 511; 606 NW2d 50 (1999). "Sexual penetration means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body." MCL 750.520a(r); *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005).

There was sufficient evidence to support, beyond a reasonable doubt, defendant's conviction for first-degree criminal sexual conduct. KG's daughter testified that defendant digitally penetrated her "private part," and the testimony of complainant alone is sufficient evidence to establish defendant's guilt beyond a reasonable doubt. *People v Taylor*, 185 Mich App 1, 8; 460 NW2d 582 (1990).

Defendant also argues that the prosecutor presented insufficient evidence to support the jury's verdict as to his remaining convictions. We disagree.

To secure a conviction under MCL 750.145c(2), the prosecutor had to prove that defendant "knowingly allowed a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material," or produced child sexually abusive material. MCL 750.145c(2). Knowledge can be inferred from the surrounding circumstances and reasonable inferences arising from the evidence. *People v Lang*, 250 Mich App 565, 576-577; 649 NW2d 102 (2002). Child sexually abusive activity is defined as engaging a child in a listed sexual act including erotic nudity. MCL 750.145c(1)(h) and (l). Erotic nudity is defined as, "the lascivious exhibition of the genital, pubic, or rectal area of any person." MCL 750.145c(1)(g). "The statutory definition of erotic nudity does not encompass the depiction of all child nudity. Rather, it is narrowly defined to exclude those depictions that have a primary literary, artistic, educational, political, or scientific value and that do not appeal to the prurient interests in sex." *People v Gezelman (On Rehearing)*, 202 Mich App 172, 174; 507 NW2d 744 (1993).

Viewing the evidence in a light most favorable to the prosecution, the evidence established beyond a reasonable doubt that defendant knowingly took at least two photographs of KG's daughter that constituted "erotic nudity." The photographs were taken in defendant's home, in his bedroom, where he lived alone, and they focused on the victim's pelvic area, looking up her skirt and partially exposing her buttocks. The photographs do not have literary,

artistic, educational, political, or scientific value, and they appeal to the prurient interests in sex. *Gezelman, supra* at 174. In addition, defendant was, "particularly" friendly with KG's daughter and the testimony showed they were often alone in defendant's house together. The evidence and reasonable inferences support the jury's conclusion that defendant knowingly allowed the victim to engage in child sexual abusive activity, for the purpose of producing sexually abusive material, i.e. photographs.

In addition to the photographs of KG's daughter, the police also recovered a photograph of defendant's 15-year-old neighbor, in which she was depicted lying on defendant's bed nude. Only a portion of the girl's face is visible, but she appeared to be unconscious and her buttocks are visible as well as a part of her vagina. This photograph also constitutes "erotic nudity," because it displays the victim's genital area and does not have literary, artistic, educational, political, or scientific value. *Gezelman, supra* at 174. The photograph was recovered from the camera card on defendant's digital camera, and a copy was also found on defendant's computer saved under two different filenames, both containing defendant's first name. The circumstantial evidence, and reasonable inferences arising from the prosecution's evidence, were sufficient to support defendant's convictions of the crime of producing child sexually abusive material. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Defendant additionally argues that the prosecution produced insufficient evidence to support his conviction of possession of child sexually abusive material. To secure a conviction, the prosecutor must prove beyond a reasonable doubt that defendant knowingly possessed child sexually abusive material. MCL 750.145c(4). The definition of sexually abusive material includes any depiction that is of a child or appears to include a child engaging in a listed sexual act. MCL 750.145c(1)(m). A "listed sexual act" includes: sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, or erotic nudity. MCL 750.145c(1)(g) and (l); *People v Riggs*, 237 Mich App 584, 592; 604 NW2d 68 (1999). Here, the evidence and reasonable inferences were sufficient to warrant the jury's finding that defendant possessed child sexually abusive material. Detective Rebecca Macarthur testified that she recovered 85 images depicting underage girls engaged in sexual intercourse, fellatio, digital penetration, and other images. In addition, two of the images alerted as "known child pornography" when run through forensic computer software. Each of the images was recovered from hardware in defendant's home.

