

**FOURTH DIVISION
DOYLE, P. J.,
COOMER and MARKLE, JJ.**

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June 28, 2019

**NOT TO BE OFFICIALLY
REPORTED**

In the Court of Appeals of Georgia

A19A0442. EDVALSON v. THE STATE.

MARKLE, Judge.

Thomas Edvalson was convicted of 22 counts of sexual exploitation of children (OCGA § 16-12-100), which involved 11 counts of possession of digital images depicting a minor engaged in sexually explicit conduct, and the other 11 counts accusing him of possession with intent to distribute the corresponding digital images. He appeals from the trial court's denial of his motion for new trial, as amended, arguing that (1) the trial court erred in failing to suppress evidence obtained pursuant to a search warrant; (2) the trial court erred in failing to merge the convictions for the possession with intent charges into a single count; and (3) he received ineffective assistance of counsel. For the reasons discussed below, we affirm.

Viewing the evidence in the light most favorable to the verdict, *Jackson v. Virginia*, 443 U. S. 307 (99 SCt 2781, 61 LE2d 560) (1979), the record shows that Edvalson owned and maintained a child pornography website called Cruels.net, and the images of child sexual abuse were found on electronic drives and computers located at his Gwinnett County residence. At trial, an employee of GoDaddy, a company that registers domain names and provides hosting for those domain names, and who worked in the network abuse department investigating child pornography claims, testified that GoDaddy had registered a domain name called Cruels.net in October 2009. In March 2012, after receiving an email that the domain contained images of child sexual abuse, GoDaddy investigated the site and found images of a fully nude child, along with several other images of child sexual abuse and child erotica.¹ According to GoDaddy's records, the domain Cruels.net was purchased by an Edward Thompson on Meadow Grove Way, Lilburn, Georgia, and the email account associated with the domain was Machin3@gmail.com. All the information

¹ State's Exhibits 1 through 3, which depicted images and information found on the Cruels.net website, were introduced into evidence. State's Exhibit 1 is an image of a fully clothed child holding a sign reading "I hurd you like CP." Exhibit 2 is a how-to guide on creating your own pedophile site on the dark web, discovered within the directory on Cruels.net site, and Exhibit 3, is a user glossary on what is considered child pornography.

retrieved during the investigation was compiled and sent to the National Center for Missing and Exploited Children (“NCMEC”).

An agent with the Georgia Bureau of Investigation (“GBI”), who worked as a cyber tip program manager and received leads from NCMEC regarding incidents of child exploitation on electronic servers, testified that, in 2012, she received two related cyber tips from NCMEC and GoDaddy. The tips identified a suspect, Edward Thompson, with an email address of Machin3@gmail.com, along with a physical address in Lilburn, Georgia, and a corresponding telephone number. She sent a subpoena to Google regarding the email address and discovered that the most recent IP address associated with the gmail account traced back to Comcast and Edvalson. She then subpoenaed Comcast, which provided information that the subscriber of the IP address was Brian Narsavage, located at the same address. The GBI agent sent the results of her investigation to the Gwinnett County police.

A Gwinnett County police officer, who was the lead detective on the investigation in 2012, testified that she received a cyber tip from the GBI indicating there was child pornographic material on a computer or computers or other electronic devices at the suspect residence. Based on the tip, she had the names of Brian

Narsavage, Edward Thompson, and Thomas Edvalson as persons of interest², and she confirmed the residence belonged to Edvalson. She secured and executed a search warrant on Edvalson's home on Meadow Grove Way in September 2012. In one of the bedrooms, officers found a plaque on a dresser with Edvalson's name on it, two laptop computers, and an external hard drive. They also discovered an identification card in Edvalson's name. During the search, officers seized other items, such as CDs and several flash drives on which they found images of child pornography.

Edvalson's defense at trial was that someone else could have accessed his electronic devices and either viewed or downloaded the illicit images. The jury convicted Edvalson on all 22 counts.³

Thereafter, Edvalson filed a motion for new trial, as amended, arguing several grounds. As are relevant to this appeal, Edvalson argued that (1) the trial court erred in failing to suppress evidence obtained from the search of his residence because (a) the search warrant did not establish a nexus between his residence and the alleged

² Brian Narsavage is Edvalson's stepfather, and Edward Thompson is unknown.

