STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v
DARYL WILLIAM MARTIN,

Defendant-Appellant.
_____/

Supreme Court No. 166339

Court of Appeals No. 358580

Presque Isle Circuit Court No. 20-093153-FC

THE PEOPLE'S ANSWER IN OPPOSITION TO DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL

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Dated: November 30, 2023

The People of the State of Michigan, through Attorney General, Dana Nessel, ask this Court to deny Defendant Daryl William Martin's application for leave to appeal, saying:

1. Martin's application essentially relies on the same arguments made in the Court of Appeals.

2. The People's Brief on Appeal in the Court of Appeals adequately addressed these issues and is appended to this answer. (App'x A.) In addition, the People rely on the Court of Appeals' unpublished per curiam opinion in this case (before: GLEICHER, C.J., and JANSEN and RICK, JJ.) (App'x B.)

3. The Court of Appeals did not clearly err in rejecting Martin's arguments and affirming his convictions and sentence. MCR 7.305(B)(5)(a). And the Court of Appeals' opinion does not conflict with prior precedent. MCR 7.305(B)(5)(b).

4. Martin's application does not satisfy any of the other grounds for granting leave to appeal. MCR 7.305(B)(1)-(3).

5. Martin's application raises no issues worthy of this Court's review, and it should be denied.

CONCLUSION AND RELIEF REQUESTED

Accordingly, the People ask this Court to deny Martin's application for leave to appeal.

Respectfully submitted,

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BRIEF OF APPELLEE PEOPLE OF THE STATE OF MICHIGAN

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

The People concur that this Court has jurisdiction over this appeal and agree with Daryl William Martin's statement of jurisdiction.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the trial court violated the separation of powers doctrine in the state and federal constitutions where the prosecution initially moved in-trial for *nolle prosequi*, but withdrew the motion after the court held the motion in abeyance pending a short recess?

   Martin's answer: Yes.

   The People's answer: No.

   Trial court's answer: Martin did not present this question to the trial court.

2. Whether the trial court deprived Martin of the appearance of judicial impartiality and his Sixth Amendment right to fair trial by ordering a recess during the minor victim's testimony?

   Martin's answer: Yes.

   The People's answer: No.

   Trial court's answer: Martin did not present this question to the trial court.

3. Whether the trial court abused its discretion by admitting the prosecution's properly noticed evidence of Martin's prior sexual assaults on three relatives when they were minors pursuant to MCL 768.27a and that statute is unconstitutional?

   Martin's answer: Yes.

   The People's answer: No.

   Trial court's answer: No, to the extent that the trial court admitted the evidence and denied Martin's motion to exclude it; Martin did not raise an issue regarding the constitutionality of MCL 768.27a in the trial court.

4. Whether the trial court abused its discretion by admitting the victim's statements to her behavioral health therapist regarding her fear of Martin pursuant to MRE 803(4)?

Martin's answer: Yes.

The People's answer: No.

Trial court's answer: No.

5. Whether the trial court plainly erred by admitting improperly noticed testimony that Martin beat his son and trial counsel was ineffective for not objecting to the evidence under MRE 404(b) and MCL 768.27b?

Martin's answer: Yes.

The People's answer: No.

Trial court's answer: Martin did not present this question to the trial court.

6. Whether the cumulative effect of the alleged errors deprived Martin of due process and a fair trial?

Martin's answer: Yes.

The People's answer: No.

Trial court's answer: Martin did not present this question to the trial court.

7. Whether Martin's sentence to a lifetime of electronic monitoring is cruel and/or unusual punishment in violation of the state and federal constitutions?

Martin's answer: Yes.

The People's answer: No.

Trial court's answer: Martin did not present this question to the trial court.

STATUTES AND RULES INVOLVED

I. Statutes

In relevant part, MCL 767.29 provides:

> A prosecuting attorney shall not enter a nolle prosequi upon an indictment, or discontinue or abandon the indictment, without stating on the record the reasons for the discontinuance or abandonment and without the leave of the court having jurisdiction to try the offense charged, entered in its minutes.

MCL 768.27a states:

> (1) Notwithstanding section 27, in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant. If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence to the defendant at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered.
>
> (2) As used in this section:
>
> (a) "Listed offense" means that term as defined in section 2 of the sex offenders registration act, 1994 PA 295, MCL 28.722.
>
> (b) "Minor" means an individual less than 18 years of age.

MCL 768.27b states in part:

> (1) Except as provided in subsection (4), in a criminal action in which the defendant is accused of an offense involving domestic violence or sexual assault, evidence of the defendant's commission of other acts of domestic violence or sexual assault is admissible for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403.
>
> (2) If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered, to the defendant not less than 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown. [MCL 768.27b(1)-(2).]

II. Rules

MRE 403 states,

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

MRE 404(b) states:

> (b) Other crimes, wrongs, or acts.
>
> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.
>
> (2) The prosecution in a criminal case shall provide written notice at least 14 days in advance of trial, or orally on the record later if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only by the defendant's privilege against self-incrimination.

MRE 801 states in part:

> The following definitions apply under this article:
> (a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
> (b) Declarant. A "declarant" is a person who makes a statement.
> (c) Hearsay. "Hearsay" is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. [MRE 801(a)-(c).]

MRE 803(4) states,

> (4) Statements Made for Purposes of Medical Treatment or Medical Diagnosis in Connection with Treatment. Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment

INTRODUCTION

Martin raises a multitude of issues here on appeal, none of which entitle him to a new trial, resentencing or any form of relief.

First, the trial court did not violate the separation of powers doctrine by calling a recess during the victim's testimony in lieu of granting the prosecutor's motion for *nolle prosequi*. Judicial authority inherently encompasses a court's control of its docket and the management of its courtroom, and a court has a "fundamental interest in protecting its own integrity and that of the judicial process." See *Maldonado v Ford Motor Co*, 476 Mich 372, 389 (2006). Still, a circuit court may reverse or revise the prosecution's decisions only if it appears on the record that it has abused the power confided to it. *Genesee Co Prosecutor v Genesee Circuit Judge*, 391 Mich 115, 121 (1974). Here, as explained below, the prosecutor's motion for *nolle prosequi* was premature considering the circumstances of the proceedings, and the trial court's denial preserved the integrity of the judicial process.

Second, the trial court did not pierce the veil of judicial impartiality nor demonstrate judicial bias by calling a recess during the victim's testimony. The jury was uninformed of the reason for the recess, the recess was not apparently directed at one party or the other, the judge did not express an opinion regarding the victim's credibility in front of the jury and the victim admitted that she was nervous, scared and dishonest during her initial testimony. On balance of factors articulated by our Supreme Court in *People v Stevens*, 498 Mich 162 (2015), the trial judge's intervention was appropriate and does not warrant reversal.

Third, the trial court did not abuse its discretion by admitting the prosecutor's properly noticed other acts evidence of Martin's prior sexual assaults on three relatives when they were minors pursuant to MCL 768.27a, nor does that statute violate due process. The evidence was admissible under MCL 768.27a and did not warrant exclusion under MRE 403 on balance of the factors articulated by our Supreme Court in *People v Watkins*, 491 Mich 450 (2012). If this Court finds error in the admission, that error is harmless, as explained below. Further, as previously determined by this Court, MCL 768.27a does not violate due process; that evidence admitted under MCL 768.27a remains subject to exclusion under MRE 403 safeguards defendants' right to due process.

Fourth, the victim's statements to her behavioral health therapist were admissible under MRE 803(4). They were made for the purpose of treating the victim's behavioral health issues, aided the therapist in diagnosing the victim with post-traumatic stress disorder (PTSD) and, on balance of the factors in *People v Meeboer*, 439 Mich 310 (1992), bore sufficient indicia of truthfulness to be admissible despite that the victim made the statements as a minor and to a mental health professional rather than a medical doctor. Even if this Court finds the statements were inadmissible, the trial court's admission of the statements was harmless error where other competent evidence of the same was before the jury.

Fifth, though the trial court arguably erred by admitting evidence that Martin beat his son without proper notice to the defense and without a showing of good cause for the untimely notice, this was not a plain error affecting Martin's

substantial rights and reversal is unwarranted. There was a myriad of competent prior other acts before the jury which divested this evidence of its prejudicial effect and its ability to alter the outcome of Martin's trial. For the same reason, as explained below, Martin cannot demonstrate he was prejudiced by his trial counsel's failure to object to the admission of the evidence on certain grounds.

Sixth, the cumulative effect of the alleged errors did not deprive Martin of his constitutional rights to due process and a fair trial. In short, there were only a few, debatable errors that occurred at Martin's trial, all of which were harmless and/or did not affect the outcome of Martin's trial. In the aggregate, the errors did not affect the outcome of Martin's trial.

Finally, seventh, Martin's sentence to a lifetime of electronic monitoring is not cruel and/or unusual punishment in violation of the state and federal constitutions. As conceded by Martin, this Court found in *Hallak* that such monitoring "does not violate [a] defendant's state or federal rights against cruel and/or unusual punishment." *People v Hallak*, 310 Mich App 555, 577 (2015). This case remains binding precedent, and this Court must follow the decision here.

This Court should affirm Martin's convictions and sentences for first- and second-degree criminal sexual conduct and deny his request for relief.

COUNTER-STATEMENT OF FACTS

Background

In June 2017, K.E.[1] (born January 16, 2013) moved into a home on Tonkey Highway in Millersburg, Michigan with her parents, Jasmine and Christopher, and her sibling. (8/4/21 Trial Tr, pp 34–35.) Defendant Daryl William Martin (born July 30, 1963) is Christopher's stepfather. (*Id.*, p 35.) K.E. referred to Martin as her "grandpa." (*Id.*, p 53.)

Martin frequently visited Jasmine and Christopher's home, at least two or three times per week. (*Id.*, p 36.) During visits, Martin played with K.E. in her bedroom, the bathroom and outside; they would play "jail" and "shopping" or "store," and Martin read to K.E. (*Id.*, pp 36, 39, 54.) There were times when Jasmine and Christopher left K.E. alone with Martin to play together, and K.E. and Martin were out of sight elsewhere in the home. (*Id.*, pp 37, 45–46, 55.)

Martin sexually assaults K.E.

Martin sexually assaulted K.E. when she was age five at her home on Tonkey Highway. (*Id.*, p 66.) During one instance, K.E. was laying on her bed in her bedroom and Martin pulled off her clothing. (*Id.*, pp 66–67.) Martin then touched K.E.'s vagina with his hand or fingers. (*Id.*, p 67.) In a second instance, Martin put his tongue on K.E.'s vagina while she was in the bathtub at home. (*Id.*, p 68.) K.E. was not taking a bath when this happened, rather she was just laying down in the

[1] The People abbreviate the victim's name using initials because she is a minor.

bathtub. (*Id.*, p 68.) K.E. described, "I was laying down. My head was in the bathtub, and [Martin] was licking my privates." (*Id.*, p 68.)

Martin sexually assaults J.H., J.M., and M.M.[2]

J.H. was Martin's niece through marriage; Martin was formerly married to her aunt, Veronica. (*Id.*, p 71.) J.H. used to frequently visit Veronica and Martin at their home in Atlanta, Michigan. (*Id.*, p 71.) Martin was a father figure to J.H.; he took her snowmobiling, to Dairy Queen, to the movie theater, etc., and it was a good relationship. (*Id.*, p 72.) In 1994, the relationship soured when J.H. woke up to someone touching her while spending the night at Martin's and Veronica's home. (*Id.*, pp 72, 76.) J.H. was then 14 years old. (*Id.*, p 76.) J.H. was sleeping on a fold-out futon in front of their island area when she felt fingers going in and out of her vagina for 10 to 25 minutes; J.H. laid there paralyzed with fear. (*Id.*, pp 72–73.)

The hands felt rough and calloused, and the fingernails were "a little long." (*Id.*, p 73.) J.H. could not see who was touching her, but she suspected it was Martin because his hands were usually roughed up from working on cars; she was positive it was not a woman touching her—the person had manly hands. (*Id.*, pp 73–74.) Though two of J.H.'s male cousins, as well as her female cousin were also in the house at the time, they were minor children; Martin was the only adult male present at the time. (*Id.*, pp 72, 75, 77–79.). J.H. believed that Martin sexually

[2] J.H. and J.M. are not minors, but the People use their initials to protect their privacy.

assaulted her. (*Id.*, p 75.) J.H. told Veronica and gave a statement at the prosecutor's office but no charges resulted. (*Id.*, pp 75–76.)

J.M. is Martin's and Veronica's daughter. (*Id.*, p 80.) J.M. would visit Martin's home when he lived separately from Veronica after they divorced. (*Id.*, pp 81–82.) At some point, Martin began to make lewd comments toward J.M. that made her uncomfortable, and he "smacked [her] butt." (*Id.*, pp 82.) In one instance, J.M. was in the car with her younger brother and Martin, and J.M. was eating a sucker; Martin told J.M., "If your little brother wasn't here, I'd give you something to suck on." (*Id.*, p 82.) J.M. was then eight years old. (*Id.*, p 82.)

In another instance, J.M. was staying at a hotel with her stepmother and Martin, and, unbeknownst to her stepmother, Martin made J.M. take a bath with the door open while her stepmother performed oral sex on Martin. (*Id.*, pp 83–84.) In another instance, Martin got drunk, pulled down the front of J.M.'s pants and told her she "had a mound like [her] mom's" and she needed to shave her vagina so it would look better. (*Id.*, p 83.)

Martin routinely touched J.M. underneath her pants but without penetration. (*Id.*, p 84.) The assaults began when J.M. was age eight and continued until she was age "twelve, thirteen, maybe fifteen." (*Id.*, p 84.) However, Martin's lewd comments and smacking of J.M.'s butt did not stop until she last saw Martin in 2013, about when she stopped attending high school. (*Id.*, p 84.)

Martin is M.M.'s step-grandfather, and M.M. is K.E.'s sibling or half-sibling. (*Id.*, p 91.) In 2001, when M.M. was age five or six years old, she visited Martin's

home in Alba, Michigan once. (1/11/21 Hr'g Tr, p 7; 8/4/21 Trial Tr, p 92.) M.M. laid down in Martin's bedroom to sleep. (*Id.*, p 92.) Martin removed M.M.'s pants. (8/4/21 Trial Tr, p 93.) Martin touched M.M.'s vagina with his hands and mouth. (*Id.*, p 92.) Martin put his fingers inside M.M.'s vagina. (*Id.*, p 93.) Martin told M.M. not to tell her mother; M.M. disclosed the sexual assault a year later to her mother and grandmother. (*Id.*, pp 93–94.)

PROCEEDINGS BELOW

Charging, jury verdict and sentencing

The People charged Martin with count 1, criminal sexual conduct second degree (CSC II) (person under 13, defendant 17 years of age or older), contrary to MCL 750.520c(1)(a) and MCL 750.520c(2)(b); and counts 2 and 3, criminal sexual conduct first degree (CSC I) (person under 13, defendant 17 years of age or older; tongue/vaginal penetration), contrary to MCL 750.520b(1)(b), and MCL 750.520b(2)(b). The offenses took between November 2019 and February 2020.

During trial, the People moved to dismiss Count 3. (8/4/21 Trial Tr, p 136.) The jury found Martin guilty of count 1, CSC II, and count 2, CSC I. (8/5/21 Trial Tr, p 105.) The trial court sentenced Martin to 25 years to 40 years for CSC I and to 10 years to 15 years for CSC II.

Select trial court rulings

The other acts evidence

The prosecution filed a pre-trial notice of intent to admit other-acts evidence that Martin sexually assaulted three other minors in 1994, 2001 and 2011, pursuant to MCL 768.27a. Defense trial counsel filed a motion to exclude the other acts evidence, which included Martin's arguments that the prior acts did not satisfy admissibility factors under *People v Watkins*, 491 Mich 450 (2012) and were unfairly prejudicial under MRE 403. (1/11/21 Hr'g Tr, pp 3–7.) The trial court denied the defense's motion. (*Id.*, pp 9–10.) The trial court engaged in a balancing test of the other acts evidence under MRE 403. (*Id.*, pp 8–9.) The trial court found the other

acts were sufficiently like the charged offenses because in all instances, Martin sexually assaulted young children that were related to him or in his home by virtue of a relationship. (*Id.*, p 8.) Also, the prior acts showed Martin engaged in the same pattern of behavior with young children over many years. (*Id.*, p 8.) The trial court found no danger of unfair prejudice, stating:

> None of those prior allegations are so—so beyond the scope of the current charges that the jury would be, I guess, taken off track by their focus on the disgust that they have with some of the prior allegations. So I think there's—the danger of unfair prejudice is low. I mean, I agree with the defense, that there's a lot of prejudice to the defendant, but I have to look at is it unfair prejudice. Would it dissuade the jury from their focus of determining the truth of the matter. I don't believe that it would.
>
> I think it is relevant for the Court to consider the number of other acts victims alleged. If we had somebody charged today and a single victim from 1994, some of the defense arguments I think would perhaps be stronger. But I think the Court is fair to consider that we had more than one, and that lends, if anything, more reliability to those allegations. And I think any defense attorney who'd counsel with their client would tell them as much, and any prosecutor looking at that would certainly think as much, that if they have that many people alleging sexual misconduct at the hands of the defendant, that the reliability of each of them is bolstered by the number of the allegations.
>
> So I think the—the evidence does fit within the scope of the statute, and I don't find that they would be excluded under MRE 403. [1/11/21 Hr'g Tr, p 9.]

During trial, the prosecution solicited additional other-acts testimony from J.M. that Martin beat his son with a belt and with his son's pants down, which caused blood to trickle down his legs. (8/4/21 Trial Tr, pp 85–86.) This testimony was not noticed prior to trial. Trial defense counsel objected based on a lack of foundation. (*Id.*, p 85.) The trial court overruled the objecting after establishing that J.M. was testifying from her personal knowledge. (*Id.*, p 85.)

The evidence of K.E.'s statements to Koss

During trial, Megan Koss, a behavioral health therapist at Thunder Bay Clinic in Rogers City, Michigan, testified that she saw K.E. four times after court proceedings were already in motion. (8/4/21 Trial Tr, p 125.) Koss testified that K.E.

> expressed to me that she had concerns that the defendant would escape jail and come to her again in the middle of the night. She had a nightmare from that. She also has some fears of her animals during the night, like her stuffed animals; she's had nightmares about those as well performing sexual acts to her. [*Id.*, p 126.]

Martin's trial counsel objected to the testimony based on hearsay in violation of MRE 801 and MRE 802 and based on Martin's right to confrontation. (*Id.*, pp 126–127.)

The trial court overruled the objection, reasoning that the K.E.'s statements to Koss were made for the purpose of medical treatment or medical diagnosis in connection with treatment, thus fell within an exception to ban against hearsay under MRE 803(4). (*Id.*, pp 127–128.) The trial court cited *In re Freiburger*, 153 Mich App (1986) for the proposition that "MRE 803(4) is not limited to statements made to medical doctors. In that case statements to a psychiatric social worker were admissible." (*Id.*, p 128.) The trial court also cited ICLE's *Michigan Courtroom Evidence Annotated* for the proposition that "psychiatric counseling is a medical treatment within the meaning of the rule, and the statements were reasonably necessary for the treatment and diagnosis of emotional and behavioral problems resulting from abuse." (*Id.*, p 128.) The trial court added, "I would think that that

by analogy is applicable not only to a psychiatrist, per se, but to a counselor as long as it's dealing with treatment and diagnosis of emotional behavioral problems." (*Id.*, p 128.)

The trial court's recess during direct examination of K.E.

During direct examination, K.E. initially testified that Martin did not give her any "bad touches," i.e., touching her groin or chest, that he did not touch her privates and that he did not do anything with her clothing. (8/4/21 Trial Tr, pp 55–56.) The prosecutor asked K.E. if she was sure that Martin do anything with her clothing, and K.E. responded that she was not sure. (*Id.*, pp 56–57.) Martin's trial counsel objected because the prosecutor's statement was not in form of a question, but the trial court overruled the objection, stating: "Well, I think he's just reminding her of her promise to tell the truth. I'll allow it, but not—not much more, Mr. Radzibon." (*Id.*, p 57.)

The prosecutor continued examining K.E., including asking whether Martin ever touched her while they were playing jail; K.E. previously testified that jail took place in the bathroom, and K.E. would have to lay down on a towel. (*Id.*, p 59.) K.E. answered, "No." (*Id.*, pp 59–60.) The prosecutor concluded his direct examination and trial counsel declined cross-examination. (*Id.*, p 60.)

The trial court excused the jurors, K.E., and her support person and had a discussion out of their presence with the attorneys. (*Id.*, p 60.) The prosecutor said K.E.'s testimony was "totally unexpected" and was not consistent with what K.E. told him when he interviewed her a few weeks ago. (*Id.*, pp 60–61.) The prosecutor

said, "[T]his is the moment of truth" and that he had "no recourse at this time but to dismiss the charges, 'cause if I can't get the basic acts out of the witness, the other witnesses really don't matter." (*Id.*, p 61.)

The trial court indicated that a recess may be more appropriate instead. (*Id.*, pp 61–62.) The trial court observed that K.E. appeared to "be hesitant or nervous when Mr. Radzibon broached the subject of the allegations. She did describe lying on a towel on some occasions, and then didn't want to talk about what had happened." (*Id.*, p 62.) The trial court stated,

> I think it's just asking too much to say it's a drop-dead moment when you're out here with the lights on and she froze that we have to just call the game. Allowing a five- or six-minute recess to have the prosecutor not coach her in her testimony but to set her at ease, remind her of her promise to tell the truth, I think, given the overall purpose of the rules of evidence, is entirely appropriate, and that's why I did it. [*Id.*, p 106.]

The trial court referenced MRE 102, stating, "the purpose of all the rules of evidence is '. . . . to the end that the truth may be ascertained and proceedings justly determined.'"

To note, K.E. was eight years old at the time of trial and testified with the presence of a support person. (*Id.*, pp 34, 49.) The trial court gave a cautionary jury instruction regarding the support person's presence. (*Id.*, p 50.) Prior to the recess, K.E.'s mother, Jasmine, testified that in March 2020, she told a law enforcement officer that K.E. tended to get things twisted around a lot, and that if one asked K.E. that someone did something, she tended to say, "Yeah." (*Id.*, pp 42–43.)

The prosecutor proceeded to request a 10-minute recess to talk to K.E. (*Id.*, p 62.) The prosecutor encouraged K.E. to tell the truth. (See *id.*, p 63.) After the recess and outside of the presence of the jurors, the prosecutor informed the trial court that K.E. admitted she was not telling the truth on direct examination—Martin did do things to her, but she was nervous about telling the jury, she had a bad dream about Martin the night prior and she was scared. (*Id.*, p 63.) Further, K.E. said she would tell the truth about what Martin did if direct examination continued. (*Id.*, p 63.)