Defendant next argues that the verdict was against the great weight of the evidence. Defendant moved for a new trial on this ground, and the trial court denied that motion. In deciding this issue, this Court must determine whether the evidence preponderates so heavily against the verdict, that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998). This Court reviews the trial court's grant or denial of a new trial for an abuse of discretion. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). "A trial court may be said to have abused its discretion only when its decision falls outside the principled range of outcomes." *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). Here, defendant failed to show that the evidence preponderated heavily against the verdict, or that the testimony of the prosecution's witnesses was impeached to the extent that it was deprived of all probative value such that the jury could not believe it. *Lemmon, supra* at 642-643. The jury, through its deliberations, found the prosecution's version credible, and the prosecution's witnesses gave similar accounts of the incidents, which

diminishes defendant's argument that they were incredible. On this record, it would not be a miscarriage of justice to allow the verdicts to stand, and the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Defendant next contends that he was denied a fair trial, when the trial court granted the prosecution's motion to consolidate the criminal sexual conduct charge filed in LC docket no. 07-010165-FC, with the child sexually abusive material charges, filed in LC docket no. 07-010253-FH. Whether charges are related, for purposes of consolidation, is a question of law that this Court reviews de novo, and a trial court's decision under the joinder court rule, MCR 6.120, is reviewed for an abuse of discretion. *People v Girard*, 269 Mich App 15, 17; 709 NW2d 229 (2005). MCR 6.120(B) provides, in pertinent part, that a trial court may join offenses if the offenses are related i.e., based on the same conduct or transaction, a series of connected acts, or a series of acts constituting parts of a single scheme or plan. Single scheme or plan offenses can be shown if a defendant acting alone commits two or more offenses in order to achieve a unified goal. *People v McCune*, 125 Mich App 100, 104; 336 NW2d 11 (1983).

The trial court did not abuse its discretion in consolidating the two cases. Both cases involved alleged crimes committed against KG's daughter, and the evidence established defendant had a common scheme to attract KG's daughter and other underage children, including his 15 year old neighbor, to his home. Although he lived alone, he filled his house with games and pictures of children. In consolidating the cases, the trial court also considered other permissible factors, including the fact that the same witnesses would be called as witnesses in both matters, and the fact that the pictures taken of KG's daughter that were the basis for the child sexual abusive material would also be admitted as evidence in the criminal sexual conduct trial. MCR 6.120(B)(2).

Defendant next argues that the trial court erred in permitting Detective Macarthur to testify to information that required scientific, technical, or specialized knowledge without a showing that she qualified as an expert. We review unpreserved issues for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Police testimony can be characterized as lay or expert. *People v Dobek*, 274 Mich App 58, 63-64; 732 NW2d 546 (2007). If the officer is testifying to her perceptions, then her testimony is lay testimony; but if the officer is testifying based on her training and experience, she is offering expert testimony. *Id.* MRE 602 permits a lay witness to testify on matters for which she has personal knowledge. In addition, MRE 701 provides that opinion testimony from a non-expert is admissible, if it is based on the perception of the witness, and is helpful to the determination of a fact in issue. We have held that police lay testimony is proper when the witness' conclusions are not "overly dependent on scientific, technical, or specialized knowledge. . . ." *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 456; 540 NW2d 696 (1995).

Here, the trial court did not plainly err in permitting Detective Macarthur to testify as a lay witness, because she was testifying to her own perceptions, and not relying on specialized knowledge, when she described the images recovered from defendant's computer. Detective Macarthur testified that she recovered over 1,200 images on defendant's hardware that she considered "child erotica," and she explained that the pictures consisted of naked children, but that the images were not child pornography because of how the children were posed, or the focus

of the pictures. In addition, Detective Macarthur also recovered 85 images that she considered child pornography. Two of the images matched known child pornography when she ran defendant's images through a national database. Detective Macarthur based her assessment of these pictures on her own perceptions, and not on any identifiable "scientific, technical, or other specialized knowledge." *Richardson, supra* at 456. In addition, Detective Macarthur's testimony was helpful to a determination of facts at issue. MRE 701.