³ The trial court originally sentenced Edvalson to 60 years to serve the first 20 years in confinement, but the trial court later amended his sentence to conform to the split-sentence requirements under OCGA § 17-10-6.2.

activity, and (b) the information in the search warrant was at least six months old; (2) the trial court erred in failing to merge the convictions for possession with intent counts into a single count under OCGA § 16-12-100; and (3) he received ineffective assistance of counsel because trial counsel failed to (a) object to hearsay testimony from three of the State's witnesses regarding the information contained in the investigative reports; (b) object to witness testimony on Confrontation Clause grounds; and (c) file a special demurrer on the grounds that the indictment was multiplicitous or, in the alternative, that counsel should have requested that the possession with intent to distribute convictions merge into a single count.

Following a hearing on the motion for new trial, at which defense counsel testified, the trial court denied the motion. Edvalson now appeals.

1. Edvalson argues that the trial court erred in failing to suppress the evidence seized from his home because there was an insufficient connection between his residence and the illegal activity; therefore, there was no probable cause to issue the search warrant. He further argues the trial court should have suppressed the evidence because the information contained in the search warrant affidavit was stale. We disagree.

In reviewing the trial court's grant or denial of a motion to suppress, we will not disturb its findings if there is any evidence to support them; all relevant evidence of record, including evidence introduced at trial, as well as evidence introduced at the motion to suppress hearing, may be considered. The trial court's application of the law is subject to de novo review.

(Citations and punctuation omitted.) *Johnson v. State*, 336 Ga. App. 888 (785 SE2d 424) (2016).

Prior to trial, Edvalson filed a motion to suppress the evidence obtained from his home, including the computers. The trial court denied the motion,⁴ and we agree with the trial court's ruling.

(a) First, we conclude the affidavit supplied the required probable cause connecting Edvalson's residence to the evidence obtained from the search of his home.

In determining the existence of probable cause, the issuing judge is required simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit. . . , including the veracity and basis of knowledge of persons supplying hearsay

⁴ As Edvalson points out, his motion to suppress, as well as the transcript of the suppression hearing and the trial court's order denying same, are part of the record from an earlier appeal, A16A1392.

information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. Our duty in reviewing the magistrate's decision in this case is to determine if the magistrate had a substantial basis for concluding that probable cause existed to issue the search warrant[.] A magistrate's decision to issue a search warrant based on a finding of probable cause is not a hypertechnical one to be employed by legal technicians, but is based on the factual and practical considerations of everyday life on which reasonable and prudent men act. Moreover, even doubtful cases should be resolved in favor of upholding a warrant.

(Citations and punctuation omitted.) *Burgess v. State*, __ Ga. App. __ (2) (824 SE2d 99, *104 (2)) (2019).

Here, the facts stated in the search warrant affidavit provide a substantial basis from which the magistrate could conclude that probable cause existed to issue the search warrant. As illustrated in the search warrant affidavit, the State's evidence consisted primarily of evidence obtained from two investigative sources: GoDaddy and NCMEC. The affiant, who was the lead detective, indicated that she received two cyber tip reports from the GBI and NCMEC, which included a user's personal web page, Cruels.net, hosted by the GoDaddy.com internet domain registrar, and which contained numerous illicit pictures of children. The affidavit indicated an email address associated with the web page containing the images as Machin3@gmail.com,

and the subscriber information and IP addresses identified Edvalson as the name on the account. The affidavit further indicated that the most recent IP address resulted in subscriber information leading to Edvalson's address in Lilburn, and identified Edvalson as the creator of the web page Cruels.net. The information contained in the search warrant affidavit was corroborated by a GoDaddy employee.

Based on this evidence, we conclude the search warrant affidavit was sufficient to supply the required probable cause connecting Edvalson's home to the evidence ultimately seized, and that the trial court properly denied the motion to suppress the evidence on this ground. See *Burgess*, 824 SE2d at *104 (2). Accordingly, this enumeration of error fails.

(b) Next, Edvalson argues that the trial court should have suppressed the evidence obtained in the search because the information contained in the search warrant was stale. We disagree.

As indicated above, our duty in reviewing a decision to grant a search warrant is to determine whether the court had a substantial basis for concluding that probable cause existed to issue the warrant, and "even doubtful cases should be resolved in favor of upholding a warrant." (Citations omitted.) *Woods v. State*, 346 Ga. App. 323, 324 (816 SE2d 156) (2018). And although a magistrate must consider time as an

element of probable cause when issuing a warrant, “the mere passage of time does not equate with staleness. Rather, the inquiry is as to whether the factual statements within the affidavit are sufficient to create a reasonable belief that the conditions described in the affidavit might yet prevail at the time of issuance of the search warrant.” (Citations and punctuation omitted.) *Copeland v. State*, 273 Ga. App. 850, 853 (1) (a) (616 SE2d 189) (2005). Moreover, “media capable of storing sexually explicit material, such as computers or hard drives, are unlikely to be affected by the passage of time.” *Gerbert v. State*, 339 Ga. App. 164, 166 (1) (a) (793 SE2d 131) (2016).