The prosecutor requested to continue with K.E.'s direct examination, indirectly withdrawing his request to dismiss the charges. (*Id.*, p 64.) Whereafter trial counsel indicated he objected to that whole proceeding, i.e., the calling of the recess. (*Id.*, p 64.) The trial court allowed the prosecutor to resume K.E.'s direct examination; after the prosecutor encouraged K.E. to tell the truth, K.E. testified about Martin's sexual assaults on her and trial proceeded as normal. (*Id.*, pp 65–66.)

ARGUMENT

I. The prosecutor withdrew his motion for *nolle prosequi* before the trial court ruled on it, and even if the court had denied the motion, it did not violate the separation of powers doctrine in doing so.

A. Issue Preservation and Standard of Review

"Michigan has long recognized the importance of preserving issues for appellate review." *People v Carines*, 460 Mich 750, 762 (1999). To preserve an issue, a party must raise it before the trial court. *People v Grant*, 445 Mich 535, 546 (1994). A challenge on one ground before the trial court is not sufficient to preserve a challenge on another ground on appeal. *People v Kimble*, 470 Mich 305, 309 (2004). When a party raises a separate argument on appeal than the party raised before the trial court, the party must satisfy the standard for plain-error review. *Id.* at 312. Though trial counsel objected to the trial court's decision to call a recess, (see Def's Appeal Br, p 21), trial counsel did not raise a separation of powers argument; this issue is unpreserved, and the plain error standard of review applies. Cf. *People v Swenor*, 336 Mich App 550, 562 (2021).

"'[T]his Court disfavors consideration of unpreserved claims of error,' even unpreserved claims of constitutional error[,]" thus, "[t]he failure to assert a constitutional right ordinarily constitutes a forfeiture of that right." *People v Vaughn*, 491 Mich 642, 653–54 (2012); see *Carines*, 460 Mich at 763–765. For forfeited claims of error, a defendant is not entitled to relief unless he can establish (1) that the error occurred, (2) that the error was "plain," (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an

actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Vaughn*, 491 Mich at 654; *Carines*, 460 Mich at 763. The defendant bears the burden of showing prejudice, "i.e., that the error affected the outcome of the lower court proceedings." *Carines*, 460 Mich at 763.

B. Analysis

The prosecutor withdrew the motion for *nolle prosequi* rendering it unreviewable on appeal. In any event, the trial court did not violate the separation of powers doctrine in its treatment of the prosecution's in-trial motion for *nolle prosequi*.

"The conduct of a prosecution on behalf of the [p]eople by the prosecutor is an executive act." *Genesee Co Prosecutor v Genesee Co Circuit Judge*, 386 Mich 672, 683 (1972) (citation omitted); see generally Const 1963, art 3, § 2. As chief law enforcement officer of a county, the prosecutor has exclusive authority to decide whether to prosecute a person and what charges to file. *People v Williams*, 244 Mich App 249, 251–252 (2001). "The prosecution is not for the benefit of the injured party, but for the public good." *Id.* at 253.

Entering a *nolle prosequi* ordinarily falls within the prosecutor's broad and independent discretion. However, once an information is filed and a prosecution is underway, MCL 767.29 constrains the prosecutor's power to *nolle prosequi*. Once an information has been filed, the prosecutor may not enter a *nolle prosequi* "or in any other way discontinue or abandon the same, without stating on the record the reasons therefore and without leave of the court having jurisdiction to try the

offense charged, entered into its minutes." *Genesee Co Prosecutor*, 391 Mich 115, 120 (1974), quoting MCL 767.29. Essentially, a court has discretion to veto the prosecutor's decision to *nolle prosequi*. See *People v Stewart*, 52 Mich App 477, 483 (1974); see *People v Glass (After Remand)*, 464 Mich 266, 278 (2001); see MCL 767.29.

In deciding whether a prosecuting attorney acted properly in proposing to *nolle prosequi*, discontinue, or abandon a prosecution, the judge must review the prosecutor's statement of reasons and the evidence filed in the case. *Genesee Co Prosecutor*, 391 Mich at 121. "Such review is a judicial review, searching the record to determine whether . . . . the prosecutor's decision is in accord with the law, facts and reason of the matter." *Id.* A trial court may not substitute its judgment for that of the prosecuting attorney as if it were acting in a supervisory capacity. *Id.* A circuit court may reverse or revise the prosecution's decisions only if it appears on the record that it has "abused the power" confided to it. *Id.*

Nonetheless, our Supreme Court has observed that "[e]ach branch of government has inherent power to preserve its constitutional authority." *Employees & Judge of Second Judicial Dist Court, Second Div v Hillsdale Co*, 423 Mich 705, 717 (1985). The Court emphasized that "an indispensable ingredient of the concept of coequal branches of government is that 'each branch must recognize and respect the limits on its own authority and the boundaries of the authority delegated to the other branches.'" *Id.*, quoting *United States v Will*, 449 US 200, 228 (1980).

Judicial authority inherently encompasses a court's control of its docket and

the management of its courtroom. See *Maldonado v Ford Motor Co*, 476 Mich 372, 389 (2006). A court has a "fundamental interest in protecting its own integrity and that of the judicial process." *Id.* (quotation marks and citation omitted). A court's inherent powers are not subject to interference or diminishment by the other branches of government, such as the executive branch, except by constitutional authority. *Id.* at 663.

Further, MCL 767.29 is intended to the protect the interests of criminal defendants by preventing repeated dismissals and subsequent reinstitution of the charges against him resulting in "endless vexations" in the prosecution of criminal cases. *People v Curtis*, 389 Mich 698, 705–706 (1973). See also *Rinaldi v United States*, 434 US 22, 29 n 15 (1977) (discussing FRCP 48(a), a federal rule like MCL 767.29, and declaring that the purpose of the "leave of court" provision is to protect a defendant against repeated charges from the prosecution, or where the public interest clearly weighs against the dismissal).

As an initial matter, the record substantiates that the trial court did not deny the motion, but that the prosecutor withdrew it. Thus, that motion is not properly before this court. The prosecutor's reason for the motion for *nolle prosequi* was that K.E. did not immediately testify about Martin's actions on direct examination. (See 8/4/21 Trial Tr, p 61.) Arguably, the prosecutor's motion was premature: (1) K.E. was just eight years old at the time of her trial testimony, (2) as observed by the trial court, K.E. appeared to be hesitant or nervous when the prosecutor broached the subject of the sexual assault allegations, (*id.* at 62), and (3) K.E. had testified

that Martin made her lay on a towel in the bathroom while playing jail but did not want to testify further about what happened, (*id.* at 59–60). Additionally, prior to K.E.'s testimony, K.E.'s mother testified that in March 2020, she told a law enforcement officer that K.E. tended to get things twisted around a lot. (*Id.*, pp 42–43.) Further, while moving for *nolle prosequi*, the prosecutor said that K.E.'s testimony was "totally unexpected" and was "not consistent with what [K.E.] told me when I interviewed her a few weeks ago. It was not consistent with what she told other people." (*Id.*, pp 60–61.)

In short, given the record, the prosecutor moved a bit too hastily to dismiss the charges against Martin. It affirmatively appeared that something more happened between Martin and K.E., but she failed to disclose during her initial direction examination. Thus, the trial court reasonably decided to hold off on granting the prosecutor's motion for *nolle prosequi* and order a recess instead. That was not a denial of the motion but effectively was a decision to hold the motion in abeyance pending the recess. After the recess and the continuance of the testimony, the prosecutor effectively withdrew the motion after the reason for it was resolved. Thus, it is not properly before this Court for review.

Even if it was, the trial court did not plainly err. In short, the public interest clearly weighed against dismissing Martin's charges, and the trial court's recess in lieu of granting the granting the prosecutor's motion furthered the trial court's fundamental interest in protecting its own integrity and that of the judicial process.

See *Maldonado*, 476 Mich at 389; *Rinaldi*, 434 US at 29. This was not a violation of the separation-of-powers doctrine.

The trial court's recess in lieu of granting the motion weighed in favor of the public interest, as well. It affirmatively appeared that something more happened between K.E. and Martin, but K.E. was holding back. Considering K.E.'s demeanor during direct examination, as well as the existence of three other acts witnesses, who were present to testify about Martin's sexual abuse and never had their day in court, the public interest clearly weighed in favor of a recess as opposed to ending Martin's trial and dismissing the charges.

Finally, the recess was ultimately fruitful and preserved the integrity of the trial. K.E. admitted that she was not telling the truth during her initial direct examination. K.E. admitted that she was just nervous and scared. This led the prosecutor to withdraw his motion for *nolle prosequi*. The trial court did not overstep its authority or violate the separation of powers doctrine in handling the prosecutor's motion.

In the event this Court finds that the trial court denied the prosecutor's motion and erred in doing so, relief is still unwarranted under the plain error standard of review. Martin has not demonstrated that he is actually innocent in any of the issues raised here on appeal, nor did the trial court's decision seriously affect the fairness, integrity, or public reputation of judicial proceedings. See *Vaughn*, 491 Mich at 654; *Carines*, 460 Mich at 763. Indeed, the trial court's decision ultimately promoted the integrity, public reputation and fairness of the

judicial proceedings. Especially considering that K.E. was just eight years old and admittedly nervous and scared during her testimony.

This Court should deny Martin relief on this issue.

II. The trial court did not pierce the veil of judicial impartiality by ordering a recess during the victim's testimony.

A. Issue Preservation and Standard of Review

When the issue is preserved and a reviewing court determines that the trial judge's conduct pierced the veil of judicial impartiality, the court may not apply harmless-error review. Rather, the judgment must be reversed and the case remanded for a new trial. *People v Stevens*, 498 Mich 162, 164 (2015). Yet, trial counsel did not specifically object to the trial court's calling of a recess on the ground that such recess pierced the veil of judicial impartiality, so this issue is unpreserved. See *Kimble*, 470 Mich at 312.

This Court reviews unpreserved claims of judicial impartiality for plain error affecting substantial rights. *People v Jackson*, 292 Mich App 583, 597 (2011); *Stevens*, 498 Mich at 180 n 6; *Carines*, 460 Mich 750, 763–764; see also Argument Section I.A., *supra*, discussing the plain error standard of review.

B. Analysis

The trial court did not pierce the veil of judicial impartiality by ordering a recess during the prosecution's direct examination of K.E. Martin received due process and a fair trial before a fair tribunal.

"The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v Jerrico, Inc*, 446 US 238, 242 (1980); see *People v Cheeks*, 216 Mich App 470, 480 (1996); see also US Const, Am XIV; see also Const 1963, art 1, § 17. A judge's conduct during trial may pierce the

veil of judicial impartiality and, as a result, deprive a defendant of a fair trial. See *Stevens*, 498 Mich at 165.

Nevertheless, "[a] defendant must overcome a heavy presumption of judicial impartiality when claiming judicial bias," and when "determining whether a trial judge's conduct deprives a defendant of a fair trial, this Court considers whether the trial judge's conduct pierces the veil of judicial impartiality." *People v Willis*, 322 Mich App 579, 588 (2018) (quotation marks and citation omitted). "A single instance of misconduct generally does not create an appearance that the trial judge is biased, unless the instance is *so egregious* that it pierces the veil of impartiality." *Willis*, 322 Mich App at 588 (quotation marks and citation omitted; emphasis added). The factors a reviewing court should consider include, but are not limited to

- the nature of the trial judge's conduct,
- the tone and demeanor of the judge,
- the scope of the judicial conduct in the context of the length and complexity of the trial and issues therein,
- the extent to which the judge's conduct was directed at one side more than the other, and
- the presence of any curative instructions, either at the time of an inappropriate occurrence or at the end of trial.

People v Swilley, 504 Mich 350, 371 (2019); *Stevens*, 498 Mich at 164. This list of factors is non-exhaustive. *Stevens*, 498 Mich at 172.

Regarding the nature of judicial conduct, "[i]mproper judicial conduct may come in many forms, including 'belittling of counsel, inappropriate questioning of witnesses, providing improper strategic advice to a particular side, biased

commentary in front of the jury, or a variety of other inappropriate actions.'" *Stevens*, 498 Mich at 172–173. "[U]ndue interference, impatience, or participation in the examination of witnesses, or a severe attitude on the judge's part toward witnesses . . . . may tend to prevent the proper presentation of the cause, or the ascertainment of truth in respect thereto[.]" *Stevens*, 498 Mich at 174, quoting former Canon 3(A)(8). Nonetheless, under MRE 614(b), a trial judge is generally permitted to ask questions of witnesses. *Stevens*, 498 Mich at 173. Further, a judge may intervene in a trial to expedite matters, prevent unnecessary waste of time, or clear up an obscurity. *Id.* at 174, citing Code of Judicial Conduct, Canon 3(A)(8).

Regarding the tone and demeanor of the judge, "[t]o ensure an appearance of impartiality, a judge should not only be mindful of the substance of his or her words, but also the manner in which they are said[,]" and should "avoid a controversial manner or tone." *Stevens*, 498 Mich at 174–175.

Regarding the context and scope of judicial intervention, an appellate court must consider "the scope of the judicial conduct in the context of the length and complexity of the trial, *as well as the complexity of the issues therein.*" *Stevens*, 498 Mich at 187–188 (emphasis added). "[A] judge's inquiries may be more appropriate when a witness testifies about *a topic* that is convoluted, technical, scientific, or otherwise difficult for a jury to understand." *Swilley*, 504 Mich at 387, quoting *Stevens*, 498 Mich at 176 (emphasis in original).

Regarding the extent to which the judge's conduct was directed at one side more than the other, "[j]udicial partiality may be exhibited when an imbalance

occurs with respect to either the frequency of the intervention or the manner of the conduct." *Stevens*, 498 Mich at 177.

Finally, regarding the presence or absence of a curative instruction, a "curative instruction will often ensure a fair trial despite minor or brief inappropriate conduct." *Id.* at 177. "Because '[i]t is well established that jurors are presumed to follow their instructions,' *People v Graves*, 458 Mich 476, 486 (1998), a curative instruction will often ensure a fair trial despite minor or brief inappropriate conduct." *Id.* at 177–78. "Depending on the circumstances, an *immediate* curative instruction may further alleviate any appearance of advocacy or partiality by the judge. *Id.* at 177.

In this case, the trial court judge did not pierce the veil of judicial impartiality by calling a recess. The judge's interference in K.E.'s examination was not undue. See *Stevens*, 498 Mich at 174. As explained in the previous section, the recess was necessary to protect the integrity of the trial because it allowed K.E. to calm her nerves and fears and testify truthfully. See Argument section I.B., *supra*.

First, the nature of the trial judge's conduct weighs in favor of the People. Martin complains of a single instance of conduct—the calling of recess—and the conduct was not egregious. The judge did not interrupt K.E.'s testimony, calling the recess at its natural conclusion, and did not apprise the jury of the reason for the recess. (See 8/4/21 Trial Tr, p 60.) The judge made no statements in front of the jurors whether he believed or disbelieved K.E.'s initial testimony. (See *id.*, pp 60–65.)

Next, the tone and demeanor of the judge is not apparent from the record, so this factor is, arguably, neutral.

Third, the scope of the judicial conduct weighs in favor of the People. The charges were predicated on eight-year-old K.E.'s recounting of Martin sexually assaulting her when she was five years old, and K.E.'s credibility and testimony was paramount. For K.E., testifying before a jury and Martin on how she was sexually assaulted was apparently complex. The trial court's calling of one ten-minute recess was minimal in scope in comparison to the difficult subject matter of K.E.'s testimony.

Fourth, the extent to which the judge's conduct was directed at one side more than the other weighs in favor of the People, or is at least neutral. The trial court's recess was one instance of conduct and to the jury, the recess was directed at both parties (or no particular party)—though it ultimately benefitted the People.

Fifth, the presence of curative instructions weighs in favor of the People. The judge gave the following curative instruction toward the end of Martin's trial:

> My comments, rulings, questions, and instructions are also not evidence. It is my duty to see that the trial is conducted according to the law and to tell you the law that applies to the case. However, when I make a comment or give an instruction, I'm not trying to influence your vote or express any personal opinion about the case. If you believe that I have such an opinion about how you should decide this case, you must pay no attention to that opinion. You are the only judges of the facts, and you should decide this case from the evidence. [8/5/21 Trial Tr, p 89.]

Courts presume that juries follow their instructions. *People v Bruner*, 501 Mich 220, 228 (2018). Martin has not demonstrated that the jury failed to follow this instruction.

On balance of the *Stevens* factors, the trial court judge's conduct did not pierce the veil of impartiality. Nor has Martin demonstrated that the judge was biased against him; apparently, the judge was protecting the integrity of judicial proceedings by calling the recess to allow K.E. to confer with the prosecutor, be reminded of her oath to testify truthfully and to correct her earlier false testimony. Martin is not entitled to relief on this issue.

III. The trial court did not abuse its discretion by admitting the prosecutor's properly noticed other acts evidence of Martin's prior sexual assaults on minor relatives pursuant to MCL 768.27a, nor does that statute violate due process.

A. Issue Preservation and Standard of Review

Ordinarily, an evidentiary issue is preserved when a defendant makes a timely and specific objection on the same grounds he later asserts on appeal. *People v Thorpe*, 504 Mich 230, 252 (2019); *People v Considine*, 196 Mich App 160, 162 (1992); *see generally* MRE 103(a). However, Martin preserved this issue with a pretrial motion contesting the admission of the challenged evidence at trial. (Def's Appeal Br, p 30; 1/11/21 Hr'g Tr, pp 1–11). See *People v Henry (Aft Rem)*, 305 Mich App 127, 144 (2014).

Preserved evidentiary issues are reviewed for an abuse of discretion. *Thorpe*, 504 Mich at 252. A trial court abuses its discretion if it makes a decision that falls outside the range of principled outcomes. *People v Duenaz*, 306 Mich App 85, 95 (2014). "A trial court's improper admission or exclusion of evidence must result in a miscarriage of justice for an appellate court to find error requiring reversal." *People v Barker*, 161 Mich App 296, 303 (1987), citing MCL 769.26.

Martin failed to argue that MCL 768.27a violates due process, so this issue unpreserved. (See 1/11/21 Hr'g Tr, pp 1–11.) This Court reviews "unpreserved constitutional issues for plain error affecting substantial rights." *People v Burkett*, 337 Mich App 631, 635 (2021) (quotation marks omitted); *Carines*, 460 Mich 750, 763–764; see also Argument Section I.A., *supra*.

B. Analysis

The trial court did not abuse its discretion by admitting the prosecution's evidence that Martin sexually assaulted three minor relatives. The trial court adequately balanced the evidence under MRE 403 prior to its admission. Nor does MCL 768.27a violate due process.

MCL 768.27a provides in part, "[I]n a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant . . . ." MCL 768.27a(1). With respect to other-acts evidence under MCL 768.27a, the prosecution need not prove that the defendant was convicted of committing the other act. *People v Petri*, 279 Mich App 407, 411 (2008). Rather, the prosecution must present substantial evidence that the other act was committed. See *People v Golochowicz*, 413 Mich 298, 309 (1982) (examining MCL 768.27).

MCL 768.27a(1) permits the introduction of evidence that previously would have been inadmissible, as "it allows what may have been categorized as propensity evidence to be admitted [.]" *People v Pattison,* 276 Mich App 613, 619 (2007); see generally MRE 404(a)(1), and MRE 404(b)(1). The statute "reflects the Legislature's policy decision that, in certain cases, juries should have the opportunity to weigh a defendant's behavioral history and view the case's facts in the larger context that the defendant's background affords." *Id.* at 620. Having a complete picture of a defendant's history can shed light on the likelihood that a given crime was committed. *Id.*

1. The trial court did not abuse its discretion by admitting the other acts evidence.

In *People v Watkins*, 491 Mich 450 (2012), our Supreme Court held that evidence admissible under MCL 768.27a nonetheless remains subject to exclusion under MRE 403. See 491 Mich at 481–486. MRE 403 provides that a court may exclude relevant evidence if the danger of unfair prejudice, among other considerations, outweighs the evidence's probative value. *Id.* at 455–56, 481–86; MRE 403. "Unfair prejudice" refers to the tendency of evidence to adversely affect a defendant's position by injecting extraneous considerations such as jury bias, sympathy, anger, or shock. *People v Goree*, 132 Mich App 693, 702–703 (1984). "[C]ourts must weigh the propensity inference in favor of the evidence's probative value rather than its prejudicial effect." *Watkins*, 491 Mich at 456, 486.

Trial courts may consider the following non-exhaustive list of factors when balancing evidence admissible under MCL 768.27a under MRE 403:

> (1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony. [*Watkins*, 491 Mich at 487–488; see *Duenaz*, 306 Mich App at 99.]

Here, the trial court did not abuse its discretion admitting evidence of Martin's prior sexual assaults under MCL 768.27a, and the court sufficiently balanced the evidence under MRE 403. Regarding the trial court's balancing test under MRE 403, that court discussed the relative similarity of the other acts evidence to the charged offenses and the frequency of the other acts. (See 1/11/21

Hr'g Tr, pp 8–9). The court also heard arguments from the parties regarding all the *Watkins* factors prior to its ruling. (See *id.*, pp 4–9.) Arguably, this was sufficient. To the extent that this Court may find that the trial court failed to sufficiently articulate its MRE 403 analysis, the failure is harmless error because, as discussed below, MRE 403 did not require exclusion of the evidence on balance of the *Watkins* factors.

First, the other acts are *similar to* the charged offenses. All the other acts involve Martin sexually assaulting a minor female relative—J.H. was Martin's niece through marriage, J.M. is Martin's daughter, and M.M. is Martin's step-granddaughter. (8/4/21 Trial Tr, pp 71, 80, 91.) As with K.E., Martin acted opportunistically and by virtue of his relationship to the other acts victims to sexually assault them. Martin took advantage of being isolated with J.M., which happened by virtue of his living separately from her mother, Veronica; Martin sexually assaulted J.M. when she was in his custody and away from Veronica. (*Id.*, pp 81–84.) Martin took advantage of his father-figure relationship with J.H. to sexually assault her—J.H. regularly spent the night at Martin's home by virtue of their relationship, where Martin sexually assaulted her. (*Id.*, pp 36, 39, 54, 71–72.) Martin took advantage of his grandfatherly relationship with M.M. by having her sleep in his bed during her visit to his home, where Martin sexually assaulted her. (*Id.*, pp 91–94.) Two of the three other acts victims, J.M. and M.M. were under age 10 when Martin sexually assaulted them, as was K.E. (*Id.*, p 84.) Finally, Martin

touched the other act witnesses' vaginas with his hands or his mouth and hands, as he did with K.E. (*Id.*, pp 67–68, 72–73, 84, 92.)