Defendant next argues several unpreserved claims of prosecutorial misconduct, which we review for plain error. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). "The test for prosecutorial misconduct is whether, after examining the prosecutor's statements and actions in context, the defendant was denied a fair and impartial trial." *People v Hill*, 257 Mich App 126, 135; 667 NW2d 78 (2003). Claims of prosecutorial misconduct are considered on a case-by-case basis, and the actions of the prosecutor are to be considered as a whole and evaluated in light of the defense arguments and the evidence admitted at trial. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

First, defendant challenges the prosecutor's opening statement wherein he told the jury that it would find the subject matter "disturbing" and stated he would be showing certain evidence that he did not enjoy sharing. Prosecutors are afforded great latitude regarding their arguments and conduct at trial, and are free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Here, the argument was a permissible commentary on the nature of the evidence, and was not prejudicial such that it affected the outcome of the trial.

Next, defendant challenges the evidence and argument that defendant was "grooming" neighborhood children because of how his house was situated, and that several witnesses testified they were uncomfortable around defendant. The challenged testimony was relevant, because it made it more probable than not that defendant had a planned scheme to entice KG's daughter and/or defendant's 15 year old neighbor for sexual digital penetration or to sexually assault her as well as to produce child sexually abusive material, facts that were in issue. *People v Starr*, 457 Mich 490, 496-498; 577 NW2d 673 (1998). Each of the statements made the existence of the victim's sexual abuse more probable than it would have been without the evidence. MRE 401. Accordingly, the prosecutor's good-faith effort to admit evidence does not constitute misconduct. *Dobek, supra* at 63-64.

Next, defendant argues that the prosecutor impermissibly appealed to the jury's civic duty in order to convince the jury to convict defendant. "A prosecutor may not appeal to the jury to sympathize with the victim." *Unger, supra* at 237. In addition, a prosecutor may not make a civic duty argument that appeals to the fears and prejudices of the jurors, because this injects issues broader than the guilt or innocence of the accused into the trial. *Bahoda, supra* at 282-284.

During closing argument, the prosecutor argued that complete nudity was not required to support the elements of the crime, and that defendant should not be able to "get away with it." Further, during rebuttal, he commented that defendant should not be "rewarded" for choosing a victim who was too young to recall all of the details of the abuse. Read as a whole, the prosecutor's comments do not appeal to the fears and prejudices of the jurors. *Bahoda, supra* at 282-284. The challenged questions and statements did not inject issues broader than the guilt or

innocence of defendant into the trial. There was no misconduct. *Id.* at 283-285. Moreover, the trial court instructed the jury that it must decide the case based on the evidence, and that the attorneys' statements are not evidence. The instructions were sufficient to cure any prejudice. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993).

Defendant additionally argues that the prosecution denigrated the defendant and the defense when he commented that defendant has "some sort of predatism for children." A prosecutor must refrain from "denigrating a defendant with intemperate and prejudicial remarks." *Bahoda, supra* at 283. However, a prosecutor is not required to phrase arguments in bland terms. *People v Matuszak*, 263 Mich App 42, 56; 687 NW2d 342 (2004). This statement was supported by the evidence produced at trial, including the fact that defendant's home was filled with games, and his camera and computer were filled with images of children. Therefore, the prosecutor's characterization of defendant as a child predator was reasonable, and prosecutors are free to argue all reasonable inferences from the evidence, as it relates to their theory of the case. *Bahoda, supra* at 283.

Defendant next argues that the prosecutor argued facts not in evidence, when he asserted that defendant effectively paid $10,000 for the victim to move in next to him, and that he "groomed" the victim. A prosecutor may not make a factual statement to the jury that is not supported by the evidence. *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). Here, there was a factual basis for each of the prosecutor's statements. Dorothy Kasper testified that she offered defendant $95,000 for the home in question, but that instead defendant sold the home to KG for $86,000. In addition, several witnesses testified that defendant's home was filled with children's games, and appeared to be "geared toward" children. There was no plain error.

Defendant next argues that the prosecutor misstated the law when he argued that the pictures of KG's daughter constituted "erotic nudity." A prosecutor's clear misstatement of the law may deprive a defendant of a fair trial if it remains uncorrected; however, if the jury is correctly instructed on the law, an erroneous legal argument made by the prosecutor can be cured. *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002). After review of the record, we find that the prosecutor properly argued that the photographs met the statutory requirements. Moreover, any error was cured when the trial court properly instructed the jury using the language of the statute. *Id.*

Lastly, with respect to prosecutorial misconduct, defendant argues that the sum total of the prosecution's instances of misconduct denied him a fair trial. Although the cumulative effect of minor instances of prosecutorial misconduct may result in reversal, here there were no errors to accumulate. *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003).