Here, the search warrant affidavit shows that the GBI and NCMEC received the two cyber tip reports in March 2012, and based on this information the lead detective secured the search warrant six months later. The evidence identified in the search warrant were computers, hard drives, and other electronic devices containing images of child pornography. And because these images were digital in nature, retrieved from Edvalson’s computer and hard drive, it is unlikely they were affected by the passage of six months. *Gerbert*, 339 Ga. App. at 166 (1) (a). As such, Edvalson’s staleness argument is without merit, and the trial court did not err in failing to suppress the evidence seized during the search of Edvalson’s home.

2. Edvalson next argues that the trial court erred in failing to merge his possession with intent convictions into a single count, pursuant to OCGA § 16-12-100 (b) (5), because his possession of the 11 images constituted a single course of conduct. We discern no error.

“Whether offenses merge is a legal question, which we review de novo.” (Citation omitted.) *Nostratifard v. State*, 320 Ga. App. 564, 570 (2) (740 SE2d 290) (2013). Merger is required when one offense is included in the other and constitutes a single course of conduct. See *Cordle v. State*, 345 Ga. App. 584, 586 (814 SE2d 569) (2018).

OCGA § 16-12-100 (b) (8) (June 2017) provides that “[i]t is unlawful for any person knowingly to possess or control any material which depicts a minor or a portion of a minor’s body engaged in any sexually explicit conduct.” OCGA § 16-12-100 (b) (5) further criminalizes the act of creating, reproducing, publishing, selling, distributing, giving, exhibiting, or possessing with the intent to sell or distribute any visual medium depicting such images. This Court has already decided that OCGA § 16-12-100 (b) (8)

criminalizes *each individual act* of possessing or controlling an image depicting child pornography. The legislature’s frequent use of the word

“any” throughout the statute suggests a lack of restriction or limitation with respect to the statute’s intended scope. In paragraph (b) (8) specifically, the term “any material” is qualified by the singular form of the noun “minor”—“a minor or a portion of a minor’s body”—indicating that each depiction of a child engaged in sexually explicit conduct constitutes a separate and distinct violation of that statutory provision.

(Citation omitted and emphasis supplied.) *State v. Williams*, 347 Ga. App. 183, 186 (818 SE2d 256) (2018) (Cert. granted April 15, 2019).

Edvalson was indicted on 22 counts of sexual exploitation of children, and, at sentencing, the trial court merged all the possession counts into the possession with intent to distribute counts. Thus, Edvalson was only sentenced on the possession with intent to distribute counts. Each possession with intent to distribute count of the indictment described an image depicting a minor engaged in specific sexually explicit conduct separate and distinct from any other possession with intent to distribute count alleged. As we have held in *Williams*,

“each illicit image represents an independent abuse of the child victim depicted, and signifies precisely the type of harm OCGA § 16-12-100 seeks to prevent. . . . [and] it would make little sense to conclude that one who possesses vast amounts of child pornography is entitled to a volume discount when it comes to prosecution and sentencing.”

Williams, 347 Ga. App. at 186-187. Accordingly, there is no merit to Edvalson’s argument that he should have been sentenced on only a single count.

Further, we are unpersuaded by Edvalson’s reliance on *Coates v. State*, 304 Ga. 329 (818 SE2d 622) (2018). In *Coates*, the Supreme Court of Georgia interpreted OCGA § 16-11-131 (b) for possession of a firearm by a convicted felon in relation to the issue of firearms, and concluded that the specific number of firearms that one possessed was “inconsequential” and that the statute permitted only one prosecution and conviction. *Coates*, 304 Ga. at 331.

Whereas, in *Williams*, we specifically examined OCGA § 16-12-100 (b) (8) in relation to there being not one but multiple child victims, and thus we concluded that “each depiction of a child engaged in sexually explicit conduct constitutes a separate and distinct violation of that statutory provision.” *Williams*, 347 Ga. App. at 186. Given this distinction, we conclude that nothing in *Coates* implicitly overrules our decision in *Williams*.

Accordingly, we find no error in the trial court’s decision not to merge these convictions into a single count for sentencing.

3. Finally, Edvalson argues that he was denied effective assistance of counsel on three grounds: (a) trial counsel failed to object to inadmissible hearsay testimony

of three of the State's witnesses concerning information contained in the GoDaddy and NCMEC investigative reports; (b) trial counsel failed to object to the testimony given by these same three witnesses on the basis that such testimony violated the Confrontation Clause; and (c) trial counsel failed to file and argue a special demurrer on the grounds the indictment was multiplicitious or, in the alternative, he failed to request that the possession with intent to distribute counts merge into a single count. We disagree, and we address each argument in turn.