Second, the *frequency* of the other acts weighed in favor of their admission. Martin sexually abused not one, but three others, and, as for J.M., Martin sexually abused her on an ongoing basis (from when J.M. was age eight or nine to age 12, 13 or 15). (*Id.*, p 84.)

Third, the *reliability* of the evidence showing the other acts occurred weighed in favor of admission, or is at least neutral. True, Martin was not charged for these other acts, but MCL 768.27a allows for the admission of uncharged sexual offenses against minors. *People v Pattison*, 276 Mich App 613, 619 (2007); see MCL 768.27a. There was substantial evidence that these other acts occurred—here, J.H.'s, J.M.'s and M.M.'s sworn, detailed testimonies. And the fact that three witnesses all testified to similar types of abuse buttress the reliability of the others. Beyond testimony, it is unclear what other evidence the People could have offered to prove that the other acts occurred considering the nature of Martin's sexual assaults—digital-vaginal contact and oral-vaginal contact would not necessarily leave behind evidence, especially not years after the assaults' occurrence.

Fourth, there was a *need* for evidence beyond K.E.'s testimony, so this weighed in favor of admitting the other acts evidence. There was a lack of physical evidence to corroborate K.E.'s accusations (not to say there should have been considering the nature of Martin's assault). K.E.'s testimony about the sexual assaults was not greatly detailed, as would be expected from someone her young

age. The other acts evidence made K.E.'s testimony more credible because it demonstrated Martin's propensity to sexually assault minor relatives. K.E.'s credibility may have needed rehabilitation in the eyes of some jurors based on the inconsistences between her testimony given before and after the trial court's recess and her failure to disclose the sexual assaults during her forensic interview. (See 8/4/21 Trial Tr, pp 55–56; 8/5/21 Trial Tr, pp 23–24.)

Fifth, the *presence of intervening acts* is neutral. It is not apparent from the record if and when any intervening acts took place, aside from the passage of time. Indeed, the only *Watkins* factor that arguably weighs against the admission of the other acts evidence is *temporal proximity*. Martin's other acts took place in 1994, 2001 and 2011 or 2013—several years prior to Martin's assaults on K.E. in 2019 or 2020. (See 1/11/21 Hr'g Tr, p 7.) But that is counterbalanced by the fact that three different (though similarly situated) witnesses testified to similar conduct. Martin clearly has a type: young females with familial relationships with him. The fact that his misconduct was spread across many years may have been the result of not having a prime victim available in the intervening time periods.

Overall, the trial court did not abuse its discretion admitting evidence of Martin's prior sexual assaults on three relatives who were then minors pursuant to MCL 768.27a. On balance of the *Watkins* factors, MRE 403 did not require the evidence's exclusion.

2. MCL 768.27a does not violate due process.

MCL 768.27a does not violate due process.

In *Watkins*, our Supreme Court upheld the constitutionality of MCL 768.27a as relates to the separation-of-powers principles in Michigan's Constitution. See *Watkins*, 491 Mich at 456; see generally Const 1963, art 3, § 2. Yet, the Supreme Court found it unnecessary to address the due process implications of MCL 768.27a considering its holding that evidence admissible under that statute nonetheless remains subject to exclusion under MRE 403. See *Watkins*, 491 Mich at 481–486.

Since *Watkins*, this Court has directly confronted due process challenges to MCL 768.27a and repeatedly denied such challenges, reasoning that statute affords due process since the proposed evidence is still subject to the constraints in MRE 403. See, e.g., *People v Bagley*, unpublished per curiam opinion of the Court of Appeals issued April 21, 2015 (Docket Nos. 318874, 322746, 322828), pp 7–8, n 3 (citation omitted) (stating, "Because MCL 768.27a is subject to MRE 403, the statute does not violate due process," and finding *United States v LeMay*, 260 F3d 1018, 1024–1027 (CA 9, 2001) and *United States v Castillo*, 140 F3d 874, 880–883 (CA 10, 1998), which held that FRE 414, the federal counterpart of MCL 768.27a, does not violate due process because it remains subject to FRE 403, to be persuasive precedent); see also, e.g., *People v Lownsberry*, unpublished per curiam opinion of the Court of Appeals issued June 26, 2014 (Docket No. 314901), p 4 ("In this case, the trial court concluded, and we agree, the other acts evidence was not unfairly prejudicial under MRE 403. Accordingly, the admission of the evidence did not violate defendant's due process right to a fair trial"); *People v Gibbs*, unpublished per curiam opinion of the Court of Appeals issued October 30, 2014 (Docket No.

315652), p 14 (footnotes omitted) ("Because we have concluded that the evidence was not unduly prejudicial, we conclude that it did not infuse the trial with unfairness. Accordingly, we reject Gibbs's due process challenge [to MCL 768.27a]").[3]

Further, while MCL 768.27a may allow evidence that previously would have been inadmissible under MRE 404(b), the standard for obtaining a conviction has not changed. *People v Wilcox*, 280 Mich App 53, 55–56 (2008), reversed on other grounds 486 Mich 60 (2010); see also *People v Pattison*, 276 Mich App 613, 619 (2007). Also, trial courts routinely instruct defendants are presumed to be innocent and that they cannot convict a defendant solely because they think he or she is guilty of other bad conduct. Jurors are presumed to follow their instructions. *Graves*, 458 Mich at 486.

As this Court's previously rejected due process based challenges to MCL 768.27a, this Court should also reject Martin's challenge. Martin is not entitled to relief on this claim.

[3] Pursuant to MCR 7.215(C)(1), *People v Bagley, People v Gibbs*, and *People v Lownsberry* are not cited for any binding proposition of law, rather because there is an absence of published case law regarding whether MCL 768.27a violates due process and illustrates how this Court has previously decided such a claim. These cases are attached as Exhibits A–C.

IV. The trial court did not abuse its discretion by admitting the victim's statements to her behavioral health therapist pursuant to MRE 803(4). Alternatively, any error in admitting the statements was harmless.

A. Issue Preservation and Standard of Review

Martin objected to challenged testimony on hearsay and confrontation grounds, (8/4/21 Trial Tr, p 126), so this issue is preserved. See *Thorpe*, 504 Mich at 252. Preserved evidentiary issues are reviewed for an abuse of discretion. *Thorpe*, 504 Mich at 252; see Argument Section III.A., *supra*.

Although Martin attempts to frame this issue as a claim of constitutional error implicating his due-process rights, evidentiary errors are not constitutional errors. *People v Blackmon*, 280 Mich App 253, 259, 261 (2008). Regarding constitutional due process, reversal based on evidentiary errors is not appropriate unless the trial was "infused . . . . with unfairness." *Estelle v McGuire*, 502 US 62, 75 (1991).

B. Analysis

The trial court did not abuse its discretion by admitting evidence of K.E.'s statements to her behavioral health therapist, Megan Koss, under MRE 803(4).

Hearsay is defined as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). "Hearsay is considered unreliable evidence because it is not subject to traditional testimonial safeguards." *People v Chelmicki*, 497

Mich 960, 961 (2015) (Viviano, J., concurring in part and dissenting in part). Further, MRE 802 precludes hearsay's admission. See MRE 802.

MRE 803(4) provides an exception to the general prohibition on hearsay for statements made for purposes of medical treatment or medical diagnosis in connection with treatment, and states:

> (4) Statements made for purposes of medical treatment or medical diagnosis in connection with treatment. Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment. [MRE 803(4).]

"The rationale supporting the admission of statements under this exception is the existence of (1) the reasonable necessity of the statement to the diagnosis and treatment of the patient, and (2) the declarant's self-interested motivation to speak the truth to treating physicians in order to receive proper medical care." *People v Garland*, 286 Mich App 1, 8 (2009); see also *People v Shaw*, 315 Mich App 668, 674 (2016).

Our Supreme Court has recognized that in child victim sexual assault cases, identification of the perpetrator is generally relevant both to treating the child's psychological injuries and to assuring the child's safety which is part of the treatment. *People v Meeboer*, 439 Mich 310, 328–330 (1992).

Still, the Supreme Court recognized that a child may not understand the need to be truthful in the medical treatment setting which is the underlying basis for the hearsay exception in MRE 803(4). *Id.* at 326. Thus, a child's statement

must also be found trustworthy to be admitted under MRE 803(4). *Id.* at 324–326. The totality of the circumstances must be considered when determining trustworthiness. *Id.* at 324–325. Some of the factors to be considered include:

> (1) the age and maturity of the declarant, (2) the manner in which the statements are elicited (leading questions may undermine the trustworthiness of a statement), (3) the manner in which the statements are phrased (childlike terminology may be evidence of genuineness), (4) use of terminology unexpected of a child of similar age, (5) who initiated the examination (prosecutorial initiation may indicate that the examination was not intended for purposes of medical diagnosis and treatment), (6) the timing of the examination in relation to the assault (the child is still suffering pain and distress), (7) the timing of the examination in relation to the trial (involving the purpose of the examination), (8) the type of examination (statements made in the course of treatment for psychological disorders may not be as reliable), (9) the relation of the declarant to the person identified (evidence that the child did not mistake the identity), and (10) the existence of or lack of motive to fabricate. [*Id.* at 324–325.]

For example, in *Diaz-Lopez*, an unpublished opinion,[4] this Court upheld the admission of a sixteen-year-old victim's statements to her therapist about being sexually assaulted by the defendant under MRE 803(4). *People v Diaz-Lopez*, unpublished per curiam opinion of the Court of Appeals, issued May 26, 2022 (Docket No. 353826), p 5. The therapist testified about some general details that the victim told her regarding assault, the victim's identification of her assailant, including his name and relationship to her, the victim's demeanor and symptoms,

[4] Pursuant to MCR 7.215(C), *People v Diaz-Lopez*, unpublished per curiam opinion of the Court of Appeals, issued May 26, 2022 (Docket No. 353826) is not cited for any binding proposition of law, rather to illustrate this Court's application of *Meeboer*, i.e., the conducting of a totality of the circumstances analysis to statements admitted under MRE 803(4). *People v Diaz-Lopez* is attached hereto as, "People's Exhibit D."

etc. *Id.* Evaluating the totality of the circumstances surrounding the victim's statements, this Court upheld the trial court's admission of the statements, stating:

> [I]t is manifestly apparent that the victim was seeking treatment for her trauma of her own accord and for the purpose of healing, rather than undergoing an examination for the benefit of law enforcement, so she had every reason to be truthful with the therapist. Furthermore, there was physical evidence that the victim had been assaulted; and defendant admitted to having sex with the victim, claiming that he did so with her consent. Although identifying defendant by name may not have been strictly necessary, identifying an assailant as having been a coworker and as having committed a previous assault both have obvious ramifications to a person's feelings of safety, and a general description of the nature of the assault would have obvious importance to a person's treatment. We conclude that, other than specifying defendant's name, the statements made by the therapist on direct examination about what the victim disclosed during therapy are sufficiently reliable and sufficiently related to seeking medical treatment to fall under MRE 803(4). [*Id.*]

Additionally, the victim's statement regarding the defendant's name was harmless error, as consent, not identity, was the contested issue at trial. *Id.* at 6.

Here, evaluating the totality of the circumstances, K.E.'s statements to Koss fell under MRE 803(4) and bore sufficient indicia of truthfulness and reliability. To start, K.E.'s statements were made for the purpose of medical treatment or medical diagnosis. Jasmine brought K.E. to Koss, a behavioral health therapist with a master's degree and license in social work, because K.E. was still having behavioral health complications after court proceedings were initiated. (8/4/21 Trial Tr, pp 123, 125.) Koss provided therapy to K.E. at the recommendation of K.E.'s primary care physician, presumably a medical doctor. (8/4/21 Trial Tr, p 124.) According to Koss, K.E.'s prior health records showed that she had been demonstrating behavioral issues. (*Id.*, p 130.) Koss used the challenged statements, i.e., K.E.'s

statements regarding her fears related to Martin escaping from jail, her nightmares, and her fears regarding her stuffed animals sexually assaulting her, to form her opinion that K.E.'s exhibit symptoms of post-traumatic stress disorder (PTSD), a psychiatric disorder. (*Id.*, pp 129, 131.)

Even though K.E. was a child when she spoke to Koss, K.E.'s statements bore sufficient indicia of truthfulness to be admitted. K.E.'s mother, Jasmine, apparently brought K.E. to Koss on her own accord (not by request of any party to the litigation or law enforcement). The purpose was diagnosing and treating K.E.'s behavioral health issues—healing—so K.E. had reason to be truthful.

Further, most of the factors in *Meeboer* weighed in favor of admitting K.E.'s statements. See *Meeboer*, 439 Mich at 324–325. Regarding the fifth factor, the prosecutor did not initiate K.E.'s therapy with Koss, K.E.'s mother did at the recommendation of her primary care physician. Regarding the third and fourth factors, though Koss did not directly quote K.E.'s phrases and terms, K.E.'s fears were obviously childlike—for example, a typical adult would recognize that stuffed animals cannot perform sexual acts. Regarding the sixth factor, the timing of the examination, K.E. was apparently still in distress from Martin's sexual assaults at the time she saw Koss, as demonstrated by the fact that she had behavioral health issues noted in her health records.

Further, regarding the ninth factor, the relation of the declarant to the person identified, K.E. was Martin's step-granddaughter and there was no issue regarding identity at trial—the issue was the occurrence of the assaults. Finally,

regarding the tenth factor, there is no evidence that K.E. had a motive to fabricate her statements to Koss. It is dubious whether she understood the consequences of a pending case against Martin at her young age, let alone had capacity to intentionally manipulate the outcome. Nor was K.E.'s motive an issue at trial. (See 8/5/21 Trial Tr, pp 80–84.)

In sum, the trial court properly determined that K.E.'s statements to Koss were admissible because they fell within the hearsay exception in MRE 803(4). Martin is not entitled to relief.

Alternatively, if this Court finds that the trial court erred by admitting K.E.'s statements under MRE 803(4), the error was harmless. An evidentiary error must be considered in context, and it "is not a ground for reversal unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495–496 (1999) (quotation omitted). Here, the prosecution introduced competent evidence that K.E. experienced nightmares and that she exhibited fears of Martin through Christopher's trial testimony; Christopher testified from personal knowledge of K.E. (8/5/21 Trial Tr, p 67.) Christopher also testified that K.E. was nervous and worried about coming to trial, and, after trial, he had a hard time with K.E. and she was not very talkative. (*Id.*, p 67.) Considering that legally admissible evidence was before the jury of K.E.'s nightmares and fears, the trial court's error was harmless. This Court should deny Martin relief on this claim.

V. Arguably, the trial court erred by admitting evidence that Martin beat his son, but this was not a plain error affecting Martin's substantial rights and reversal is unwarranted. Also, Martin's counsel was effective despite not objecting to the admission of the evidence under MRE 404(b) and MCL 768.27b.

A. Issue Preservation and Standard of Review

The trial court did not address the admissibility of the evidence that Martin beat his son under MRE 404(b) or MCL 768.27b, nor did trial counsel object to the admissibility of the evidence on these grounds. Martin's challenge to the trial court's admission of the evidence is arguably forfeited or waived but, at a minimum, not preserved. See *People v Considine*, 196 Mich App 160, 162 (1992); *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382 (2007). This Court reviews unpreserved claims of error for plain error affecting substantial rights. *Carines*, 460 Mich 750, 763–764; see also Argument Section I.A., *supra*, discussing the plain error standard of review.

Regarding Martin's related claim of ineffective assistance of counsel claim, this issue is preserved because Martin made a motion for a new trial raising this issue in the trial court; the motion was denied. See *People v Petri,* 279 Mich App 407, 410 (2008); (Def's Appeal Br, p 39). Whether Martin's trial counsel provided effective assistance is a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579 (2002). Appellate courts review the trial court's factual findings for clear error and de novo questions of constitutional law. *Id.* at 579. "Clear error exists where the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Callon*, 256 Mich App 312, 321 (2003).

B. Analysis

1. The trial court arguably erred by admitting evidence that Martin beat his son, but reversal is unwarranted.

Arguably, the trial court erred by admitting evidence that Martin beat his son on a prior occasion where the evidence was improperly noticed under MRE 404(b) and MCL 768.27b. Nonetheless, the error was not plain error affecting Martin's substantial rights, and reversal is unwarranted.

MCL 768.27b provides in part that, "in a criminal action in which the defendant is accused of an offense involving domestic violence or sexual assault, evidence of the defendant's commission of other acts of domestic violence or sexual assault is admissible for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403." MCL 768.27b; see generally MRE 403. The prosecuting attorney must provide notice of intent to use this type of other acts evidence not less than 15 days in advance of trial or later for good cause shown. MCL 768.27b(2).

Under MRE 404(b), other acts evidence may be

> admissible for other [non-propensity] purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case. [MRE 404(b)(1).]

The prosecutor must "provide written notice at least 14 days in advance of trial, or orally on the record later if the court excuses pretrial notice on good cause shown." MRE 404(b)(2).

In *People v VanderVliet*, our Supreme Court articulated the four-prong analysis to consider whether evidence is admissible under MRE 404(b):

- *First*, the other acts must be offered to prove something other than a propensity to certain conduct,
- *Second*, the other acts evidence must be relevant under MRE 402 as enforced through MRE 104(b),
- *Third*, under MRE 403, a determination must be made whether the danger of undue prejudice substantially outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making that determination, and
- *Fourth*, the trial court may, on request, provide a limiting instruction to the jury under MRE 105.

People v VanderVliet, 444 Mich 52, 74–75 (1993); see generally MRE 104(b); MRE 105; MRE 401; MRE 402; MRE 403.

Where appellate courts find error in the admission of other-acts evidence, the courts apply harmless-error review. See *People v Denson*, 500 Mich 385, 409 (2017). "A preserved nonconstitutional error is presumed not to be a ground for reversal unless it affirmatively appears that, more probably than not, it was outcome determinative—i.e., that it undermined the reliability of the verdict." *Id.* (quotation marks omitted). The courts "focus[ ] on the nature of the error and assess[ ] its effect in light of the weight and strength of the untainted evidence." *Id.* at 409–410 (alterations in original).

For example, in *Murray*, this Court found that the trial court erred by admitting the prosecutor's other-acts evidence since the prosecutor did not provide proper pretrial notice, yet reversal was unwarranted because the evidence did not

prejudice the defendant. *People v Murray*, ___Mich App ___; ___ NW2d___ (Docket No. 355736) (vacated in part on other grounds). Specifically, the defendant was accused of sexually assaulting his minor daughter, L.M, as well as his ex-wife, M.M. *Id.* at 1. At trial, the court admitted other-acts testimony from M.M. and M.M.'s friend, A.V., regarding an incident where the defendant committed domestic violence against M.M. on the way home from an outing at the mall. *Id.* at 2. At trial, the defense objected to the admission of A.V.'s testimony because the prosecutor failed to give pretrial notice of A.V.'s testimony pursuant to MCL 768.27b(2). *Id.*

On appeal, the defendant argued that "the trial court erred by concluding that the prosecution gave sufficient notice of [A.V.'s] testimony under MCL 768.27b(2) and by allowing [A.V.] to testify." *Id.* In part, this Court found that even if the trial court erred by admitting AV's testimony based on the prosecutor's lack of notice, reversal was unwarranted because the error was not outcome-determinative and did not cause a miscarriage of justice. *Id.* at 3. This Court reasoned that: (1) A.V.'s testimony was completely unrelated to L.M.'s sexual assault allegations resulting in the defendant's first- and second-degree criminal sexual conduct convictions; and (2) A.V.'s testimony provided no new facts to the jury, was extremely brief and did not relate to M.M.'s sexual assault allegations resulting in the defendant's third-degree criminal sexual conduct conviction. *Id.* at 3–4. Further, the defendant failed to substantively challenge the admissibility of the evidence. *Id.* at 4. This Court stated,

> There was corroborative evidence—testimony by [L.M.]—that was far more probative in relation to [M.M.'s] account of her sexual abuse at the hands of defendant, than [A.V.'s] wholly unrelated testimony. Furthermore, defendant did not substantively challenge the admissibility of the other-acts evidence and has not explained how the asserted lack of notice impacted any cross-examination of [A.V.] or would have otherwise altered the defense's approach to the case. Accordingly, assuming that the trial court erred by allowing [A.V.'s] testimony, we conclude that defendant has not established the requisite prejudice and hold that reversal is unwarranted. [*Id.* at 4.]

As another example, in *Hawkins*, this Court concluded the defendant was not entitled to relief due to the prosecutor's failure to provide the notice required under MRE 404(b) because, among other things, the lack of notice did not result in the prosecutor being "able to use irrelevant, inadmissible prior bad acts evidence to secure [the defendant's] conviction" and the defendant "has never suggested how he would have reacted differently to th[e] evidence had the prosecutor given notice." *People v Hawkins*, 245 Mich App 439, 449 (2001).

Here, the trial court arguably erred by admitting evidence testimony from J.M. that Martin beat his son with a belt and with his son's pants down, which caused blood to trickle down his son's legs. (See 8/4/21 Trial Tr, pp 85–86.) The admission of the evidence was error because the prosecutor did not give notice of his intent to use the evidence in compliance with the timeframes set forth in MCL 768.27b(2) and MRE 404(b)(2) nor show good cause for late notice. Nonetheless, as in *Murray*, the error was harmless and not plain error affecting Martin's substantial rights. That is, there is not a reasonable probability that had the trial court excluded the evidence then the outcome of Martin's trial would be different.

First, all the other competent prior bad acts evidence that was before the jury, that is, J.H.'s, J.M.'s and M.M.'s testimonies about Martin sexually assaulting them, disarmed the evidence that Martin beat his son on one occasion of its prejudicial effect. Put differently, the jurors had a myriad of competent evidence before of many prior bad acts by Martin them from which they could lawfully infer that Martin has a bad character and a propensity to commit violence against minors, albeit sexual violence. See MCL 768.27a. It is unlikely that the evidence that Martin beat his son had enough probative force to alter the outcome of Martin's trial on its own considering the other competent prior bad acts evidence before the jury. Second, as in *Murray*, Martin's conduct in beating his son greatly differed from the charged conduct, sexual assaulting K.E.; thus, it is unlikely that the evidence that Martin beat his son convinced the jury to convict Martin. See *Murray*, *supra* at 4. Third, as in *Murray*, J.M.'s testimony regarding Martin beating his son was extremely brief; J.M.'s testimony was limited to one responsive answer on direct examination spanning about five lines. (See 8/4/21 Trial Tr, pp 85–86.) Finally, as in *Hawkins*, Martin fails to demonstrate that he or trial counsel would have reacted differently had the evidence been properly noticed, for instance, how he would have approached J.M.'s cross-examination differently or altered his trial strategy such that a different result was reasonably probable. See *Hawkins*, 245 Mich App at 449.