Defendant next argues on appeal that his sentence of 25 to 40 years' imprisonment constitutes cruel or unusual punishment under the United States and Michigan constitutions. US Const, Am VIII; Const 1963, art 1, § 16. We review unpreserved sentencing and constitutional issues for plain error affecting substantial rights. *Carines, supra* at 774; *People v Sexton*, 250 Mich App 211, 227; 646 NW2d 875 (2002). In deciding if punishment is cruel or unusual, this Court looks to the gravity of the offense, and the harshness of the penalty, comparing the punishment to the penalty imposed for other crimes in this state, as well as the penalty imposed for the same crime in other states. *People v Poole*, 218 Mich App 702, 715; 555 NW2d 485

(1996). Legislatively mandated sentences are presumptively proportional and presumptively valid. *People v Williams*, 189 Mich App 400, 404; 473 NW2d 727 (1991).

Defendant was sentenced pursuant to MCL 750.520b(2)(b), which requires that defendant be sentenced to life or any term of years, but not less than 25 years. Using the factors outlined in *Poole, supra,* we conclude that defendant's sentence is proportional. First, we conclude that the gravity of defendant's actions was severe. Defendant, a 50-year-old man, befriended and influenced an eight-year-old girl, with the intent of sexually abusing her. The evidence established that defendant inappropriately touched the victim on more than one occasion and took abominable photographs of her and another victim. Our Legislature carefully considered the age of the victim in establishing the severity of the criminal conduct, and the age of the victim is balanced against the nature of the sexual conduct to establish a graduated system of punishment. *People v Cash*, 419 Mich 230, 242-243; 351 NW2d 822 (1984). Here, the disparity in age is striking and the conduct had an emotional effect on the victim, who the evidence established continues to write about him. Second, in comparing the penalty for first-degree criminal sexual conduct to those imposed for other crimes, we find several other crimes that are punishable by a life sentence with the possibility of parole, although none include a mandatory minimum. These crimes include assault with intent to commit murder, MCL 750.83; armed robbery, MCL 750.529; kidnapping, MCL 750.349; second-degree murder, MCL 750.317; conspiracy to commit murder, MCL 750.157a; and bank robbery, MCL 750.531. But, life imprisonment for sexual penetration of an underage victim has a long history in Michigan. *Cash, supra* at 243. Moreover, several jurisdictions have similar statutes punishing sexual penetration of child with mandatory minimums, including Ohio, Ohio Rev Code Ann 2971.03; Kentucky, Ky Rev Stat Ann 532.060; Tennessee, Tenn Code Ann 39-13-522; and Indiana, Ind Code 35-50-2-4. Defendant has failed to overcome the presumption that his legislatively-mandated sentence was proportional and valid. *Williams, supra* at 404.

Defendant next claims that he received ineffective assistance of counsel. Our review of defendant's claim is limited to mistakes apparent on the record. *Rodriguez, supra* at 38. To prevail on his claim, defendant must show that defense counsel's performance fell below an objective standard of reasonableness, and was so prejudicial that he was denied a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). He must overcome the strong presumption that counsel's actions constituted sound trial strategy. *Unger, supra* at 242.

First, defendant argues that defense counsel failed to impeach the first victim's testimony, which was vulnerable because there were inconsistencies in her trial testimony, when compared to her statement in the police investigation, and because there was a violation of the child witness protocol. But whether and how to impeach a witness are matters of trial strategy, left to counsel's professional judgment. *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997). And, we note that defendant's assertion is incorrect. During the police interview, the victim was never asked if defendant digitally penetrated her. Therefore, her testimony at trial was not inconsistent when she testified that defendant's fingers or hand went inside her vagina. In addition, defendant has failed to establish how the victim's testimony was a violation of the child witness protocol, or how false memories were implanted. Defendant must provide the factual predicate for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Here, defendant has failed to identify any specific, prior inconsistent statements that may have been used to impeach victim one, and he failed to argue or demonstrate

that any particular statements would have impeached the victims, such that the outcome of the trial would have been affected.