To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U. S. 668 (104 SCt 2052, 80 LEd2d 674) (1984), an appellant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Green v. State*, 302 Ga. 816, 817 (2) (809 SE2d 738) (2018).

Under the first prong of this test, counsel's performance will be found deficient only if it was objectively unreasonable under the circumstances and in light of prevailing professional norms. And under the second prong, prejudice is demonstrated only where there is a reasonable probability that, absent counsel's errors, the result of the trial would have been different. A reasonable probability is defined as a probability sufficient to undermine confidence in the outcome. Failure to satisfy either prong of the *Strickland* test is sufficient to defeat a claim of ineffective assistance, and it is not incumbent upon this Court to

examine the other prong. . . . A trial court’s factual findings made in the course of deciding an ineffective assistance of counsel claim will be affirmed by the reviewing court unless clearly erroneous.

Green, 302 Ga. at 817-818 (2). Further, “failure to make a meritless objection cannot be evidence of ineffective assistance.” (Citation omitted.) *Hardin v. State*, 344 Ga. App. 378, 382 (1) (a) (810 SE2d 602) (2018).

(a) First, we cannot agree with Edvalson’s argument that the testimony of the GoDaddy employee, the GBI agent, and the lead detective constituted inadmissible hearsay.

OCGA § 24-8-801 (c) defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” However, the statute provides an exception to the hearsay rule and permits records and reports, *in any form*, if they are “kept in the course of a regularly conducted business activity and it was the regular practice of that business activity” to create the report or record. OCGA § 24-8-803 (6) (C) and (D). Moreover, extrinsic evidence of authenticity for such reports or records is not necessary if they are accompanied by a qualified person certifying that the record was

kept or made in the regular course of business. OCGA § 24-9-902 (11) (A), (B), and (C).

Here, the State did not proffer any report at trial. Instead, the State put Edvalson on notice of its intent to introduce witness testimony as to the business records, and Edvalson's trial counsel did not object. Subsequently, the State introduced the oral testimony of the GoDaddy employee as to the business records. The employee testified that its investigative records were kept in the regular course of business, that it was their regular practice to make such reports, and that they routinely handle complaints about child pornography because "we don't want it on our network. . . ." There is no evidence this investigative record was prepared in anticipation of this prosecution.⁵ See *Jones v. State*, 345 Ga. App. 14, 16-17 (2) (a) (812 SE2d 337) (2018) (sheriff's office's log sheet of intoxilyzer printouts, which were not made in anticipation or preparation for litigation, met the criteria as a business records exception).

⁵ To the extent Edvalson contends otherwise, the fact that electronic service providers, such as GoDaddy, were required to report pornography to NCMEC does not equate to such records being prepared in anticipation of litigation. Cf. *Thompson v. State*, 332 Ga. App. 204, 208 (1) (770 SE2d 364) (2015) (where store's loss prevention report was not prepared in anticipation of litigation and where the store required on in every instance of shoplifting).

The GBI agent testified to information already provided through the GoDaddy employee's testimony, and she explained what she did during the course of her investigation and as a result of subpoenas she sent to Google and Comcast. She further testified to Google's certificates of authenticity showing the searches they ran on the IP address and gmail accounts, as well as Comcast's certification of records showing the subscriber for the IP address. All of this was properly admitted through the OCGA § 24-8-803 (6) business records exception. Finally, the lead detective testified, again, to information that was already admitted through the GoDaddy employee, and further explained what actions she took during her investigation. As such, we conclude that the testimony Edvalson complains of falls within the business records exception under OCGA § 24-8-803 (6), and any objection by trial counsel would have been meritless.⁶ *Hardin*, 344 Ga. App. at 382 (1) (a). Thus, Edvalson has

⁶ To the extent Edvalson argues that his conviction should be reversed because the evidence did not exclude a reasonable hypothesis that someone else in the home could have accessed his computers and downloaded the images, we are not persuaded. First, his reliance on *Lindley v. State*, 345 Ga. App. 637 (814 SE2d 784) (2018) (physical precedent only) is misplaced because here, unlike in *Lindley*, there was evidence from which the jury could conclude that Edvalson knowingly had direct or constructive possession of the child pornography. And second, the jury, as the trier of fact, was free to accept or reject Edvalson's defense theory, and they chose to reject it. *Jones v. State*, 299 Ga. 377, 379 (1) (b) (788 SE2d 477) (2016) ("evidence presented was sufficient for the jury to reject as unreasonable any other theory save that of appellant's guilt with respect to these charges")(citations omitted.).

not shown how counsel's performance was deficient, and, therefore, he cannot satisfy the first prong of the *Strickland* test to show ineffective assistance of counsel. *Green*, 302 Ga. at 817-818 (2).