Thus, Martin's substantial rights were not affected by the trial court's arguably erroneous admission of evidence that Martin beat his son on a prior

occasion, that is, Martin fails to meet his burden of demonstrating prejudice, that is, a reasonable probability the erroneous admission of the evidence affected the outcome of his trial. *Carines*, 460 Mich at 763. This Court should deny him relief on this claim.

2. Martin received the effective assistance of counsel.

Martin received the effective assistance of counsel despite counsel's failure to object to the admission of evidence that Martin beat his son under MRE 404(b) and MCL 768.27b or to request a limiting instruction for the evidence.

Defendants have a constitutional right to the effective assistance of counsel for his or her defense in all criminal prosecutions, as guaranteed by the federal and state constitutions. See US Const, Am VI; see Const of 1963, art 1, § 20; see *Strickland v Washington*, 466 US 668, 685–86 (1984) (external citations omitted). "Effective assistance of counsel is presumed. The defendant bears a heavy burden of proving otherwise." *People v Rockey*, 237 Mich App 74, 76 (1999).

A defendant seeking relief based on ineffective assistance of counsel must meet *Strickland's* familiar two-pronged standard by showing (1) that counsel's representation fell below an objective standard of reasonableness, i.e., deficient performance, and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, i.e., prejudice. *People v Douglas*, 496 Mich 557, 565 (2014); see generally *Strickland*, 466 US at 687–88. Because both prongs of *Strickland's* two-part test must be

satisfied to establish ineffective assistance, if a defendant cannot satisfy one prong, the other need not be considered. *Strickland*, 466 US at 697.

Under the first prong, deficient performance, the measure of a counsel's performance is "simply reasonableness under prevailing professional norms." *Padilla v Kentucky,* 559 US 356, 366 (2010). The second prong, *prejudice*, requires a defendant to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 US at 694. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691.

Here, Martin fails to demonstrate that he was prejudiced by trial counsel's failure to object to J.M.'s testimony that Martin beat his son based on the requirements in MRE 404(b) and MCL 768.27b or his failure to request a limiting instruction. (8/4/21 Trial Tr, pp 80, 85.) As discussed above, it is unlikely that the evidence had sufficient probative force to have altered to outcome of Martin's trial considering the myriad prior bad acts evidence properly before the jury. See Argument section V.B.1., *supra.* From the competent other-acts testimony, including J.H.'s J.M.'s, and M.M.'s testimonies regarding Martin's sexual abuse, the jurors were permitted to infer that Martin had a propensity to abuse minors and had bad character.

Essentially, it is unlikely the evidence that Martin beat his son tipped the scales toward a guilty verdict alone. Thus, Martin cannot demonstrate a reasonable

probability that counsel's failure to object to the admission of the evidence based on MRE 404(b) and MCL 768.27b affected the outcome of his trial.

A defendant must satisfy both prongs of *Strickland's* two–part test to be entitled to relief, so this Court need not consider whether counsel's performance was deficient to deny Martin relief on this claim. See *Strickland*, 466 US at 697.

VI. The cumulative effect of the alleged errors did not deprive Martin of his constitutional rights to due process and a fair trial.

A. Issue Preservation and Standard of Review

Martin did not raise a cumulative-error objection below, so this issue is unpreserved. See *People v Danto*, 294 Mich App 596, 605 (2011). This Court reviews "this issue to determine if the combination of alleged errors denied defendant a fair trial." *People v Dobek*, 274 Mich App 58, 106 (2007).

Unpreserved issues are reviewed for plain error affecting a defendant's substantial rights. *Carines*, 460 Mich at 763–764; see also Argument Section I.A., *supra*.

B. Analysis

The cumulative effect of the alleged errors did not deprive Martin of his constitutional rights to due process and a fair trial.

"It is true that [t]he cumulative effect of several minor errors may warrant reversal where the individual errors would not." *People v Unger*, 278 Mich App 210, 258 (2008). Under the cumulative error doctrine, this Court will reverse and remand for a new trial when the cumulative effect of several errors establishes that the defendant did not receive a fair trial, even though no one error by itself warranted a new trial. *People v Bahoda*, 448 Mich 261, 292 n 64 (1995); *People v Cooper*, 236 Mich App 643, 659–660 (1999); see also *Dobek*, 274 Mich App at 106.

The cumulative effect of the actual errors must cause substantial prejudice such that the failure to order a new trial would deny the defendant substantial

justice under MCR 2.613(A). *Lewis v LeGrow*, 258 Mich App 175, 200–201 (2003); MCR 2.613(A). However, "Only 'actual errors' are aggregated when reviewing a cumulative-error argument." *People v Gaines*, 306 Mich App 289, 310 (2014), citing *Bahoda*, 448 Mich at 292 n 64.

In this case, there were only three possible errors that occurred at Martin's trial: (1) the trial court's admission of improperly noticed other-acts evidence that Martin beat his son, as discussed in Argument section V.B.1., (2) the trial court's failure to articulate its analysis more fully under MRE 403 for admitting evidence of Martin's prior sexual assaults against J.H., J.M. and M.M. under MCL 768.27a as discussed in Argument section III.B.1, and (3) the trial court's admission of K.E.'s statements to her behavioral health therapist as discussed in Argument section IV.B. As argued above, these were not actual errors, but to the extent they were errors, they were harmless and/or most likely did not affect the outcome of Martin's trial. Taken together these harmless errors, if errors at all, could not have caused substantial prejudice to Martin.

This Court should deny Martin relief on this issue.

VII. Martin's sentence to lifetime electronic monitoring is not unconstitutional cruel and/or unusual punishment.

A. Issue Preservation and Standard of Review

To preserve an issue of unconstitutionally cruel and/or unusual sentences, Martin must advance such a claim in the lower court. See *People v Bowling*, 299 Mich App 552, 557 (2013). Martin preserved this issue by filing a motion to correct his invalid sentence pursuant to MCR 6.429(B)(1) in the trial court. (See Def's Appeal Br, p 47.)

Preserved claims of constitutional error are reviewed de novo. *People v Pipes*, 475 Mich 267, 274 (2006). In reviewing a claim of preserved constitutional error, the beneficiary of the error must prove that it is harmless beyond a reasonable doubt. *People v Reese*, 242 Mich App 626, 635 (2000); *Carines*, 460 Mich at 774.

B. Analysis

Martin's sentence to lifetime electronic monitoring is not unconstitutionally cruel and/or unusual.

Martin claims that the imposition of lifetime electronic monitoring upon his prison release is cruel and/or unusual punishment in violation of the Eighth Amendment and Michigan's Constitution. As conceded by Martin, this Court found in *Hallak* that such monitoring "does not violate [a] defendant's state or federal rights against cruel and/or unusual punishment." *People v Hallak*, 310 Mich App 555, 577 (2015). This Court noted that the imposition of lifetime electronic monitoring for those convicted of committing CSC against someone less than 13

years of age "addresses the significant concerns of rehabilitation and recidivism." *Id.* at 573. "To combat these substantial recidivism risks, it has been recognized that 'the monitoring system has a deterrent effect on would-be re-offenders' and 'the ability to constantly monitor an offender's location allows law enforcement to ensure that the offender does not enter a school zone, playground, or similar prohibited locale.'" *Id.* at 574 (citation omitted). This Court explained that any "harshness" in the penalty for committing CSC against a child less than 13 years of age was justified because of "[t]he high recidivism rate and vulnerability of the victims"—children, who are "some of the most vulnerable individuals in our society." *Id.* at 574–575.

Thereafter, the Supreme Court denied leave to appeal that portion of the decision. See *People v Hallak*, 499 Mich 879, 880 (2016). Under MCR 7.215(C)(2), *Hallak* is binding. Martin is not entitled to relief on this issue.

CONCLUSION AND RELIEF REQUESTED

For these reasons, the People respectfully request that this Court affirm Daryl William Martin's convictions and sentences and deny his request for relief.

Respectfully submitted,

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 21, 2015
v	Nos. 318874; 322746; 322828 Newaygo Circuit Court
KEITH ALLEN BAGLEY, Defendant-Appellant.	LC Nos. 12-010152-FH; 12-010153-FC

Before: METER, P.J., and SAWYER and BOONSTRA, JJ.

PER CURIAM.

In Lower Court No. 12-010152-FH, defendant was charged with three counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a). The victim was HB, defendant's daughter. In Lower Court No. 12-010153-FC, defendant was charged with one count each of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(d)(*ii*); CSC II, MCL 750.520c(1)(a); and fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e(1)(d). The victim was KM, who was also defendant's daughter. The two cases were consolidated and, following a jury trial at which defendant represented himself, defendant was convicted of the six charges. In Lower Court No. 12-010152-FH, the trial court sentenced defendant as a second-offense habitual offender, MCL 769.10, to six years to 22 years and six months' imprisonment for each of the CSC II convictions. In Lower Court No. 12-101053-FC, the trial court sentenced defendant as a second-offense habitual offender to prison terms of 18 to 75 years on the CSC I conviction, six years to 22 years and six months on the CSC II conviction, and two to three years on the CSC IV conviction. After defendant moved for resentencing and the trial court held that the sentencing guidelines, in part, were incorrectly scored, the trial court resentenced defendant to the same sentences. In Docket No. 318874, defendant appeals by right from his convictions. In Docket Nos. 322746 and 322828, defendant appeals by right from the sentences imposed on resentencing. We affirm in all docket numbers.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

In December 2010, Marlene Engman, who was in a romantic relationship with defendant, moved into defendant's Newaygo home. Defendant's daughter, HB, and her sister[1] also lived in the home. KM, who is also defendant's daughter, and her son moved into the home in February 2011. The following month, Michael Middleton and his daughter moved into the home. At the time, KM and Middleton were dating. They married in August 2012.

Engman testified that she and defendant engaged in "threesomes" with other women. According to Engman, defendant talked about KM in a sexual manner "quite a bit." He said that he wanted to have a sexual relationship with KM. Engman had seen defendant grab KM's breasts and buttocks on multiple occasions. Engman also testified that on one occasion HB lifted her shirt and asked defendant how her breasts were doing. Defendant felt her breasts and said they were getting there.

HB, who was 13 years old at the time of trial, testified that defendant touched her breasts and buttocks when she was younger than 13 years of age. HB described four times when defendant touched her buttocks, and testified that defendant often told her that her buttocks were nice when he touched them. HB also described several times when defendant touched her breasts. HB testified that there were several times when defendant dumped a bucket of ice water on her while she was taking a shower. Defendant would open the shower curtain and watch her freeze.

KM, who was 19 years old at trial, testified that defendant and her mother separated about a year after she was born. She then lived with her mother. KM occasionally saw defendant every other weekend. She testified that defendant's treatment of her was "decent" until he started touching her buttocks and breasts. The touching started when KM was under the age of 13 and happened frequently. KM believed the touching was intentional, not accidental. Defendant laughed and joked when he did it, but the touching was not playful tickling.

KM testified that she moved into defendant's house after her son was born because she thought defendant had changed and she needed a stable home for her son. KM testified that after she moved in she occasionally saw defendant touch HB's buttocks.

Things soon got "awkward" for KM with defendant and Engman. Defendant and Engman did not hide the fact that they went on "picnics," or had threesomes, with women they met over the Internet. Both commented to KM that they would like to have sex with her and that they would pay her. The idea disgusted KM and she told defendant and Engman that she would never do it. KM continued to stay at defendant's house because she never thought defendant and Engman would act on their request.

Defendant hosted parties at his house, where there would be alcohol and drugs. There was a party at the end of May or the beginning of June 2011. Defendant, Engman, KM, and

[1] The record is unclear whether HB's sister is also defendant's daughter.

Middleton were at the party, as were Jake Kruger, Steven Lisee, and Thomas Kropewnicki. Others may have been there too. There was drinking at the party; both KM and Middleton admitted that they were drunk. Engman had purchased the alcohol, although Middleton and defendant had split the cost of a bottle of liquor. KM testified that she exposed her breasts when she was in the kitchen with Middleton, defendant and Engman, and that the exposure was intended for Middleton, not anyone else. Defendant did not touch KM, but he took a picture of her breasts with his phone. KM was unsure whether anyone else was in the kitchen. Middleton believed that everyone who was at the party was in the kitchen when the exposure happened. He also believed, but could not say for certain, that defendant took a picture of KM. HB testified that she was at the party. Defendant let her drink alcohol and hang out with everyone. After she used the bathroom, she saw KM turn around and put her shirt back on.

KM testified that, after defendant and Engman went to their bedroom, Engman called her to the room. She and defendant wanted to talk to KM. After KM sat on the edge of the bed, defendant came and held her down. He put one hand on her leg and his other hand on her shoulder. He pushed KM back onto the bed. Engman held KM's other shoulder down. KM tried to get away. She struggled, but defendant was much bigger than she was. Defendant pulled down the front of KM's pants and touched the inside of her vagina with his hand. He told Engman to "try this." Engman leaned over and put her mouth on KM's vagina. Defendant and Engman then let KM leave the bedroom. KM did not tell Middleton what had happened. She testified that she knew that Middleton, if he knew what had happened, would confront defendant and that defendant would throw them out of the house. They had no other place to live.

Engman testified that she went into the bathroom sometime after KM exposed herself. When she left the bathroom, she saw defendant and KM in the bedroom. She went into the room and sat on the bed. She testified that defendant and KM wanted Engman to lick KM's private parts. Defendant undid KM's pants. He grabbed Engman's head and pushed Engman toward KM's vagina. Engman moved her head, stood up, and walked out of the bedroom. Engman was experiencing memory problems; she suffers from grand mal seizures. She could not recall whether she saw defendant touch KM's vagina, although she knew that defendant's hands were "pretty close."

Middleton testified that he and KM retired to their bedroom when the party tapered and went to bed. But he remembered that, at some point in the evening, Engman called KM to the bedroom that Engman shared with defendant. After that night, Middleton soon noticed that KM was "a little more standoffish" and that she did not want to be at defendant's house. It was always Middleton and KM's plan to get their own place, but after the party, KM showed increased urgency for finding a new place to live. Within three weeks of the party, four weeks at most, KM and Middleton moved out of defendant's home and into an apartment.

In January 2012, defendant made Engman move out of the house. Subsequently, Engman wanted to get her belongings out of the home. She requested that a police officer accompany her because she knew that defendant would be irate. A City of Newaygo Police Officer, Noah Farrant, accompanied Engman. Defendant refused to let Engman into the house. The two started yelling at each other. Engman told Farrant of concerns she had that defendant had sexually touched his daughters. She also said there were "pictures" on defendant's telephone and computer. Defendant denied Engman's allegations. Farrant asked defendant for KM's

contact information. Instead of providing the requested information, defendant called KM on the telephone. Defendant then gave the telephone to Farrant. Farrant asked her about Engman's allegation that defendant had touched her sexually; KM denied the allegation. According to Farrant, KM's denial was "a passive no." KM later testified that she had denied the allegations because the telephone call was unexpected and she did not know what to do.

Soon thereafter, City of Newaygo Police Officer Mike Goff and Children's Protective Services investigator Jennifer Arnold, interviewed HB at the Newaygo Middle School. They informed HB that they wanted to talk to her about parties at defendant's house. The only allegation of which they were aware was that KM had taken her top off at a party and that HB had witnessed this act. The interview was brief. HB was scared and started crying soon after the interview began. She said that she was not allowed to talk to them without defendant's permission. HB did not make any disclosures about defendant. In fact, she said that she was not aware of any bad touches that happened at defendant's house. However, she indicated that she wanted to talk more to Goff and Arnold in the future.

HB testified that, after Engman called the police on defendant, defendant told her not to talk to the police without him there or without his permission. She did not tell Goff and Arnold anything about defendant because she was scared that defendant would beat her. Defendant had previously hit her and screamed at her.

Goff also interviewed KM. KM admitted that she had exposed herself at the party, and she made other disclosures about defendant. According to KM, she told Goff "mostly everything." However, she did not tell him about what had happened with defendant and Engman in the bedroom because she was ashamed. The same day, Goff and Arnold returned to Newaygo Middle School to speak with HB. HB was more relaxed, and she made disclosures about defendant. HB testified that it was not easy telling the truth to Goff and Arnold and that she did not tell them everything because she was still a little scared.

The following day, KM called Goff because she wanted to be reinterviewed. She brought HB to the police station with her. In her interview, KM disclosed what had happened the night of the party. In her interview, HB was "very willing" to talk and she gave more details about being touched by defendant and how often the touches occurred. Both KM and HB testified that they had not talked with each other about what defendant had done to them.

On January 25, 2012, five days after Farrant accompanied Engman to defendant's house, City of Newaygo Police Officer Lloyd Walerczyk executed search warrants for defendant's computer and cellular telephone. There had been reports of indecent pictures on them. Numerous pictures of defendant's family members and pets were found on his cellular telephone. Numerous pornographic images of nude women were found on defendant's computer. All the women in the pictures appeared to be at least 18 years old.

Kruger, Lisee, and Kropewnicki were called as defense witnesses. Kruger, who was 21 years old at the time of trial, did not recall KM exposing herself at the party. He was "pretty heavily" intoxicated and does not remember most of the night, although he remembered sitting on the porch with defendant. Lisee, who was 20 years old at trial, did not see KM expose herself. He, too, was drunk at the party. Kropewnicki, who was 23 years old at trial, testified

that when he and KM were alone in the kitchen during the party, KM asked him if he wanted to see her breasts. Before he could respond, KM took off her shirt, exposing herself. Defendant was in a different room. Middleton came into the kitchen, saw KM's breasts, and paid no mind to what was happening. Kropewnicki also testified that he witnessed KM and Engman engaging in consensual sexual activity at the party. He admitted that he had talked to a police officer in July 2012 and did not tell the officer about anything to which he testified. Lisee did not see HB at the party, but it was his understanding that HB was in her bedroom. According to Kruger and Kropewnicki, HB was not at defendant's house and the party happened because HB was not there.

Defendant's mother testified that everything seemed fine whenever she visited defendant's house. She never saw defendant be mean to HB. She testified that HB was at her house the night of the party.

Following deliberations, the jury convicted defendant of three counts of CSC II in Lower Court No. 12-010152-FH (involving HB) and of CSC I, CSC II, and CSC IV in Lower Court No. 12-010153-FC (involving KM). The trial court sentenced defendant as described above. This appeal followed.

II. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that his convictions are not supported by sufficient evidence. We disagree. We review de novo challenges to the sufficiency of the evidence. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). We view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the prosecution proved the elements of the crime beyond a reasonable doubt. *Id*. The testimony of a CSC victim need not be corroborated in order for a CSC conviction to stand. MCL 750.520h.

Defendant's argument that his convictions are not supported by sufficient evidence because HB and KM, as well as Engman, his ex-girlfriend, were not credible witnesses is without merit. The credibility of witnesses and the weight to be accorded evidence are questions for the jury. *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009). By convicting defendant of the CSC charges, the jury necessarily found the prosecution's witnesses credible. We will not interfere with the jury's credibility determinations. *People v Noble*, 238 Mich App 647, 657; 608 NW2d 123 (1999).

To convict a defendant of CSC II under MCL 750.520c(1)(a), the prosecutor must prove that the defendant engaged in sexual contact with another person and the other person was under 13 years of age. "Sexual contact" is defined as "the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can *reasonably be construed* as being for the purpose of sexual arousal or gratification, [or] done for a sexual purpose . . . ." MCL 750.520a(q) (emphasis added). This definition incorporates a reasonable person standard. *People v Piper*, 223 Mich App 642, 647; 567 NW2d 483 (1997). Consequently, a jury need only determine whether the charged conduct, when viewed objectively, could reasonably be construed as being for a sexual purpose. *Id*. HB testified that when she was under the age of 13, defendant touched her buttocks and breasts several times. Engman also testified that she had seen

defendant touch HB inappropriately. She also testified that defendant had said he was unsure whether he would be able to control himself with HB. Viewing this evidence in a light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that defendant intentionally touched HB's intimate parts or the clothing covering those parts when HB was under the age of 13 and that the contact, reasonably construed, was for a sexual purpose. *Cline*, 276 Mich App at 642. Defendant's convictions for CSC II in Lower Court No. 12-010152-FH are supported by sufficient evidence.

KM testified that defendant started to touch her buttocks and breasts when she was 11 years old. He did so on at least 10 occasions. Defendant would tell KM that she had a nice butt or that she had a nice "ghetto booty." Viewing KM's testimony in a light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that defendant intentionally touched KM's intimate parts or the clothing covering her intimate parts when she was under the age of 13 and that the contact could reasonably be construed as being for a sexual purpose. *Id*. Sufficient evidence supports defendant's conviction for CSC II in Lower Court No. 12-010153-FC.

To convict a defendant of CSC I under MCL 750.520b(1)(d)(*ii*), a prosecutor must prove that the defendant engaged in sexual penetration with the victim and that the defendant was aided and abetted by another person and used force or coercion to accomplish the sexual penetration. Force or coercion includes when the defendant overcomes the victim through the application of physical force or violence. MCL 750.520b(1)(d)(*ii*), (f)(*i*). The victim need not resist. MCL 750.520i. "Sexual penetration" is defined as "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, but emission of semen is not required." MCL 750.520a(r). KM testified that, after Engman called her to defendant's bedroom on the night of a party where she had exposed her breasts, she sat on the bed, and defendant held her down and pushed her back onto it. Defendant had one hand on her leg and the other hand on her shoulder. KM struggled and tried to get away, but defendant was much bigger than she and Engman held her other shoulder down. Defendant pulled down the front of KM's pants and touched the inside of her vagina with his hand. Viewing KM's testimony in a light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that defendant engaged in sexual penetration with KM and that he was aided and abetted by another person and used force or coercion to accomplish the penetration. *Cline*, 276 Mich App at 642. Defendant's conviction for CSC I in Lower Court No. 12-010153-FC is supported by sufficient evidence.