Second, defendant argues that defense counsel failed to object to Detective Macarthur's conclusion that two of the images found on defendant's computer were "known child pornography," because she had not been qualified as an expert. However, as discussed above, Detective Macarthur's testimony did not constitute expert testimony, and it would have been futile for defense counsel to object to Detective Macarthur's testimony because she had not been qualified as an expert. "Defense counsel is not required to make a meritless motion or a futile objection." *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

Third, defendant argues that defense counsel was ineffective in failing to object on confrontation clause grounds to (1) to KG's testimony that her daughter told her something that made her contact the police; and (2) Detective Macarthur's testimony, that two images found on defendant's computer "alerted" as "known child pornography," when run through a national database. We disagree with defendant's claim of ineffective assistance of counsel.

A defendant has the right to be confronted with the witnesses against him. US Const, Am VI; *Crawford v Washington*, 541 US 36, 42; 124 S Ct 1354; 158 L Ed 2d 177 (2004). The confrontation clause prohibits the admission of all out-of-court testimonial statements, at trial, unless the declarant was unavailable at trial, *and* the defendant had a prior opportunity for cross-examination of the declarant. *Id*. at 68; *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007). "[P]retrial statements are testimonial if the declarant would reasonably expect that the statement will be used in a prosecutorial manner and if the statement is made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *People v Lonsby*, 268 Mich App 375, 377; 707 NW2d 610 (2005).

Recently, the United States Supreme Court held, in *Melendez-Diaz v Massachusetts*, ___ US ___, ___; 129 S Ct 2527; ___ L Ed 2d ___ (2009), a case involving a state-court conviction for cocaine trafficking, that a trial court's admission of sworn certificates of analysis, from a state laboratory, violated the defendant's right of confrontation, where the analysts did not testify live at trial. The court held that the analysts' certificates of analysis were affidavits within the core class of testimonial statements covered by the confrontation clause. *Id*. at 2532. The court rejected the arguments that the analysts were removed from the coverage of the confrontation clause, (1) because they were not accusatory witnesses; (2) because they were not conventional witnesses; and (3) because their testimony consisted of neutral, scientific testing. The court also rejected the argument that the certificates of analysis were removed from the coverage of the confrontation clause on the notion that they were akin to business records.

Here, while KG testified that her daughter told her something that made her, KG, contact the police, KG did not testify as to what the statement was. Therefore, there was nothing in that testimony to confront. Moreover, KG's daughter *testified live at trial*, and therefore defendant had every opportunity to confront her. Therefore, a confrontation clause objection by defense counsel to this testimony by KG would have been totally frivolous. Defense counsel is not required to make a frivolous objection. See *Goodin, supra* at 433.

The national database alerts, indicating that two of the images seized from defendant's hardware were known child pornography, *were* produced under circumstances that would lead an objective witness reasonably to believe that the alerts would be available for use at a later trial. This is because the whole purpose of the national database is presumably to detect crime and to support later prosecutions. However, explicit in the definition of "testimonial evidence" is that it must come from a "witness," i.e. a natural person (who can be confronted and cross-examined). *Melendez-Diaz, supra* at 2531. And defendant cites no authority, nor does any exist, for the notion that, when evidence of this kind is used, anyone other than the detective who used the database must testify at trial.[1]

Defendant was confronted by Detective Macarthur, the person who ran the images through the database. Defendant could have cross-examined her about how and why the database alerted on two of his images as "known child porn." Defendant does not identify any other witness whom, he believes, he should have been able to confront with respect to the alerts by the database. For these reasons, the alerts issued by the database were not testimonial; there was no confrontation clause violation; and therefore no basis on which defense trial counsel could have objected. Accordingly, there is no mistake apparent on the record. *Rodriguez, supra* at 38.

Affirmed.

/s/ Jane M. Beckering
/s/ Kurtis T. Wilder
/s/ Alton T. Davis

[1] We reject the notion that a computer database's action of alerting on known child porn is analogous to analysts' certificates of analysis, or affidavits, or other things within the core class of testimonial statements covered by the confrontation clause. See *Melendez-Diaz, supra* at 2532. A computer database cannot possibly be confronted or cross-examined, as an affiant, deponent, or other type of witness can. See *id*.