(b) Next, we disagree with Edvalson's argument that the information obtained as a result of the GoDaddy and NCMEC investigations and the testimony of the State's witnesses thereto was testimonial in nature and violated the Confrontation Clause.⁷

Generally, "the admission of out-of-court statements that are testimonial in nature violates the Confrontation Clause unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination." See *Samuels v. State*, 335 Ga. App. 819, 821 (1) (783 SE2d 344) (2016) (citing *Crawford v. Washington*, 541 U. S. 36 (124 SCt 1354, 158 LE2d 177) (2004)). "[S]tatements are testimonial in

⁷ We note that the GoDaddy employee testified that the records of the investigation were kept in the regular course of business for GoDaddy, and that another employee had conducted the inquiry in the case but that he had since passed away. "Hearsay statements may be admissible under the necessity exception of former OCGA § 24-3-1(b) if the proponent of the evidence can show the declarant is unavailable, the statement is relevant and more probative of a material fact than other available evidence, and the statement exhibits particular guarantees of trustworthiness. Whether a statement is trustworthy is a matter for the trial court's discretion which will not be disturbed on appeal absent an abuse of discretion." (Citations omitted.) *Johnson v. State*, 294 Ga. 86, 88 (2) (750 SE2d 347) (2013).

nature when their primary purpose is to establish or prove past events potentially relevant to later criminal prosecution.” *Samuels*, 335 Ga. App. at 821 (1). However, “business records by their nature are not testimonial statements.”⁸ *Rackoff v. State*, 275 Ga. App. 737, 741 (2) (621 SE2d 841) (2005); see also *Crawford v. Washington*, 541 U. S. at 56 (III) (B). Having concluded above that the evidence Edvalson complains of falls within the business records exception under OCGA § 24-8-803 (6), it was not testimonial in nature for purposes of the Confrontation Clause.

As such, we find that Edvalson has not shown his counsel’s performance was deficient. *Hardin*, 344 Ga. App. at 382 (1) (a). As Edvalson’s argument fails as to the first prong under *Strickland*, he cannot show ineffective assistance of counsel. *Green*, 302 Ga. at 817-818 (2).

(c) In his final enumeration of error, Edvalson argues he received ineffective assistance of counsel because trial counsel failed to file and argue a special demurrer

⁸ We acknowledge that federal courts have found that, under certain circumstances, business records can be considered testimonial. For instance, as Edvalson points out, business records which contain information from an officer about the children in the files, the officer’s opinion about whether files contain known child pornography, and where the reports themselves demonstrate the steps of the investigation and essentially prove the files downloaded were child pornography have been deemed testimonial in nature. See *United States v. Bates*, 665 FAppx. 810, 815 (II) (A) (11th Cir.2016). However, in this case, the actual reports were not admitted into evidence, and even if they had been, they contained no such information.

on the grounds the indictment was multiplicitious or, in the alternative, he failed to request that the possession with intent to distribute counts merge into a single count.⁹

Generally, “[m]ultiplicity is the charging of the same crime in several counts of a charging document.” (Citation omitted.) *Chancey v. State*, 256 Ga. 415, 433 (III) (7) (349 SE2d 717) (1986). In dealing with a multiplicity challenge, we are required to ascertain “the precise act or conduct that is being criminalized under the statute.” (Citation and punctuation omitted.) *Nosratifard*, 320 Ga. App. at 570 (2). However, for the reasons given in Division 2 that there is no merger here, we conclude counsel’s performance was not deficient for failure to make a meritless objection on this basis. Thus, Edvalson has failed to meet his burden to show ineffective assistance of counsel. *Hardin*, 344 Ga. App. at 382 (1) (a).

For the foregoing reasons, we affirm the trial court’s denial of Edvalson’s motion for new trial.

Judgment affirmed. Doyle, P. J., and Coomer, J., concur.

⁹ The State contends Edvalson’s argument on the issue of multiplicity is waived because he failed to raise the issue with the trial court. However, Edvalson raises this in the context of an ineffective assistance of counsel claim, and he raised this issue at the motion for new trial hearing. Thus, the issue is properly before us. Cf. *Stegall v. State*, 308 Ga. App. 666 (1) (708 SE2d 387) (2011).