Regarding defendant's CSC IV conviction, defendant was charged with CSC IV under MCL 750.520e(1)(d) (engaging in sexual contact with a person who is related by blood or affinity to the third degree). The jury was thus required to find that defendant engaged in sexual contact with KM and that KM was related to him by blood or affinity to the third degree. *Id*. The jury heard evidence that defendant pulled down her pants and touched her vagina the night of the party. It is also undisputed that defendant was KM's father and thus related to her to the first degree. See *People v Russell*, 266 Mich App 307, 310-311; 703 NW2d 107 (2005). Thus,

taking the evidence in the light most favorable to the prosecution, defendant's conviction for CSC IV in Lower Court No. 12-010153-FC is supported by sufficient evidence.[2]

III. OTHER ACTS EVIDENCE

Defendant argues that the trial court erred when it allowed the jury to hear evidence of his prior sexual acts with HB and KM, evidence that he had parties at his house where alcohol was served to minors and marijuana was smoked, and evidence that he had pornography on his computer. Because defendant did not object to any of the challenged evidence below, the issues are unpreserved. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). We review unpreserved claims of evidentiary error for plain error affecting defendant's substantial rights. *People v Benton*, 294 Mich App 191, 202; 817 NW2d 599 (2011). Plain error, which is error that is obvious or clear, affects a defendant's substantial rights when it affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant does not specify what constitutes the evidence of his prior sexual acts with HB and KM. We assume that, because HB and KM testified to more touchings by defendant of their breasts and buttocks than were charged, defendant is referring to the touchings that were not the basis for the CSC II charges. However, the CSC II charges were never tied to any specific touchings. Alternative acts committed by the defendant may be presented as evidence of the actus reus of the charged offense. *People v Cooks*, 446 Mich 503, 524; 521 NW2d 275 (1994). Therefore, there was no evidence of other sexual acts committed by defendant against HB and KM. Defendant's numerous touchings were evidence of alternative acts comprising the actus reus of the CSC II offenses. *Id*. Each touching, in essence, was a charged act.

Regardless, evidence of any sexual act by defendant against HB and KM was admissible under MCL 768.27a. Indeed, this is not disputed by defendant. Rather, defendant claims the evidence was inadmissible because (1) if MCL 768.27a allows evidence of a defendant's other acts to be used to show a propensity to commit crimes, the statute violates due process; (2) the evidence was unfairly prejudicial under MRE 403; and (3) the prosecutor failed to give notice of his intent to offer the evidence. These arguments are without merit. First, evidence admissible under MCL 768.27a may be used to show the defendant's character and propensity to commit the charged crime. *People v Watkins*, 491 Mich 450, 470; 818 NW2d 296 (2012). Because MCL 768.27a is subject to MRE 403, *id*. at 486, the statute does not violate due process. See

[2] It appears from this Court's review of the trial court's instructions to the jury that the jury was instructed, regarding the charge of CSC IV, that it was to find defendant guilty of CSC if (1) defendant touched KM's buttocks or breast or the clothing covering those areas; (2) the touching was done for a sexual purpose or could reasonably be construed to have been for a sexual purpose; and (3) defendant used force or coercion to commit the sexual act. Thus, it appears that the jury was not instructed regarding its need to find that defendant was related to KM. However, the jury did hear undisputed evidence at trial that KM was defendant's daughter; further, defendant expressed approval of the jury instructions, waiving any error, as discussed in Part IV, infra. We therefore conclude that any instructional error was harmless and does not affect our analysis of the sufficiency of the evidence supporting defendant's convictions.

United States v LeMay, 260 F3d 1018, 1024-1027 (CA 9, 2001); *United States v Castillo*, 140 F3d 874, 880-883 (CA 10, 1998).[3] Second, under MRE 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. But, when applying MRE 403 to evidence admissible under MCL 768.27a, courts must weigh the propensity inference in favor of the evidence's probative value rather than its prejudicial effect. *Watkins*, 491 Mich at 487. Here, the evidence was highly probative because it showed a pattern of conduct by defendant, and because it supported the credibility of HB and KM. See *id*. at 491. The evidence was thus not inadmissible under MRE 403. Third, MCL 768.27a contains a notice requirement; if a prosecutor intends to offer evidence under MCL 768.27a, he must disclose the evidence at least 15 days before trial. At the preliminary examination, the prosecutor elicited evidence of touchings by defendant of HB and KM's breasts and buttocks that was beyond the number needed to bind defendant over on three charges of CSC II in Lower Court No. 12-010152-FH and on one charge of CSC II in Lower Court No. 12-010153-FC. Hearing the preliminary examination testimony, defendant was on notice that the prosecutor intended to introduce evidence of his other sexual acts at trial. We find no plain error in the admission of any evidence of sexual acts by defendant against HB and KM.

However, we do conclude that admission of evidence regarding earlier parties[4] at defendant's house where underage people drank alcohol and smoked marijuana, was plainly erroneous, *Benton*, 294 Mich App at 202, because it was not offered for a purpose other than to establish defendant's character or propensity to commit the charged offenses, MRE 404(b)(1), *People v Magyar*, 250 Mich App 408, 414; 648 NW2d 215 (2002). We also conclude that admission of evidence that adult pornography was found on defendant's computer was plainly erroneous, *Benton*, 294 Mich App at 202, because, although it was minimally relevant to Engman's credibility (since Engman had testified that defendant looked at pornography on the computer before he discussed engaging in threesomes with her), the probative value of the evidence was outweighed by the danger of unfair prejudice, MRE 403; *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001). However, this plain error did not affect defendant's substantial rights. *Benton*, 294 Mich App at 202. Based on the testimony of HB and KM about defendant's acts, as well as Engman's testimony that defendant said he wanted to have a sexual relationship with KM and he did not know if he would be able to control himself with HB, the evidence showed that defendant had a propensity to engage in sexual acts with his daughters and

[3] These cases hold that FRE 414, the federal counterpart of MCL 768.27a, *Watkins*, 491 Mich at 471, does not violate due process because it remains subject to FRE 403. Although decisions of lower federal courts are not binding on this Court, *People v Chowdhury*, 285 Mich App 509, 516; 775 NW2d 845 (2009), we view these cases as persuasive.

[4] There was no plain error in the admission of evidence that on the night of the party where KM exposed herself, underage people drank alcohol and smoked marijuana at defendant's house. This evidence fells under the "res gestae" exception to MRE 404(b). See *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996); *People v Robinson*, 128 Mich App 338, 340; 340 NW2d 303 (1983).

had a pattern of conduct. The evidence of earlier parties and possession of pornography did not affect the outcome of defendant's trial. *Carines*, 460 Mich at 763.[5]

IV. INSTRUCTIONAL ERRORS

Defendant next argues that the trial court erred because it did not give an accomplice instruction regarding Engman. He also argues that the trial court erred when it instructed the jury that it could use evidence of uncharged acts in deciding whether defendant committed the charged acts. After the trial court instructed the jury, defendant stated that he was satisfied with the instructions. Because defendant expressly approved the instructions, he waived these claims of instructional error. See *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011); *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

Further, there was no plain error in the trial court's instructions. This Court has recognized that an accomplice might have a special interest in testifying, thereby raising questions about the accomplice's credibility. *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002). Here, however, the prosecution presented evidence of defendant's guilt of the CSC I charge beyond the testimony of Engman. He presented KM's testimony. In fact, Engman's testimony did not support the prosecution's contention that defendant had committed CSC I, because she denied participating in any sexual penetration of KM. Further, the jury was instructed that in determining witness credibility they should consider whether the witnesses have any bias, prejudice, or personal interest in how the case is decided and whether the witnesses have any special reason to tell the truth or to lie. Under these circumstances, a cautionary accomplice instruction was not clearly and obviously required. *Young*, 472 Mich at 143; *Carines*, 460 Mich at 763. And the jury was properly allowed to consider evidence of defendant's prior sexual acts against his daughters for propensity purposes. MCL 768.27a.

V. SENTENCING GUIDELINES

Defendant next argues that the trial court erred in assessing points for offense variables (OVs) 4, 10, and 14, because any facts used to score them were not found beyond a reasonable doubt by a jury, in contravention of case law from the United States Supreme Court, including *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), and *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013). Our Supreme Court has

[5] Defendant also raised other allegations of evidentiary error. Defendant argues that the trial court erred when it prevented him from asking KM about her allegation of having been raped by her mother's ex-boyfriend. He also argues that the trial court erred when it prevented him from introducing a video recording of an interview where the police purportedly said that they had to make it look like a scorned ex-girlfriend was not trying to get revenge. However, because defendant has not cited any authority in support of these claims of error, the claims are abandoned. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

held that *Apprendi* does not apply to Michigan's sentencing guidelines, *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006), while this Court has held that *Alleyne* does not apply to the sentencing guidelines, *People v Herron*, 303 Mich App 392, 405; 845 NW2d 533 (2013), application for lv to appeal held in abeyance ___ Mich ___; 846 NW2d 924 (2014). We are bound to follow these decisions. MCR 7.215(J)(1); *Charles A Murray Trust v Futrell*, 303 Mich App 28, 48; 840 NW2d 775 (2013). Defendant's argument is without merit.

Defendant also argues that the trial court erred in scoring OVs 4, 10, and 14 because any facts used to score them were not proved by a preponderance of the evidence. A trial court's factual determinations made in scoring the sentencing guidelines are reviewed for clear error and the determinations must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). Clear error exists when this Court is left with a definite and firm conviction that a mistake was made. *People v Brooks*, 304 Mich App 318, 319-320; 848 NW2d 161 (2014).

The trial court assessed 10 points for OV 4, which addresses psychological injury to a victim, MCL 777.34(1), in Lower Court No. 12-010152-FH and in Lower Court No. 12-010153-FC. Ten points may be assessed for OV 4 if "[s]erious psychological injury requiring professional treatment occurred." MCL 777.34(1)(a). A trial court properly assesses 10 points for OV 4 if the serious psychological injury may require professional treatment. MCL 777.34(2). The fact that the victim did not seek professional treatment is not conclusive. *Id*.; *People v Lockett*, 295 Mich App 165, 183; 814 NW2d 295 (2012).[6]

In Lower Court No. 12-010152-FH, HB's mother submitted a victim impact statement, in which she wrote that HB was sexually molested by defendant, her biological father, and that HB receives counseling as a result. In *People v Davenport* (*After Remand*), 286 Mich App 191, 200; 779 NW2d 257 (2009), this Court held that the trial court properly assessed 10 points for OV 4 where there was evidence that the victim went to counseling. Because there was evidence that HB went to counseling as a result of being sexually abused by defendant, the trial court's assessment of 10 points for OV 4 in Lower Court No. 12-010152-FH was not clearly erroneous. *Hardy*, 494 Mich at 438.

In her victim impact statement, KM wrote, "This has been very hard on me because he is my father." KM testified she was "ashamed" about what happened in the bedroom because defendant was her dad and she was left with the question, "why would anyone do something like that to their daughter." At trial, KM cried as she recalled what had happened in the bedroom. In *People v Williams*, 298 Mich App 121, 124; 825 NW2d 671 (2012), this Court upheld an assessment of 10 points for OV 4 when the victim wrote in his impact statement that the home invasion committed by the defendant left him feeling angry, hurt, violated, and frightened.

[6] We reject defendant's argument that the rule of lenity requires that zero points be assessed for OV 4. "The 'rule of lenity,' which provides that courts should mitigate punishment when the punishment in a criminal statute is unclear," only applies when the statute's language is ambiguous or in the absence of any firm indication of legislative intent. *People v Denio*, 454 Mich 691, 699, 700 n 12; 564 NW2d 13 (1997). The language of OV 4 is not ambiguous.

Based on KM's statements, as well has her crying at trial, the trial court's assessment of 10 points for OV 4 in Lower Court No. 12-010153-FC was not clearly erroneous. *Hardy*, 494 Mich at 438.

The trial court assessed 10 points for OV 10, which addresses exploitation of a vulnerable victim, MCL 777.40(1), in Lower Court No. 12-010152-FH and in Lower Court No. 12-010153-FC. Ten points may be assessed for OV 10 if "[t]he 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). To "exploit" means "to manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(b). A "domestic relationship" is a familial or cohabitating relationship. *People v Jamison*, 292 Mich App 440, 446; 807 NW2d 427 (2011).

There was a domestic relationship between HB and defendant. Defendant was HB's father, and HB, who was 13 years old at trial, lived with him. HB testified that defendant did not let her see or talk to her mom. HB's mother testified that, before HB disclosed defendant's abuse, she had not seen HB since 2009 because defendant would not let her see HB. Defendant was more than 30 years older than HB. These facts support a finding, under a preponderance of the evidence standard, that HB was vulnerable, either because of her youth or her domestic relationship with defendant, and that defendant manipulated HB for a selfish or unethical purpose. *Hardy*, 494 Mich at 438. The trial court's assessment of 10 points for OV 10 in Lower Court No. 12-010152-FH was not clearly erroneous. *People v Phillips*, 251 Mich App 100, 109; 649 NW2d 407 (2002).

KM was also young. She was 17 years old at the time of the party, and was about 25 years younger than defendant. KM had a familial relationship with defendant—he was her dad—and she lived in his house. KM, who was not working and who had a very young son, testified that she had no other place to live. These facts support a finding, under a preponderance of the evidence standard, that KM was vulnerable, either because of her youth or her domestic relationship with defendant, and that defendant exploited these vulnerabilities when Engman called KM into the bedroom. *Id*. The trial court's assessment of 10 points for OV 10 in Lower Court No. 12-010153-FC was not clearly erroneous. *Id*.

Finally, the trial court assessed 10 points for OV 14, which addresses the offender's role, MCL 777.44(1), in Lower Court No. 12-010153-FC. Ten points may be assessed for OV 14 if "[t]he offender was a leader in a multiple offender situation." MCL 777.44(1)(a). The entire criminal transaction is to be considered. MCL 777.44(2)(a). A "leader" is a person "who is a guiding or directing head of a group." *People v Jones*, 299 Mich App 284, 287; 829 NW2d 350 (2013), vacated in part on other grounds 494 Mich 880 (2013) (quotation omitted). A person leads by guiding, preceding, showing the way, directing, or conducting. *People v Rhodes*, 305 Mich App 85, 90; 849 NW2d 417 (2014). KM testified that Engman called her into the bedroom. Despite this fact, the trial court's finding that defendant was a leader was not clearly erroneous. *Hardy*, 494 Mich at 438. After KM sat on the bed, defendant held her down. Putting one hand on her leg and his other hand on her shoulder, he pushed KM back onto the bed. Defendant pulled down KM's pants and penetrated her vagina. He then told Engman to "try this," and Engman put her mouth on KM's vagina. Based on this evidence, which showed that defendant was the first to have physical and sexual contact with KM and that he gave direction to

Engman, we are not left with a definite and firm conviction that the trial court made a mistake in assessing 10 points for OV 14. *Brooks*, 304 Mich App at 319-320.

VI. PROPORTIONALITY

Defendant argues that the trial court violated the principal of proportionality when, at resentencing, and despite a reduction in the recommended minimum sentence ranges after the trial court rescored prior record variable 6 and OV 10 in his favor, it imposed the same sentences that it had originally imposed. There is no dispute that defendant's sentences fall within the recalculated recommended minimum sentence ranges under the legislative guidelines. Therefore, pursuant to MCL 769.34(10), because there are no errors in scoring the guidelines, we are required to affirm defendant's sentences. *People v Armisted*, 295 Mich App 32, 51-52; 811 NW2d 47 (2011).

VII. DEFENDANT'S STANDARD 4 BRIEF

Defendant raises numerous additionally allegations of error in his Standard 4[7] brief.

A. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant first argues that he was denied effective assistance of counsel because defense counsel failed to move for bills of particulars and to separate the charges for trial. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below objective standards of reasonableness and that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceedings would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008). Because defendant did not move for a new trial or a *Ginther*[8] hearing, our review of these claims is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

Defendant represented himself at varying times during pretrial proceedings, with his trial counsel available as standby counsel. "A defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of effective assistance of counsel." *People v Kevorkian*, 248 Mich App 373, 419; 639 NW2d 291 (2001). The applicable court rules, MCR 6.112 and MCR 6.120, contain no time requirement for motions requesting a bill of particulars or a severance of charges. Because defendant, when he represented himself, had the opportunity to move for bills of particulars and for a severance of the charges but did not make the motions, defendant cannot show that he was prejudiced by defense counsel's inaction.

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[7] A Standard 4 brief is a supplemental pro se brief that may be filed by a criminal defendant pursuant to Michigan Supreme Court Administrative Order 2004-6.

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

Regardless, any inaction by defense counsel did not deny defendant the effective assistance of counsel. First, because defendant had a preliminary examination, any motion for bills of particulars would have been futile. *People v Harbour*, 76 Mich App 552, 557; 257 NW2d 165 (1977). Counsel is not ineffective for failing to make a futile motion. *People v Horn*, 279 Mich App 31, 42 n 5; 755 NW2d 212 (2008). Second, even assuming, but without deciding, that the charges were not related and, therefore, that the trial court would have been required to sever the charges for trial had a motion for severance been made, see MCR 6.120(C), it is not reasonably probable that any such severance would have affected the outcome. Because all of defendant's sexual acts against HB and KM constituted listed offenses against a minor, MCL 768.27a, evidence of all of defendant's sexual acts against HB and KM would have been admissible in a trial on any of the CSC charges, on any matter to which the evidence was relevant, including defendant's character and propensity to commit the charged crime. *Watkins*, 491 Mich at 470. Thus, each jury would have heard the same evidence, and defendant cannot show that, but for defense counsel's inaction, the result of the proceedings would have been different. *Uphaus* (*On Remand*), 278 Mich App at 185.

B. REASONABLE NOTICE OF CSC II CHARGES

Defendant next argues that he was denied his right to reasonable notice of the CSC II charges against him. Because defendant did not raise this issue below, it is unpreserved, *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007), and reviewed for plain error affecting substantial rights, *Carines*, 460 Mich at 763.

"A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence[.]" *In re Oliver*, 333 US 257, 273; 68 S Ct 499; 92 L Ed 682 (1948). "A defendant's right to adequate notice of the charges against the defendant stems from the Sixth Amendment, as applied to the states through the Due Process Clause of the Fourteenth Amendment." *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998). A prosecution must be based on an information or an indictment. MCR 6.112(B). "To the extent possible, the information should specify the time and place of the alleged offense." MCR 6.112(D). In determining whether the failure to pinpoint the date of the offense denied a defendant due process of law, this Court considers four factors: "(1) the nature of the crime charged; (2) the victim's ability to specify a date; (3) the prosecutor's efforts to pinpoint a date; and (4) the prejudice to the defendant in preparing a defense." *People v Sabin*, 223 Mich App 530, 532; 566 NW2d 677 (1997), remanded in part on other grounds 459 Mich 924 (1998) (quotation omitted). "Where the facts demonstrate that the prosecutor has stated the date and time of the offense to the best of his or her knowledge after undertaking a reasonably thorough investigation, [this Court] would be disinclined to hold that an information . . . was deficient for failure to pinpoint a specific date." *People v Naugle*, 152 Mich App 227, 234; 393 NW2d 592 (1986).

The nature of the CSC II offenses was CSC against a minor. "Time is not of the essence, nor is it a material element, in criminal sexual conduct cases involving a child victim." *People v Dobek*, 274 Mich App 58, 83; 732 NW2d 546 (2007). This Court has generally recognized that children may have difficulty remembering the specific dates of abuse. *Naugle*, 152 Mich App at 235. Although the prosecutor never pinpointed, with either HB or KM, specific dates for the sexual touching, there is no indication on the record that the prosecutor did not undertake a

reasonably thorough investigation to determine more specific times for the abuse before defendant was charged. Under these circumstances, and especially because the nature of the charged offenses was CSC against minors, we conclude that the timeframes for the CSC II charges in either docket did not clearly and obviously deny defendant his right to adequate notice of the charges. *Carines*, 460 Mich at 763.

Defendant further claims that the lack of specificity regarding when the CSC II offenses occurred denied him his right to present a defense. Defendant has abandoned this argument. Likewise, defendant has abandoned the argument that, because the informations did not indicate which body part of HB and KM was alleged to have been touched for the CSC II charges, he was denied his right to due process. By only citing cases for the general propositions that a defendant has a constitutional right to present a defense and that a defendant has a due process right to know the nature and cause of the accusations against him, defendant has given the issues cursory treatment and left it to this Court to discover and rationalize the basis for the claims. *Kelly*, 231 Mich App at 640-641.

C. UNANIMITY INSTRUCTION

Next, defendant argues that the trial court erred when it failed to give a special unanimity instruction regarding the CSC II offenses. Because defendant expressly approved the instructions, he waived this claim of instructional error. *Kowalski*, 489 Mich at 503; *Lueth*, 253 Mich App at 688. Further, the failure of the trial court to sua sponte give a special unanimity instruction did not prejudice defendant. *Carines*, 460 Mich at 763. KM testified that defendant sexually touched her more than 10 times; HB testified that defendant sexually touched her 7 times. This testimony showed that defendant had a course of conduct in touching his daughters' breasts and buttocks, as well as a propensity to engage in sexual acts with his daughters. *Id*. Further, defendant did not present separate defenses to the majority of the alleged touchings, but merely "denied the existence of any inappropriate behavior." See *Cooks*, 446 Mich at 503. Under these circumstances, the trial court's failure to give special unanimity instructions did not affect the outcome of trial.

D. PROSECUTORIAL ERROR[9]

Defendant also argues that he was denied a fair trial by prosecutorial error. Because defendant did not raise his claims of prosecutorial error below, they are unpreserved. *Metamora Water Serv, Inc*, 276 Mich App at 382. We review unpreserved claims of prosecutorial error for

[9] Courts and litigants frequently have referred to claims such as that raised by defendant as "prosecutorial misconduct." This Court has recently stated that "the term 'misconduct' is more appropriately applied to those extreme . . . instances where a prosecutor's conduct violates the rules of professional conduct or constitutes illegal conduct," and concluded that claims "premised on the contention that the prosecutor made a technical or inadvertent error at trial" are "more fairly presented as claims of 'prosecutorial error.' "*People v Cooper*, __Mich App __; __NW2d __ (2015) (Docket No. 318159), slip op at 7 (citation omitted).

plain error affecting the defendant's substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

First, defendant claims that the prosecutor failed to disclose evidence of a plea agreement with Engman. Suppression by the prosecution of evidence favorable to the accused, which is material to either guilt or to punishment, violates due process. *People v Chenault*, 495 Mich 142, 149; 845 NW2d 731 (2014). The prosecutor must disclose the contents of plea agreements with key government witnesses. *California v Trombetta*, 467 US 479, 485; 104 S Ct 2528; 81 L Ed 2d 413 (1984). There is, however, no record evidence of any agreement between the prosecutor's office and Engman. Defendant has, therefore, not established the factual predicate for this claim.

Second, defendant argues that the prosecutor committed error by introducing irrelevant and unfairly prejudicial evidence. Generally, relevant evidence is admissible, while irrelevant evidence is not admissible. MRE 402; *Benton*, 294 Mich App at 199. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Under this definition, evidence is relevant if it is helpful in throwing light upon any material point. *People v Murphy* (*On Remand*), 282 Mich App 571, 580; 766 NW2d 303 (2009). The credibility of a witness who is offering relevant testimony is always a material issue. *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995). Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403. "A finding of prosecutorial misconduct cannot be based on a prosecutor's good-faith effort to admit evidence." *People v Abraham*, 256 Mich App 265, 278; 662 NW2d 836 (2003).

Having reviewed the laundry list of evidence that defendant claims was irrelevant and unfairly prejudicial, we conclude only that the prosecutor erred in (1) eliciting testimony about earlier parties at defendant's house where underage people drank alcohol and smoked marijuana and (2) asking Aaron Stehle if he was aware that his sister had made allegations against defendant. But, as stated in Section III, evidence of the earlier parties did not affect defendant's substantial rights. *Id*. The prosecutor also erred in asking his question to Stehle because the question sought to place evidence before the jury that someone other than HB and KM had made "allegations" against defendant, which was not relevant to the instant case. The question had no impeachment value because Stehle only testified that he had never *seen* defendant inappropriately touch someone, which could be true even if Stehle did know that his sister had made allegations against defendant. However, because Stehle denied any awareness of allegations by his sister, the prosecutor's question did not affect defendant's substantial rights. *Id*. Although the prosecutor's question may have implied that Stehle's sister had made allegations against defendant, the jury was instructed that the questions of the attorneys were not evidence. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant also challenges testimony from Kropewnicki about whether he discussed his and his wife's sexual activity with friends. The testimony was irrelevant. However, because the prosecutor never had the chance to explain why he asked Kropewnicki about this, and because the question itself did not prejudice defendant, we decline to find that the prosecutor's question amounted to plain error. *Ackerman*, 257 Mich App at 448. In addition, while we previously

concluded that evidence that pornography was found on defendant's computer was unfairly prejudicial, the prosecutor did not err in eliciting the evidence because, as it was probative to Engman's credibility, it was arguably admissible. See *Dobek*, 274 Mich App at 83.

The remaining challenged testimony was relevant. The evidence of other sexual acts by defendant against HB, and KM—the acts that did not constitute evidence of the actus reus of the charged crimes—was relevant because it showed defendant's propensity to commit the charged crimes and a pattern of conduct by defendant. MCL 768.27a; *Watkins*, 491 Mich at 470. Evidence about defendant engaging in threesomes and that defendant and Engman offered KM money to have a threesome with them was relevant. The evidence had a tendency to make a fact of consequence—that defendant penetrated KM's vagina while being aided by Engman—more probable. MRE 401.[10] Evidence about Engman and Farrant's visit to defendant's house to collect her belongings and Farrant's subsequent telephone conversation with KM, evidence that HB made disclosures during her second interview, evidence that Engman and KM were concerned about HB's safety at defendant's house, evidence that defendant prevented HB from seeing and speaking to her mother, evidence about KM's hardships growing up with her mother, and evidence about the steps the Children's Protective Services investigator took after HB's first interview was relevant. This evidence helped explained why, when, and how disclosures were made about defendant's abuse. As such, the evidence shed light on a material issue: the credibility of Engman, HB, and KM. *Murphy* (*On Remand*), 282 Mich App at 580. Kropewnicki's testimony that he would not want witnesses if he sexually touched children was relevant. It was offered to counteract the implication that defendant did not abuse HB and KM simply because Kropewnicki and other defense witnesses did not witness such abuse. MRE 401.[11]

None of the evidence mentioned in the above paragraph was unfairly prejudicial. Certainly, some of it, such as defendant's refusal to let Engman retrieve her personal belongings when she arrived at defendant's house with Farrant, defendant's offer to pay KM money to engage in a threesome, and defendant's act of punishing HB for speaking on the telephone with her mother, portrayed defendant in a bad light. However, all relevant evidence is prejudicial to some extent. *Murphy* (*On Remand*), 282 Mich App at 571. "Unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury or where it would be inequitable to allow use of it." *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008). There was no clear or obvious tendency that the evidence would be given undue or

[10] Defendant also argues that the prosecutor erred by telling the jury during his opening statement that it would hear testimony that defendant and Engman engaged in threesomes and that it was defendant's desire to have a threesome with Engman and KM The prosecutor committed no error in making this statement. Evidence about defendant engaging in threesomes was relevant, and the purpose of an opening statement is to tell the jury what the advocate proposed to show. *People v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976).

[11] Even if Kropewnicki's testimony was irrelevant, this testimony amounted merely to a general statement of opinion and did not affect defendant's substantial rights. *Ackerman*, 257 Mich App at 448.

preemptive weight. *Carines*, 460 Mich at 763. There was no misconduct amounting to plain error by the prosecutor in eliciting the testimony. *Ackerman*, 257 Mich App at 448.

Defendant further argues on appeal that the prosecutor asked the jury to sympathize with HB and KM. A prosecutor may not appeal to the jury to sympathize with the victim. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). The prosecutor's remark, during opening statement, that it would be hard for HB and KM to testify against defendant was a statement of the obvious. It would be "hard" and an "interesting experience" for any daughter to testify that her father, especially when the father is representing himself, sexually abused her. The remark was not a clear and obvious appeal to the jury to sympathize with HB and KM. *Carines*, 460 Mich at 763.

Similarly, the prosecutor did not err when he summarized in his opening statement the hardships that KM endured while living with her mother and when he elicited testimony from KM about those hardships. The purpose of an opening statement is to tell the jury what the advocate proposes to show. *People v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976). By giving a summary of KM's expected testimony and by then eliciting testimony from KM about the difficulties she experienced while living with her mother, the prosecutor was not clearly and obviously asking the jury to sympathize with KM. *Carines*, 460 Mich at 763. KM's credibility was at issue and KM testified that, even though defendant started to touch her breasts and buttocks during her weekend visits with him, she continued to visit him. Her testimony about her "tough" life with her mother explains why she continued the visits.

Fourth, defendant argues that the prosecutor erred by asking witnesses to give an opinion on the credibility of HB and KM. According to defendant, the prosecutor did this when he asked Farrant about his impressions of his telephone conversation with KM and when he asked Officer Goff whether a "progression of details," such as HB made during her three interviews, was consistent with his experience. Because the credibility of the witnesses is to be determined by the jury, it is improper for the prosecutor to ask a witness to opine on the credibility of another witness. *Dobek*, 274 Mich App at 71. However, there was no improper opinion either elicited from or given by Farrant or Goff. The prosecutor did not ask either officer whether he believed HB or KM was credible, and neither officer testified that he believed either victim was telling the truth.

Likewise, there was nothing improper about the prosecutor's remark in closing argument that it was Goff's assessment that HB and KM were not coached, but that defendant "had a way of doing things." Goff had testified, in response to questions asked by defendant, that the stories given by HB and KM were "very very similar," but this did not shock him because he got the impression that touching by defendant was a "creature of habit thing." The prosecutor's remark was part of an argument that HB was credible. A prosecutor may argue from the facts that a witness is credible. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997).

Defendant argues that the cumulative effect of the prosecutor's conduct denied him a fair trial. "The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of the errors alone would not merit reversal, but the cumulative effect of the errors must undermine the confidence in the reliability of the verdict before a new trial is granted." *Dobek*, 274 Mich App at 106. Only actual errors are aggregated to determine

their cumulative effect. *People v Rice (On Remand)*, 235 Mich App 429, 448; 597 NW2d 843 (1999). The prosecutor committed two errors: (1) when he elicited testimony about earlier parties at defendant's house where underage people drank alcohol and smoked marijuana and (2) when he asked Stehle whether he was aware that his sister had made allegations against defendant. These errors, when aggregated, do not undermine the reliability of the verdict, *Dobek*, 274 Mich App at 106, especially where the testimony of HB and KM, alongside Engman's testimony, showed that defendant had a propensity to engage in sexual acts with his daughters and that he had a pattern of conduct.

E. LIFETIME ELECTRONIC MONITORING

Finally, defendant argues that the trial court erred when it imposed lifetime electronic monitoring on him for his CSC II conviction in Lower Court No. 12-010153-FC. According to defendant, because the jury never found beyond a reasonable doubt that he was over the age of 17 at the time of the sexual contact, the imposition denied him his constitutional right to jury. We review constitutional issues de novo. *Drohan*, 475 Mich at 146.

In *People v Brantley*, 296 Mich App 546, 558-559; 823 NW2d 290 (2012), after reading MCL 750.520n in conjunction with MCL 750.520b(2)(d) and MCL 750.520c(2), this Court stated when a trial court is required to impose lifetime electronic monitoring: (1) when a defendant who is 17 years old or older is convicted of CSC II against a victim who is less than 13 years old and (2) when a defendant is convicted of CSC I, regardless of the ages of the defendant and the victim. Accordingly, in Lower Court No. 12-010153-FC, because defendant was convicted of CSC I, the trial court was required to sentence him to lifetime electronic monitoring. There is no indication in the record that the trial court sentenced defendant to lifetime electronic monitoring for the CSC II conviction rather than the CSC I conviction. And it was in any event beyond question that defendant was 17 years old or older at the time of the offenses. We reject the argument that the trial court erred when it imposed lifetime electronic monitoring on defendant in Lower Court No. 12-010153-FC.

Affirmed.

/s/ Patrick M. Meter
/s/ David H. Sawyer
/s/ Mark T. Boonstra

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 26, 2014
V	No. 314901 Montcalm Circuit Court
JONAS LOWNSBERY, Defendant-Appellant.	LC No. 2011-014303-FH

Before: RONAYNE KRAUSE, P.J., and HOEKSTRA and WHITBECK, JJ.

PER CURIAM.

Defendant Jonas Lownsbery was convicted by a jury of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (sexual contact with an individual under 13 years of age). He was sentenced as an habitual offender, second offense, MCL 769.10, to 42 months to 22-½ years' imprisonment. He appeals his conviction and sentence as of right. We affirm.

The victim testified at trial that on the weekend of May 8, 2010, when she was 12 years old, she stayed the night with her two friends at defendant's residence. The victim and her two friends slept on the floor of defendant's living room. The victim slept closest to the couch. During the night, the victim awoke to find her blanket pulled down to her waist and defendant lying on the couch with his arm extended, touching the victim's breast over her sweatshirt. Defendant had his eyes closed and appeared to be asleep, though the victim testified she believed he was just pretending. The victim responded by getting up. She attempted to wake her two friends but could not. She took her cellular phone into the bathroom, where she called and sent text messages to various people, including her mother, her sister and her friend's mother. The victim finally reached her mother and told her she was scared and wanted to go home. She did not tell her mother what happened. The victim was picked up from defendant's residence shortly thereafter. She was reluctant to talk about the incident with her mother or her friends' mother, however she did tell her sister the following morning, whereupon the police were contacted. Defendant denied the allegation at trial but was ultimately convicted.

I. VIOLATION OF DISCOVERY RULES

On appeal, defendant first argues the trial court erred by failing to grant his request for a mistrial based on the prosecutor's alleged violation of discovery rules. "We review for an abuse of discretion a trial court's decision regarding a motion for a mistrial." *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010). An abuse of discretion occurs where the trial

court's decision falls "outside the range of principled outcomes." *Id*. "A trial court should grant a mistrial only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Id*. (internal quotations and citation omitted).

Specifically, defendant argues that a text message sent by the victim to her sister disclosing defendant touched her inappropriately while she was sleeping was not disclosed. Defendant did not know about the text message, the only evidence to show the victim disclosed abuse on the night of the incident. Defendant argues the prosecution was required to provide the text message under the rules of discovery, but failed to do so. He further argues this failure irreparably damaged his credibility and prejudiced his defense. His theory of the case, explained to the jury before he was aware of the text message, was that the victim never disclosed any sexual abuse until the following morning, after she was influenced by her mother and others. The prosecution contends it never had possession of the text message itself, but rather only learned about it through an interview with the victim's sister one week before trial.

MCR 6.201(A)(2) states a party must, upon request, provide an opposing party with "any written or recorded statement, including electronically recorded statements, pertaining to the case by a lay witness whom the party may call at trial . . . " However, there is "no compelling policy reason" to interpret MCR 6.201(A)(2) to require disclosure of an attorney's witness interview notes because "[b]oth sides in a criminal proceeding already benefit from the liberal, reciprocal discovery afforded by MCR 6.201[,]" including disclosure of the names and address of all lay and expert witnesses, which allows "parties to arrange their own interviews with the opposing parties' trial witnesses." *People v Holtzman*, 234 Mich App 166, 188; 593 NW2d 617 (1999).

The record reflects defendant requested discovery from the prosecution at the outset of this case pursuant to MCR 6.201. Thus, the prosecution had a continuing duty to provide defendant with all discovery material that fell within the rule. MCR 6.201(H). We agree with defendant that the text message from the victim to her sister is an electronically recorded statement of a witness such that, if in its possession, the prosecution was required to provide to defendant under MCR 6.201(A)(2). The record does not indicate the prosecution ever had possession of the text message. Rather, the prosecution only had knowledge of the text message through a pre trial interview of the victim's sister where she recited what it allegedly said. The text message itself was never produced at trial and never admitted into evidence. Therefore, the only written version of the text message was the prosecution's witness interview notes, which the prosecution was not compelled to provide. *Holtzman*, 234 Mich App at 188. Because defendant was capable of discovering the existence and contents of the text message on his own by interviewing the victim's sister and did not, we conclude there was no discovery violation. *Id*. Therefore, the trial court did not abuse its discretion in denying defendant's motion for a mistrial. *Schaw*, 288 Mich App at 236.

II. OTHER ACTS EVIDENCE

Defendant next argues the trial court erred in allowing the introduction of other-acts evidence. We review preliminary questions of law, such as whether a rule of evidence precludes admissibility, de novo, but a trial court's decision whether to admit evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

The challenged evidence is testimony from the victim about a previous incident in 2008, when she was eleven years old. The victim testified she was sleeping on a pull-out couch in defendant's living room next to her friend when she awoke to find her nightgown pulled up to her stomach and defendant lying on the floor next to her with his arm extended, touching her vagina underneath her underwear. The victim never saw defendant's eyes open. The touching continued until the victim rolled away. The victim did not tell anyone about this encounter until months later when she discussed it with her friend. The victim did not stay at defendant's home again until the weekend of May 8, 2010, when the charged conduct occurred.

The testimony was admitted, over defendant's objection, pursuant to MCL 768.27a. That statute provides, "in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant." Our Supreme Court made clear MCL 768.27a permits admission of propensity evidence even if its only relevance is to show the character of the defendant. See MRE 404(b); *People v Watkins*, 491 Mich 450, 470; 818 NW2d 296 (2012). Therefore, the trial court did not err in determining the rules of evidence do not preclude admissibility of the testimony.

While the victim's testimony of an alleged prior act is admissible, the probative value of evidence admitted under MCL 768.27a must still outweigh its prejudicial effect. See MRE 403; *Watkins*, 491 Mich at 481. "[W]hen applying MRE 403 to evidence admissible under MCL 768.27a, courts must weigh the propensity inference in favor of the evidence's probative value rather than its prejudicial effect[,]" and must not exclude the evidence "merely because it allows a jury to draw a propensity inference." *Id.* at 487. In conducting an MRE 403 balancing test, the trial court should consider several factors:

> (1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of other acts to the charged crime, (3) the frequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony. [*Id*. at 487-488]

Upon the admission of other-acts evidence under MCL 768.27a, the trial court can ensure the evidence is properly considered by issuing a limiting instruction to the jury. *Id*. at 490.

Defendant does not dispute the applicability of MCL 768.27a or the relevance of the testimony. Defendant argues under MRE 403 the testimony's "probative value is substantially outweighed by the danger of unfair prejudice." Accordingly, we analyze the testimony under the balancing test set out in *Watkins*. *Id.* at 487.

First, the charged and uncharged conduct both consisted of defendant's opportunistic predation of the victim at times when she was sleeping. Moreover, both the charged and uncharged conduct were facilitated in substantially similar ways; defendant lying down next to the victim, removing her coverings, and touching her intimate parts while pretending to be asleep. Second, the charged and uncharged conduct occurred less than two years apart. Defendant's lack of access to the victim during this period tips this factor in favor of probative

value. Third, the victim's friend provided testimony that supported the other event took place, even though her testimony corroborated only the surrounding circumstances and not the actual act. Fourth, there was a need for evidence beyond the testimony of defendant and the victim because there was no physical evidence and defendant challenged the victim's credibility. Finally, the trial court gave a limiting instruction to the jury that ensured the jury properly employed the evidence. *Watkins*, 491 Mich at 490. We conclude the trial court did not abuse its discretion in finding the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice under MRE 403.

Defendant also contends his due process rights were violated because the evidence was unfairly prejudicial, therefore denying his right to a fair trial. This claim lacks merit. In *Watkins*, 490 Mich at 486 n 82, our Supreme Court found it unnecessary to address the due process implications MCL 768.27a in light of its holding evidence admissible under that statute nonetheless remains subject to exclusion under MRE 403. In this case, the trial court concluded, and we agree, the other acts evidence was not unfairly prejudicial under MRE 403. Accordingly, the admission of the evidence did not violate defendant's due process right to a fair trial.

III. OFFENSE VARIABLE SCORING

Defendant finally argues the trial court erred in scoring offense variable (OV) 9 of the legislative sentencing guidelines, resulting in an incorrect sentence range. We review a trial court's factual determinations under the sentencing guidelines for clear error to determine if they are 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" that we review de novo. *Id*.

OV 9 applies to the number of victims and provides ten points may be scored where between two and nine victims were "placed in danger of physical injury or death." MCL 777.39(1)(c). OV 9 mandates a court "[c]ount each person who was placed in danger of physical injury or loss of life . . . as a victim." MCL 777.39(2)(a).

This Court has previously held when multiple vulnerable persons are present at the time of a criminal sexual conduct offense, such that the defendant had a "choice of victims," each of the persons present is "in danger of physical injury" and therefore a "victim" for purposes of OV 9. *People v Waclawski*, 286 Mich App 634, 684; 780 NW2d 321 (2009). Such was the case

here. The evidence established the victim was sleeping in the living room in close proximity to two other underage girls at the time of the offense. Defendant argues the other two girls were in "no danger whatever." However, the presentencing report contains a statement from one of the other two girls that defendant touched her in her sleep a month earlier. Since it is clear defendant did not simply have a fixation on the victim in this case, it is reasonable to conclude defendant had a "choice of victims," *id.*, and he chose the victim over the other two girls. Accordingly, the other two girls were "in danger of physical injury" for purposes of OV 9 and the trial court did not err in scoring ten points under that variable.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Joel P. Hoekstra
/s/ William C. Whitbeck

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 30, 2014
v	No. 315652 Ingham Circuit Court
LAWRENCE FREDERICK GIBBS, Defendant-Appellant.	LC No. 12-000669-FC

Before: METER, P.J., and WHITBECK and RIORDAN, JJ.

PER CURIAM.

Defendant, Lawrence Frederick Gibbs, appeals as of right his conviction, following a jury trial, of one count of first-degree criminal sexual conduct (CSC I),[1] and three counts of second-degree criminal sexual conduct (CSC II).[2] The trial court sentenced Gibbs as a second-offense habitual offender[3] to serve concurrent terms of 300 to 600 months' imprisonment for his CSC I conviction and 107 to 270 months' imprisonment for his CSC II convictions. We affirm.

I. FACTS

A. THE COMPLAINANTS' TESTIMONIES

The first complainant was 30 years old at the time of trial. According to the 30-year-old complainant, he lived next door to Gibbs when he was growing up. He and his younger sister were often left alone, and he was pleased that Gibbs paid attention to him. When he was between six and eight years old, he was helping Gibbs "set[] primers," an activity that involved explosives and bullets and that he thought was "cool." When he and Gibbs were alone, Gibbs

[1] MCL 750.520b(1)(a) (sexual penetration with a person under 13 years of age).

[2] MCL 750.520c(1)(a) (sexual contact with a person under 13 years of age) and (b)(iii) (sexual contact with a person at least 13 but less than 16 years of age when the actor is in a position of authority).

[3] MCL 769.10.

pulled his shorts and underwear down and performed fellatio on him. Gibbs told him that he would get in trouble if he told anyone.

The 30-year-old complainant testified that further abuse occurred several times over several years, and ended when he was 13 years old. According to the 30-year-old complainant, he took a job at Gibbs's business in 2006, when he was 19 years old. Gibbs at some point vaguely apologized to the complainant for what he did to the complainant as a child. The 30-year-old complainant testified that this triggered memories and he confronted Gibbs and reported the abuse to the police in 2006, but he did not hear anything until police contacted him in 2012.

The second complainant was 14 years old when he was abused. According to the 14-year-old complainant, he and his brother, the 13-year-old complainant, moved to Holt, Michigan from Arizona because their mother abused substances. He began working for Gibbs's maintenance business at some point in 2011 or 2012. Gibbs began offering to crack the complainant's back. The 14-year-old complainant would lie on his stomach and Gibbs would use his hands to crack the complainant's back. Gibbs would crack the 14-year-old complainant's back both when other people were and were not around.

According to the 14-year-old complainant, if Gibbs cracked his back when no one else was around, Gibbs would ask him to lower his pants so that Gibbs could "replace" his hip. Gibbs would massage his back and buttocks. On one occasion, Gibbs offered to give the complainant a buzz-cut. While the complainant's shirt was off, Gibbs hugged him and put his hands down the inside of the complainant's pants and rubbed his buttocks. The 14-year-old complainant testified that he stopped working for Gibbs after that incident.

The third complainant testified that he was the 14-year-old complainant's brother and was 13 years old when he was abused. According to the 13-year-old complainant, he began helping Gibbs do odd jobs. At some point, Gibbs convinced the 13-year-old complainant to let Gibbs crack his back. After Gibbs cracked his back, he turned the 13-year-old complainant over and began massaging the complainant's thighs and calves. Gibbs touched the complainant's testicles. The 13-year-old complainant testified that Gibbs touched his penis and testicles on other occasions after that.

The fourth complainant was 8 years old when he was abused. The 8-year-old complainant testified that at some point, Gibbs and two teenagers installed a furnace in his home's basement. According to the 8-year-old complainant, he was playing in the basement with his sister but his sister went upstairs. Gibbs approached him and asked him what his name was. Gibbs stood very close to him, Gibbs's crotch touched his crotch, and Gibbs moved his waist in a circle. Gibbs walked away when one of the teenagers said that he needed to ask Gibbs a question.

The 8-year-old complainant's mother testified that, in May 2012, she discovered that Gibbs had been arrested for "something involving a child." Gibbs had installed a furnace for her around Christmas of 2011. According to the complainant's mother, she asked the complainant about Gibbs. The complainant said that Gibbs made him feel "very awkward" and stood too close to him. The complainant's mother asked the 9-year-old complainant to show her what he meant, and the 9-year-old complainant pushed his body against her and pushed his hips against

her. The complainant's mother testified that the complainant's demonstration caught her off guard and she called the police.

B. OTHER INCIDENTS OF CHILD ABUSE UNDER MCL 768.27a

Witness 1 testified that he was 50 years old at the time of trial and met Gibbs when he was 13 or 14 years old. According to Witness 1, Gibbs lived with Witness 1's grandmother for a year and spent time with his family. Gibbs visited on Fourth of July while other family members were visiting. The sleeping arrangements required Witness 1 to share a bed with Gibbs and his uncle. Witness 1 woke up in the middle of the night to Gibbs fondling Witness 1's penis. Gibbs then performed fellatio on Witness 1 and told Witness 1 that it would be their secret. Witness 1 testified that he and Gibbs performed fellatio on each other on over 20 occasions over the next two years.

Witness 2 testified that he is Gibbs's nephew and went to a family gathering with Gibbs when he was 8 or 9 years old. Gibbs offered to sleep in a tent with Witness 2 in front of the cabin where the family was staying because Witness 2 was afraid to sleep behind the cabin with the other family members. Witness 2 awoke to find Gibbs rubbing his penis. On another occasion, Witness 2 spent the night on Gibbs's couch and woke to find Gibbs playing with his penis. Witness 2 testified that he did not say anything until he was 19 or 20 years old and Gibbs was being prosecuted for something similar in Barry County. Witness 2 testified that Gibbs pleaded no contest to CSC IV charges in Missaukee County.

Witness 3 testified that he worked for Gibbs when he was 15 years old. According to Witness 3, he had a rough childhood and was borderline truant. The first time he was alone with Gibbs, Gibbs pulled Witness 3's pants to the floor. Witness 3 became upset and Gibbs said he was just joking around. Gibbs initiated a lot of hugging and back-cracking. When Witness 3 was 16 years old, Gibbs provided him with Jack Daniels and they drank it. Gibbs then performed fellatio on Witness 3. Witness 3 continued to work for Gibbs for two more years, and Gibbs touched his penis on two more occasions.

According to Witness 3, he confronted Gibbs when he was 18 years old, after learning that "it happened" to other people. Witness 3 testified at a preliminary hearing in Barry County, and learned that Gibbs pleaded to contributing to the delinquency of a minor.

C. OTHER ACTS WITNESSES UNDER MRE 404(b)

Witness 4 testified that he began working for Gibbs when he was 21 years old. According to Witness 4, Gibbs would sometimes pull down Witness 4's shorts and underwear. On one occasion, Gibbs pressed a vibrating pager to Witness 4's genitals. Gibbs would also have Witness 4 take off his shirt or pants to massage Witness 4, and sometimes Gibbs would touch Witness 4's buttocks or genitals. Witness 4 did not say anything because he did not want to be fired. Witness 4 had a young child.

Witness 4 testified that one time after he had fallen off a ladder and was in bed, Gibbs came over to his house to give him a massage. After Gibbs massaged him, Gibbs began performing fellatio on him. Witness 4 testified that he was shocked and embarrassed, but continued to work for Gibbs until he found another job to provide for his family.

Witness 5 testified that he worked for Gibbs when he was 15 years old. According to Witness 5, Gibbs initiated a lot of hugging, massages, and back-cracking. Once while massaging Witness 5, Gibbs turned Witness 5 over and touched his penis during the course of a massage. Once while camping at Gibbs's hunting property, Witness 5 shard a bed with Gibbs and awoke to Gibbs touching his penis. Witness 5 testified that Gibbs touched his penis on other occasions, but he did not tell anyone because his father was dying and his mother was under a lot of stress.

Witness 5 testified that he and Witness 3 confronted Gibbs. Witness 5 testified that this confrontation resulted in Gibbs being prosecuted in Barry County.

Witness 6 testified that he began working for Gibbs when he was 19 years old. According to Witness 6, Gibbs would give him hugs and crack his back. On one occasion, after Gibbs cracked Witness 6's back, Gibbs laid down next to Witness 6 and touched Witness 6's genitals. Witness 6 made it clear that he was not interested. On another occasion, after cracking Witness 6's back, Gibbs tried to touch their penises together while Witness 6 was wearing his underwear.

Witness 7 testified that he worked for Gibbs when he was 16 years old. According to Witness 7, he did not get along with his father and Gibbs tried to assume a fatherly role with him. Gibbs would give Witness 7 hugs, insert his legs between Witness 7's legs while hugging him, and rub his groin against Witness 7's groin. Gibbs would also rub his genitals against Witness 7's buttocks while cracking Witness 7's back. Witness 7 spoke to the police about Gibbs in 1998, but he was told that the police would not do anything because he was over 16 years old.

II. JOINDER

A. STANDARD OF REVIEW AND ISSUE PRESERVATION

Generally, this Court reviews for clear error the trial court's findings of fact and review de novo questions of law related to criminal joinder.[4] However, a defendant must raise an issue before the trial court for the issue to be preserved.[5] We review unpreserved issues for plain error affecting a party's substantial rights.[6] An error is plain if it is clear or obvious.[7] The error affected the defendant's substantial rights if it affected the outcome of the lower court proceedings.[8]

[4] *People v Williams*, 483 Mich 226, 231; 769 NW2d 605 (2009).

[5] *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004).

[6] *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

[7] *Id*. at 763.

[8] *Id*.

B. LEGAL STANDARDS

To determine whether joinder is permissible, a trial court must first find the relevant facts and then decide whether those facts constitute 'related' offenses for which joinder is appropriate."[9] The trial court may join offenses into a single trial if those offenses are sufficiently related.[10]

MCR 6.120(C) requires the trial court to sever charges on unrelated offenses for separate trials if the defendant moves for separate trials. MCR 6.120(B)(1)(c) provides that offenses are related if they are based on "a series of acts constituting parts of a single scheme or plan." However, "joinder of . . . other crimes cannot prejudice the defendant more than he would have been prejudiced by the admissibility of the other evidence in a separate trial."[11]

C. APPLYING THE STANDARDS

Gibbs contends that the trial court should have severed his trial into three separate trials because the 30-year-old complainant, the 8-year-old complainant, and the 13- and 14-year old complainants' allegations involved sufficiently different circumstances. We disagree.

The trial court need not sever offenses that involve a series of ongoing acts that are part of a single scheme. In *People v Gaines*, a panel of this Court considered whether the trial court should have severed the defendant's trials for accosting two children for immoral purposes and CSC III against two victims, involving three children between the ages of 13 and 15.[12] The panel rejected the defendant's assertion that the trial court should have severed the trial into three trials.[13] The panel concluded that the similarities in the defendant's methods of communicating with and isolating the children showed evidence of a single scheme.[14] The panel further reasoned that evidence of the defendant's actions against each separate victim would have been admissible in each other victim's case pursuant to MCL 768.27a,[15] which allows the trial court to admit evidence of a defendant's other crimes against minors for any relevant purposes.

The facts in this case are substantially similar to those in *Gaines*. The circumstances of each case was substantially similar, showing Gibbs's scheme of using his maintenance business to isolate and exploit young men and young boys in order to initiate contact with them for the

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[9] *Williams*, 483 Mich at 231.

[10] MCR 6.120(B).

[11] *Williams*, 483 Mich at 237, quoting *United States v Harris*, 635 F2d 526, 527 (CA 6, 1980) (alteration and quotation marks omitted).

[12] *People v Gaines*, ___ Mich App ___; ___ NW2d ___ (2014), slip op at 1-2.

[13] *Id.* at ___, slip op at 9.

[14] *Id.*

[15] *Id.*

purposes of sexual gratification. Three of the four complainants' complaints involved Gibbs asserting authority over them; each of the complainants' cases involved Gibbs exploiting the operation of his business to sexually assault boys and young men when the business's clients were not present. Further, each of the complainants was a minor when Gibbs sexually assaulted them. Therefore, evidence from each of the complainant's trials would have been admissible as evidence in the other complainants' trials under MCL 768.27a.

Accordingly, we conclude that joinder of Gibbs's charges did not prejudice him. The most prejudicial evidence—that of the complainant witnesses and the other MCL 768.27a witnesses—would have been admissible at each of Gibbs's trials, had those trials been separate. Therefore, we conclude that Gibbs has failed to demonstrate that the trial court's failure to sever his charges into three trials was either a plain error, or an error that affected his substantial rights.

D. INEFFECTIVE ASSISTANCE

Gibbs contends that trial counsel was ineffective for failing to move to sever his charges into three separate trials. We reject this argument.

Counsel is not ineffective for making futile challenges.[16] Here, for the reasons stated above, the trial court properly joined Gibbs's charges into a single trial because all his charges concerned a single plan or scheme of isolating boys and young men using his business. Accordingly, counsel was not ineffective for failing to move to sever the trials because such a challenge would have been futile.

E. DUE PROCESS

Gibbs briefly asserts that joinder of his trials deprived him of his state and federal right of Due Process. Improper joinder constitutes a constitutional violation "only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial."[17] Because we have rejected Gibbs's argument that joinder of his charges prejudiced him, we also reject his due process challenge on the same grounds.

III. OTHER ACTS WITNESSES

A. MRE 404(B) WITNESSES

1. STANDARD OF REVIEW

This Court reviews for an abuse of discretion preserved challenges to the trial court's evidentiary rulings.[18] The trial court abuses its discretion when it chooses an outcome outside

[16] *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

[17] *United States v Lane*, 474 US 438, 446, n 8; 106 S Ct 725; 88 L Ed 2d 814 (1986).

[18] *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001).

the range of reasonable and principled outcomes.[19] We review de novo the preliminary questions of law surrounding the admission of evidence, such as whether a rule of evidence bars admitting it.[20] Even if properly preserved, an error in the admission of other acts evidence does not require reversal unless it is more probable than not that the error was outcome determinative.[21]

2. LEGAL STANDARDS

Generally, MRE 404(b)(1) prohibits a party from introducing evidence of another party's other crimes, wrongs, or acts to prove that person's character or propensity to engage in that type of action. Such evidence

> may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material . . . .[22]

The trial court properly admits other acts evidence if the proponent establishes that (1) it is offering the evidence for a proper purpose, (2) the evidence is relevant to a fact of consequence at trial, and (3) the evidence is not substantially more prejudicial than probative.[23]

3. APPLYING THE STANDARDS

Gibbs contends that the trial court erred by admitting the evidence of so many other acts witnesses. We disagree.

The fact that so many witnesses testified about so many similar instances of sexual contact with Gibbs makes their testimony logically relevant for the purposes of MRE 404(b):

> If a type of event linked to the defendant occurs with unusual frequency, evidence of the occurrences may be probative, for example, of his criminal intent or of the absence of mistake or accident because it is objectively improbable that such events occur so often in relation to the same person due to mere happenstance.[24]

Here, each of the MRE 404(b) witnesses testified about instances in which Gibbs inappropriately touched their genitals or inappropriately rubbed his genitals against them with or

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[19] *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007)

[20] *Layher*, 464 Mich at 761.

[21] *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001).

[22] MRE 404(b)(1).

[23] *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000).

[24] *People v Mardlin*, 487 Mich 609, 617; 790 NW2d 607 (2010).

without clothing. Gibbs explained incidents with the complainants as mere accidents or misinterpretations. For instance, Gibbs contended that he brushed past the 9-year-old complainant, but did not sexually assault him. Evidence that Gibbs had frequently engaged in inappropriate contact was relevant to establish that it was not probable that the incidents with the complainants were mere mistakes or misinterpretations.

Gibbs also contends that the prosecutor did not admit the evidence for a proper purpose because the various MRE 404(b) witnesses' assaults were too dissimilar from the assaults against the complainants to constitute evidence of a single plan or scheme. We disagree.

Evidence relates to a common plan or scheme when it indicates that a defendant's actions are "part of a single continuing conception or plot."[25] Acts are part of a common plan or scheme if "common features . . . indicate the existence of a plan rather than a series of similar spontaneous acts . . . ."[26] There may be some differences in specific instances of a given plan or scheme.[27]

Common features of the complainants' testimonies include that they were boys or young men. Each of the complainants was isolated. Gibbs was in a position of actual or implied authority over each of the complainants: with the 30-, 14-, and 13-year old complainants, Gibbs employed them, and with the 8-year-old complainant, Gibbs was the only adult in the basement. Each of the complainants was first the subject of innocuous contact: with the 30-, 14-, and 13-year old complainants, hugs, massages, and back-cracking, and with the 8-year-old complainant, initiating an innocuous conversation. Each of the complainants was then subject to sexual contact, including fellatio, fondling, or rubbing.

Witness 4 testified that he began working for Gibbs when he was 21 years old. Gibbs used innocuous contact, such as massages, to initiate sexual contact with Witness 4. Gibbs performed fellatio on Witness 4 while he was alone at his home in bed and while he employed Witness 4. Witness 4 was older than the complainants. However, we conclude that there were sufficient common features for Witness 4's testimony to provide evidence of a common plan or scheme. Witness 4 was a young man. Gibbs's used his authority as to Witness 4, and Witness 4's isolation, to initiate sexual contact with him.

Witness 5 testified that he worked for Gibbs when he was 15 years old. Witness 5 testified that Gibbs initiated a lot of innocuous contact, such as massages, hugging, and back-cracking, and then used that contact to touch Witness 5's penis. Witness 5 was close in age to the 13- and 14-year-old complainants. Further, Witness 5's testimony illustrated Gibbs's plan or scheme of using his position of authority over a young man to initiate innocuous contact, which

[25] *Sabin*, 463 Mich at 63-64.

[26] *Id*. at 65.

[27] See *People v Steele*, 283 Mich App 472, 480; 769 NW2d 256 (2009); *People v Waclawski*, 286 Mich App 634, 670; 780 NW2d 321 (2009).

eventually turned into sexual contact. We conclude that Witness 5's testimony was sufficiently similar to provide evidence of a common plan or scheme.

Witness 6 testified that he worked for Gibbs when he was 19 years old. Witness 6 testified that Gibbs initiated a lot of innocuous contact, such as hugs and back-cracking. On one occasion after Gibbs cracked Witness 6's back, Gibbs laid Witness 6 down and touched his penis. Witness 6's testimony was sufficiently similar to the 13-, 14-, and 30-year-old complainants' to provide evidence of Gibbs's plan or scheme of using a position of authority over an isolated young man to initiate contact that was initially innocuous, but became sexual.

Witness 7 testified that he worked for Gibbs when he was 16 years old. Witness 7 testified that Gibbs tried to assume a fatherly role over him, and initiated a lot of hugs. Witness 7 testified that Gibbs began to insert his leg between Witness 7's legs during hugs and that Gibbs would rub his groin on Witness 7 during hugs and while cracking Witness 7's back. Witness 7's testimony thus provided evidence of Gibbs's plan or scheme to use his position of authority over an isolated young man to initiate innocuous contact that eventually turned sexual. Witness 7's testimony also provided evidence that Gibbs would rub his genitals against another person for the purposes of sexual gratification, a separate proper purpose.

We also reject Gibbs's argument that the prosecutor did not sufficiently notify Gibbs of its intent to use the testimony of Witness 8. The prosecutor filed a motion that identified Witness 8 as a miscellaneous witness, and the prosecutor's motion also indicated that the prosecutor intended to call all witnesses to testify about Gibbs's common plan or scheme. Accordingly, Gibbs was sufficiently notified of the prosecutor's intent to call Witness 8.

Witness 8 testified that he worked for Gibbs when he was 13 or 14 years old. According to Witness 8, Gibbs was always touching him, giving him hugs, and "peck[ing]" his neck. Gibbs gave Witness 8 a back rub at a client's house and suggested that Witness 8 take his pants off, but Gibbs stopped when the client returned. Witness 8's testimony, while notably not about other wrongs, certainly concerned other acts. Witness 8's testimony was substantially similar to the complainants' testimony and tended to show that Gibbs had a practice of isolating boys over whom he had authority and engaging in innocuous contact that he would turn into sexual contact. The fact that Witness 8 testified that Gibbs stopped when Witness 8 was no longer isolated—because the client returned—provided evidence of Gibbs's common plan.

Finally, we reject Gibbs's argument that this evidence was substantially more prejudicial than probative. Gibbs contends that this evidence was prejudicial because it allowed the jury to infer that Gibbs had a "taste" for young boys and allowed the prosecutor to argue that he had a propensity to engage in certain conduct.

MRE 404(b)(1) is a rule of inclusion, not exclusion.[28] "Evidence relevant to a noncharacter purpose is admissible under MRE 404(b) even if it also reflects on a defendant's

[28] *Mardlin*, 487 Mich at 615.

character."[29] Unfair prejudice occurs if use of the evidence would be inequitable or if there is a danger that the jury will give it undue or preemptive weight.[30] "[T]he fear of prejudice does not generally render the evidence inadmissible," nor does the fact that the evidence is damaging.[31] The prejudicial effect of the evidence substantially outweighs its probative value when evidence is only marginally probative and there is a danger that the trier of fact may give it undue or preemptive weight, or when use of the evidence is inequitable.[32]

Here, the evidence of Gibbs's other acts was admissible for the proper purpose of showing his plan or scheme for exploiting isolated boys and young men over whom he had authority. The evidence was highly relevant because it tended to show that an absence of mistake or accident in Gibbs's various contacts with the complainants. That the evidence also reflected on Gibbs's character did not render it irrelevant. Compared to the testimonies of the complainants themselves, the other witnesses' testimonies were not so shocking or salacious that there was a danger the jury would give the other-acts evidence preemptive weight. Finally, as discussed below, the trial court properly instructed the jury on the proper use of this evidence.

We conclude that the evidence was not unfairly prejudicial because it was more than marginally probative, and because there was little danger that the trier of fact would give it undue or preemptive weight.

4. JURY INSTRUCTION

Gibbs contends that the trial court erred when it did not properly instruct the jury on the use of the MRE 404(b) evidence or restrict the various witnesses' testimonies to specific counts. We disagree.

The trial court instructed the jury regarding the MRE 404(b) witnesses as follows:

> You have heard evidence that was introduced to show that the Defendant committed improper acts for which he is not on trial. This evidence included the allegations of sexual acts committed by the Defendant with [Witness 4, Witness 5, Witness 6, and Witness 7]. If you believe this evidence you must be careful only to consider it for certain purposes. You may only think about whether this evidence tends to show that the Defendant specifically meant to engage in certain forms of physical contact that was meant for sexual purposes or sexual gratification, and or that the Defendant used a plan, system, or characteristic scheme that he has used before or since. You must not consider the allegations of sexual acts committed by the [Witness 4, Witness 5, Witness 6, and Witness 7]

[29] *Id*. at 615-616 (emphasis removed).

[30] *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008).

[31] *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995).

[32] *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998); *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008).

> for any other purpose. For example, you must not decide that the Defendant is a bad person or that he is likely to commit crimes. You must not convict the Defendant here because you think he is guilty of other bad conduct.

The trial court's instructions were consistent with the law and the fact that these witnesses were witnesses under MRE 404(b), as opposed to MCL 768.27a, and that the jury could only consider their testimonies for a proper purpose. Accordingly, we conclude that the record does not support Gibbs's contentions that the trial court did not adequately identify how the jury could use these witnesses' testimonies.

To the extent that Gibbs contends that the trial court erred by not instructing the jury on the use of testimony by law-enforcement officers, we note that counsel indicated on the record that counsel had met with the prosecutor and trial court in chambers and agreed on all the jury instructions except those related to lesser-included offenses. When counsel affirmatively approves of jury instructions, the defendant has waived any error regarding those instructions.[33] Therefore, counsel affirmatively approved of the jury instructions and Gibbs has waived our review of this issue.

5. INEFFECTIVE ASSISTANCE

Gibbs contends that counsel was ineffective for failing to challenge the MRE 404(b) evidence and the trial court's jury instructions. Because we conclude that the trial court properly admitted this evidence and issued proper instructions, we reject Gibbs's argument. Counsel is not ineffective for failing to make futile challenges.[34]

B. MCL 768.27a WITNESSES

1. STANDARD OF REVIEW AND ISSUE PRESERVATION

As discussed above, we review for an abuse of discretion preserved challenges to the admission of evidence.[35] Here, Gibbs contended that the trial court should not admit the testimony of the MCL 768.27a witnesses on the grounds that it was dissimilar to the charged acts and would cause confusion. Therefore, this issue is preserved.

However, Gibbs did not challenge this evidence on the grounds that it deprived him of due process. A defendant must specifically raise a constitutional issue before the trial court in

[33] *People v Chapo*, 283 Mich App 360, 372-373; 770 NW2d 68 (2009).

[34] *Ericksen*, 288 Mich App at 201.

[35] *Layher*, 464 Mich at 761.

order to preserve that issue.[36] Because Gibbs failed to do so, we review this issue for plain error affecting his substantial rights.[37]

2. SUFFICIENCY OF THE TRIAL COURT'S ANALYSIS

Gibbs contends that the trial court erred by admitting the MCL 768.27a witnesses' testimony because the testimony was cumulative, unduly prejudicial, and confusing. We disagree.

In pertinent part, MCL 768.27a(1) provides that

> in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant.

The purpose of MCL 768.27a is to broaden the range of evidence admissible in CSC proceedings involving minors.[38] MCL 768.27a permits the trial court to admit evidence that MRE 404(b) would otherwise exclude.[39]

However, the trial court must still weigh the probative value and prejudicial effect of the evidence under MRE 403.[40] Evidence that supports a propensity inference or a victim's credibility has probative value.[41] But evidence may be unduly prejudicial depending on

> (1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony.[42]

Evidence is also unfairly prejudicial if it leads to the danger of confusing the issues, misleading the jury, or the presentation of needlessly cumulative evidence.[43] The trial court should separately balance each piece of evidence.[44]

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[36] *Kimble*, 470 Mich at 309.

[37] See *Carines*, 460 Mich at 763.

[38] *People v Smith*, 282 Mich App 191, 204; 772 NW2d 428 (2009).

[39] *People v Watkins*, 491 Mich 450, 470; 818 NW2d 450 (2012).

[40] *Id*. at 486.

[41] *Id*. at 486-487, 492.

[42] *Id*. at 487-488.

[43] *Id*. at 489.

Here, the trial court found that the evidence as a whole was logically relevant because it showed Gibbs's propensity, his pattern over time, and because the evidence that so many similar acts occurred lent the complainants credibility. The trial court found that the probative value of the evidence outweighed its prejudicial effect.

We agree that the trial court erred when it failed to separately evaluate each piece of MRE 768.27a evidence. The Michigan Supreme Court has indicated that the trial court must do so.[45] However, we conclude that this error was harmless.

A preserved evidentiary error is harmless unless it "more probably than not" would have been outcome determinative.[46] As discussed above, the prejudicial effect of the evidence substantially outweighs its probative value when evidence is only marginally probative and there is a danger that the trier of fact may give it undue or preemptive weight, or when use of the evidence is inequitable.[47]

Here, as the trial court recognized, the evidence was highly relevant in multiple ways, and we are not convinced that the evidence was unduly prejudicial. Given the similarity of the acts to the charged acts—we note that Witness 1, Witness 2, and Witness 3 each testified that Gibbs isolated and molested them while they were young men or boys and while Gibbs was in a position of authority over them—the acts were sufficiently similar to the crimes charged. We recognize that not all of the acts involving fellatio were similar to the act involving contact with the 8-year-old complainant. However, Witness 1, Witness 2, and Witness 3 would have been able to testify about Gibbs's inappropriate sexual contact with them as it related to the 8-year-old complainant. Some of the acts were temporally distant, but the acts were not infrequent. And there was a strong reliability concerning the MCL 768.27a witnesses' testimonies. Therefore, even *had* the trial court performed a full analysis on each piece of this evidence, we believe it would have come to the same conclusion: this evidence was not unduly prejudicial. Therefore, this error was not outcome determinative.

Concerning Gibbs's arguments that the trial court erred because the evidence was needlessly cumulative and confusing, we are not convinced that the trial court's outcome fell outside the reasonable range of principled outcomes. Here, the trial court considered the amount of evidence and the possibility of confusion and implemented measures to reduce the jury's confusion. Further, the record supports the prosecutor's argument that even more witnesses were available to testify under both MCL 768.27a and MRE 404(b). The trial court struck a balance between admitting enough evidence to show propensity while excluding cumulative evidence. Therefore, we conclude that the trial court did not err on these grounds.

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[44] *Id*.

[45] *Id*.

[46] *People v Lukity*, 460 Mich 484, 494-495; 596 NW2d 607 (1999).

[47] *Crawford*, 458 Mich at 398; *Blackston*, 481 Mich at 462.

3. DUE PROCESS

Gibbs contends that the trial court's admission of the MCL 768.27a evidence violated his rights to due process under the Michigan and Federal constitutions. We disagree.

The essential purpose of due process is to ensure fundamental fairness.[48] The question is whether the admission of evidence "so infused the trial with unfairness as to deny due process of law."[49] Because we have concluded that the evidence was not unduly prejudicial, we conclude that it did not infuse the trial with unfairness. Accordingly, we reject Gibbs's due process challenge.

IV. PROSECUTORIAL MISCONDUCT

A. STANDARD OF REVIEW AND ISSUE PRESERVATION

This Court will not reverse a conviction on the basis of prosecutorial misconduct unless the defendant "timely and specifically" challenges the alleged misconduct before the trial court, or unless a failure to review the issue would result in the miscarriage of justice.[50] Here, Gibbs did not challenge these issues before the trial court. Accordingly, they are not preserved.

We review unpreserved claims of prosecutorial misconduct for plain error.[51] We will not find error requiring reversal if a curative instruction could have alleviated the effect of the prosecutor's misconduct because curative instructions are "sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements," and because we presume that jurors follow their instructions.[52]

B. LEGAL STANDARDS

A prosecutor can deny a defendant's right to a fair trial by making improper remarks that infringe on a defendant's constitutional rights or by making remarks that "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process."[53] The prosecutor has committed misconduct if the prosecutor abandoned his or her responsibility to seek justice

[48] *Reed v Reed*, 265 Mich App 131, 159; 693 NW2d 825 (2005). See *Estelle v McGuire*, 502 US 62, 75; 112 S Ct 475; 116 L Ed 2d 385 (1991).

[49] *Estelle*, 502 US at 75 (quotation marks and citation omitted).

[50] *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008).

[51] *Id*. at 235; *Carines*, 460 Mich at 763.

[52] *Unger*, 278 Mich App at 235.

[53] *Donnelly v DeChristoforo*, 416 US 637, 643; 94 S Ct 1868 (1974). See *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

and, in doing so, denied the defendant a fair and impartial trial.[54] We must evaluate instances of prosecutorial misconduct on a case-by-case basis, reviewing the prosecutor's comments in context and in light of the defendant's arguments.[55] Otherwise improper remarks that respond to improper arguments by defense counsel may not be prosecutorial misconduct.[56]

C. THE 8-YEAR-OLD CHILD'S KNIFE

Gibbs contends that the prosecutor committed misconduct by questioning the 8-year-old complainant about his knife because there was no factual basis for the line of questioning. We reject this argument.

A review of the 8-year-old complainant's testimony indicates that there was clearly a factual basis for the line of questioning:

Q: Why do you keep a pocket knife under your pillow?

A: For protection.

Q: From who or what?

A: I don't know.

Q: Before this happened with Larry did you do that with the knife?

A: Yes.

Q: With a knife – oh, okay. So, you've always –

A: Like with a little pocket knife.

We note that Gibbs does not raise any other issues regarding this line of questioning. Because the 8-year-old complainant testified that he did keep a knife under his pillow, there was clearly a factual basis for the prosecutor's question regarding whether he kept a knife. Accordingly, we reject Gibbs's argument that this line of questioning was somehow improper because it lacked a factual basis.

D. RELIGIOUS BELIEFS

Gibbs contends that the prosecutor committed misconduct by questioning his daughter, S. Gibbs, about her religious beliefs.

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[54] *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007); *People v Jones*, 468 Mich 345, 353; 662 NW2d 376 (2003).

[55] *Dobek*, 274 Mich App at 64.

[56] *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

MRE 610 prohibits the prosecutor from questioning a witness about his or her religious beliefs to enhance or impair their credibility. However, a prosecutor may question a witness about religious beliefs as "part of a relevant inquiry about the witness' activities at the time" of the crime."[57]

Here, S. Gibbs testified that her mother was a strict Catholic religious and her father did not attend church because he was not a Catholic, but he was very supporting and encouraging of her religious upbringing. The prosecutor raised this line of questioning among other questions regarding whether anyone else was at the home on Sundays when the 13- and 14-year-old complainants were there. Reviewing these statements in context, we conclude that they do not constitute prosecutorial misconduct.

E. UNSUPPORTED CLOSING ARGUMENTS

Gibbs contends that the prosecutor committed misconduct during closing arguments.

A prosecutor may not argue the effect of testimony that was not in evidence.[58] However, a prosecutor may argue all the facts in evidence and all reasonable inferences arising from them, as they relate to the prosecutor's theory of the case.[59]

Witness 6 testified that when police contacted him regarding Gibbs, he initially denied that sexual conduct occurred because he wanted to forget about it. Witness 6 testified that he later contacted the detective to inform her that conduct did occur because he felt guilty about lying to her. Accordingly, we conclude that the prosecutor's argument was within the reasonable inferences arising from the evidence.

F. INCORRECT STATEMENT OF LAW

Gibbs contends that the prosecutor committed misconduct by contending that the jury should not convict Gibbs of the lesser included offense of CSC IV because CSC IV was "for people who have no relationship to the victim." We will not reverse on this ground because the trial court properly instructed the jury on CSC IV, and the trial court's instruction cured any possible error.[60]

G. APPEAL TO CIVIL DUTY

Gibbs contends that the prosecutor improperly appealed to the jury's civic duty. We disagree.

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[57] *People v Calloway*, 180 Mich App 295, 298; 446 NW2d 870 (1989).

[58] *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994).

[59] *Bahoda*, 448 Mich at 282; *Unger*, 278 Mich App at 236.

[60] See *People v Mesik (On Reconsideration)*, 285 Mich App 535, 542; 775 NW2d 857 (2009).

A prosecutor may not appeal to a juror's sense of civic duty because it injects issues broader than the guilt or innocence of the accused into the trial.[61] Here, the prosecutor asked the jury to "hold [Gibbs] responsible as members of his community *because the evidence has proven to you that these crimes occurred.*" Reviewing the prosecutor's argument in context, we conclude that the prosecutor did not impermissibly inject issues broader than Gibbs's guilt or innocence into the trial. The prosecutor's wording was indelicate, but the prosecutor's appeal was for the jury to convict on the basis of the evidence. We conclude that this remark did not infect the trial with unfairness.

H. ARGUMENTS CONCERNING OTHER ACTS EVIDENCE

Gibbs contends that the prosecutor's arguments concerning the other acts evidence admitted under MRE 404(b) and MCL 768.27a were unfair and conflated evidence admitted under the separate provisions. After reviewing the prosecutor's arguments, we disagree. A prosecutor may argue all the facts in evidence as they relate to the prosecutor's theory of the case.[62] We conclude that the prosecutor's arguments were proper arguments on the evidence.

I. QUESTIONS REGARDING THE COMPLAINANTS' CREDIBILITY

Gibbs contends that the prosecutor committed misconduct by asking Gibbs to comment on the credibility of the witnesses against him. We disagree.

The prosecutor may not ask the defendant to comment on the credibility of the prosecutor's witnesses.[63] Here, on direct examination, Gibbs testified that each of the witnesses against him were lying, had some reason to fabricate a story against him, or were mistaken. On cross-examination, the prosecutor asked Gibbs:

> So sir, if I have this correctly you're testimony before this Court today is that 11 men and young boys have come in this courtroom and lied under oath about inappropriate sexual contact with you? That's your testimony?

After reviewing the prosecutor's question in light of Gibbs's answers and testimony on direct examination, we conclude that the prosecutor's question on cross-examination was a proper response to Gibbs's trial strategy. Alternatively, we conclude that this line of questioning did not prejudice Gibbs because it was cumulative to testimony that Gibbs had already given.

J. SYMPATHY FOR THE COMPLAINANTS

Gibbs contends that the prosecutor improperly elicited sympathy for the complainants by urging the jury to think about how difficult it would be for them to testify. The prosecutor may

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[61] *Bahoda*, 448 Mich at 283.

[62] *Id*. at 282; *Unger*, 278 Mich App at 236.

[63] *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985).

argue that the jury should or should not believe a witness.[64] Here, the prosecutor's comments concerning the difficulty of testifying about sexual assault and intimate sexual details was made in the context of her argument that the witnesses were credible. Reviewing the prosecutor's comment in context, we conclude that her argument was a proper credibility argument.

K. ASKING THE WITNESSES TO STAND

Gibbs contends that the prosecutor committed misconduct by asking the witnesses to stand if they testified, including the MRE 404(b) witnesses, because it permitted the jury to infer that Gibbs was a pedophile. Having reviewed the prosecutor's comment, we conclude that this was a proper argument on the weight of the evidence.

L. INEFFECTIVE ASSISTANCE

Gibbs contends that counsel was ineffective for failing to challenge the various instances of prosecutorial misconduct. We reiterate that counsel is not ineffective for failing to make futile challenges.[65] Because the prosecutor's arguments were proper, counsel was not ineffective for failing to challenge the prosecutor's proper arguments.

V. CONCLUSION

We conclude that the trial court did not plainly err when it permitted a joint trial on charges involving all four complainants. We conclude that the trial court did not abuse its discretion or otherwise err in allowing the testimony of the MRE 404(b) and MCL 768.27a witnesses. To the extent that the trial court failed to individually analyze the testimony of the MCL 768.27a witnesses, we conclude that this error was harmless. Having reviewed Gibbs's multitude of prosecutorial misconduct challenges, we conclude that each is without merit.

We affirm.

/s/ Patrick M. Meter
/s/ William C. Whitbeck
/s/ Michael J. Riordan

[64] *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005).

[65] *Ericksen*, 288 Mich App at 201.

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILSON DELIVARDO DIAZ-LOPEZ,

Defendant-Appellant.

UNPUBLISHED
May 26, 2022

No. 353826
Kent Circuit Court
LC No. 19-005381-FC

Before: GLEICHER, C.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(f) (personal injury and use of force or coercion), arising out of defendant's sexual assault of his coworker. Defendant admitted to having sex with the victim, but he contended that it was consensual. Defendant was sentenced to 5 to 25 years' imprisonment. Defendant appeals his conviction and sentence. We affirm.

I. BACKGROUND FACTS

The victim was sixteen years old at the time of the assault, and she had been living in the United States for approximately a year and a half. She resided with a brother and a sister, and her mother lived in Guatemala. She obtained employment as a vegetable packer in early 2019 by providing a false name and age, in part for the purpose of helping her brother and her mother. Defendant, who was approximately twenty-four years old at the time of the assault, worked at the same facility. The victim testified that defendant repeatedly pressured her to enter into a relationship with him, threatened to tell damaging lies to her siblings if she did not respond to his text messages, and professed his love for her. The victim attempted to avoid and rebuff defendant's advances, and she did not want a relationship with defendant.

Defendant engaged in electronic communications with the victim on the night before, and morning of, the May 30, 2019 assault. According to the victim, when she arrived for work at approximately 5:30 a.m. that morning, defendant forced her outside and attempted to force her into a car. The victim testified that she resisted, and defendant forced her into a wooded area where he threw her to the ground and forced his penis into her vagina while holding onto her arms.

Defendant told the police that the sex was consensual, and that he did not know why the victim began crying and ran away. The victim stated that, after she escaped, she called her siblings and her brother came to pick her up. A compilation of video from the company's surveillance cameras, which depicted activities in the break room and parking lot, was shown to the jury.

The victim's brother called the police, and she was interviewed about four hours after the assault, then taken for a physical examination. A responding officer noticed that the victim had injuries on her hand. The nurse examiner noted that the victim had sustained additional injuries, largely bruising and abrasions to various parts of her body, including to her labia. The victim was referred for therapy, and she eventually disclosed to her therapist that defendant had sexually assaulted her on an earlier occasion, after forcing her into a vehicle at work. Defendant was convicted by a jury and sentenced as described. Additional evidence will be discussed below.

II. HEARSAY

Defendant challenges his conviction, arguing that he was deprived of a fair trial by the admission of hearsay statements repeating the victim's disclosures of defendant's assault. Defendant argues that almost every prosecution witness provided inadmissible hearsay. Defendant further argues that he received ineffective assistance of counsel because trial counsel failed to object to the inadmissible statements. Defendant moved for a new trial on the same grounds now argued on appeal, and the trial court denied the motion. We likewise disagree with defendant's arguments.

A. STANDARDS OF REVIEW AND APPLICABLE LAW

"This Court reviews evidentiary decisions for an abuse of discretion," but "an issue concerning the proper construction of a rule of evidence presents a question of law that this Court reviews de novo." *People v Martzke*, 251 Mich App 282, 286; 651 NW2d 490 (2002). However, unpreserved issues are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 761-764; 597 NW2d 130 (1999). Reversal is warranted only if plain error resulted in the conviction of an innocent person, or if "the error seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence." *Id*. at 763-764 (quotation omitted).

"A trial court may grant a new trial to a criminal defendant on the basis of any ground that would support reversal on appeal, or because it believes that the verdict has resulted in a miscarriage of justice." *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999), citing MCR 6.431(B). This Court reviews for an abuse of discretion the trial court's decision whether to grant a new trial. *Id*. The trial court does not abuse its discretion when it chooses an outcome within the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

"Hearsay is an unsworn, out-of-court statement that is offered to establish the truth of the matter asserted." *People v Stamper*, 480 Mich 1, 3; 742 NW2d 607 (2007), citing MRE 801(c). "It is generally inadmissible unless it falls under one of the hearsay exceptions set forth in the Michigan Rules of Evidence." *Id*., citing MRE 802.

B. THE VICTIM'S SIBLINGS

The victim testified that she phoned her siblings when she emerged from the woods after the assault. The victim's sister testified that the victim was "nervous" and "crying," and "couldn't talk very well because she was scared" while stating that defendant had pulled her from the parking lot to the woods and "abused her sexually." The sister estimated that the conversation lasted five minutes, and explained that the victim could not provide more details "because she couldn't really talk because she was trembling and scared." The victim's brother testified that he spoke to the victim on the phone at approximately 8:00 a.m., after the victim and her sister both left him messages at 5:40 a.m. asking him to call the victim. The brother described the victim as "crying" when he called, and still "crying," or "practically like in shock" to where "[s]he couldn't talk" because "she was real scared" when he took her home after their call. The brother stated that, on the call, the victim told him that defendant had met her in the parking lot, "pushed her in the woods," and "took her by force" and "abused her sexually" over her protestations. The trial court concluded that the siblings' testimonies were admissible as excited utterances under MRE 803(2).

MRE 803(2) defines an excited utterance as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." "The rule allows hearsay testimony that would otherwise be excluded because it is perceived that a person who is still under the sway of excitement precipitated by an external startling event will not have the reflective capacity essential for fabrication so that any utterance will be spontaneous and trustworthy." *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998) (quotation marks and citation omitted). "The question is not strictly one of time, but of the possibility for conscious reflection." *Id*. at 551. The statement must therefore relate to the startling event or condition, and the statement must be "made when the witness was still under the influence of an overwhelming emotional condition." *People v Straight*, 430 Mich 418, 424-425; 424 NW2d 257 (1988). "Few could quarrel with the conclusion that a sexual assault is a startling event." *Id*. at 425.

The victim's statement to her sister was clearly made immediately after the assault. The victim's sister's description of the victim as "crying," "nervous," and having difficulty talking "because she was trembling and scared" when she spoke of the assault, was ample evidence that the victim was still under the influence of overwhelming emotions at the time. Although the victim's statement to her brother was made a couple of hours later, that delay is not dispositive under the circumstances. The victim's brother's description of the victim as still "crying," "like in shock," and "real scared," was evidence that she remained under the influence of overwhelming emotions at the time she told him about the assault. For these reasons, the challenged testimony from the victim's siblings was not erroneously admitted.

C. POLICE OFFICERS

Again, the victim's brother testified that, when he took the victim home and called the police, the victim was still "crying," "real scared," "practically like in shock" and "couldn't talk." Police Officer David Thompson testified that he arrived to speak with the victim roughly two hours after the brother spoke with the victim. He found the victim "visibly distraught" as she told him that she went to a place of employment to get a key from her brother when she met defendant in the parking lot, who pushed her into the woods and onto the ground where he removed her pants

and penetrated her vagina with his penis despite her resistance and eventual escape. Although the victim's statements to Officer Thompson were several hours after the assault, the evidence continues to reflect that the victim was still under the influence of the overwhelming emotional condition of the sexual assault. Therefore, Officer Thompson's description of what the victim told her later on the morning of the assault did not plainly fall outside the hearsay exception for excited utterances.

Detective Emily Cutright testified that she first interviewed the victim on the day after the assault, and that the victim was trembling and otherwise upset when telling her that she was hoping to collect a key from her brother when defendant, whom she knew from social media, met her at the car, then forced her into the woods and sexually assaulted her. Cutright further testified that she examined other evidence before speaking to the victim a second time on the day after the assault, when the specifics of the assault were not discussed, but that, three days later, the victim provided her with such additional details as that defendant threw her to the ground in the woods, and that she had tried to push him off but was not able to run away until he stopped. Police Officer Ricky Urena testified that he assisted Detective Cutright as an interpreter in speaking with the victim during the third interview, and he relayed the victim's statement about how defendant was a coworker who had sexually assaulted her by forcing her into the woods and forcing his penis into her vagina. The victim's statements the day after the assault may fall within the hearsay exception for excited utterances, but it is difficult to say whether her statements several days later would still fall within the exception. The trial court concluded that these statements were not hearsay because they were provided to establish a chronology rather than to prove the truth of the matter asserted. However, we find that reasoning doubtful, because these statements were more detailed than necessary to establish a chronology.

The prosecutor argues that the victim's statements admitted through Detective Cutright and Officer Urena were admissible to impeach the victim, because the victim initially lied about why she went to the business. "The credibility of a witness may be attacked by any party, including the party calling the witness." MRE 607. However, it was unnecessary to impeach the victim concerning what brought her to the location in question, because she admitted to the jury that she had initially lied to the police, nurse examiner, and therapist about her employment, and she explained why she had lied. For these reasons, we conclude that at least some of the victim's statements to officers Cutright and Urena were improperly-admitted hearsay.

D. NURSE EXAMINER

Nurse Stephanie Solis examined the victim on the day of the assault, and she testified about the details of the assault that the victim provided her. These statements were clearly admissible as statements made for the purpose of medical treatment and diagnosis under MRE 803(4).

> In order to be admitted under MRE 803(4), a statement must be made for purposes of medical treatment or diagnosis in connection with treatment, and must describe medical history, past or present symptoms, pain or sensations, or the inception or general character of the cause or external source of the injury. Traditionally, further supporting rationale for MRE 803(4) are the existence of (1) the self-interested motivation to speak the truth to treating physicians in order to receive proper medical care, and (2) the reasonable necessity of the statement to the diagnosis and

> treatment of the patient. [*People v Meeboer (After Remand)*, 439 Mich 310, 322; 484 NW2d 621 (1992).]

In this case, it is apparent that the victim's statements to the nurse examiner were for medical purposes because the examination took place on the day of the assault, and the examination properly included taking a history from the patient. "Particularly in cases of sexual assault . . . a victim's complete history and a recitation of the totality of the circumstances of the assault are properly considered to be statements made for medical treatment." *People v Mahone*, 294 Mich App 208, 215; 816 NW2d 436 (2011).

E. THERAPIST

Defendant further argues that the testimony of the victim's therapist about the assault should not have been admitted. On direct examination, the therapist recounted some general details of the assault, including the victim having identified her assailant as "Wilson" and that he "was a coworker." The therapist also recounted that the same person had assaulted the victim on a previous occasion, although defendant seemingly raises no specific challenge to that statement. However, the therapist did not describe any other details of the assault until asked to do so by defendant on cross-examination. Otherwise, the therapist descried the victim's demeanor and symptoms, and the fact that the victim had described the assault in a consistent manner since the beginning of therapy.

Defendant correctly observes that statements made to psychologists are generally regarded as less reliable than statements to physicians, for purposes of MRE 803(4). *People v LaLone*, 432 Mich 103, 114; 437 NW2d 611 (1989). However, our Supreme Court later suggested that statements made in the course of psychological *treatment* resulting from a medical diagnosis might be deemed more reliable. *Meeboer*, 439 Mich at 329. Furthermore, even if statements to psychologists may generally be less reliable than statements to physicians, that fact may not be dispositive in light of the totality of the circumstances. *Id*. at 324-327. In particular, corroborating physical evidence of an assault and circumstances showing a lack of motive to fabricate may be relevant. *Id*. at 324-326.

Under the circumstances, it is manifestly apparent that the victim was seeking treatment for her trauma of her own accord and for the purpose of healing, rather than undergoing an examination for the benefit of law enforcement, so she had every reason to be truthful with the therapist. Furthermore, there was physical evidence that the victim had been assaulted; and defendant admitted to having sex with the victim, claiming that he did so with her consent. Although identifying defendant by name may not have been strictly necessary, identifying an assailant as having been a coworker and as having committed a previous assault both have obvious ramifications to a person's feelings of safety, and a general description of the nature of the assault would have obvious importance to a person's treatment. We conclude that, other than specifying defendant's name, the statements made by the therapist on direct examination about what the victim disclosed during therapy are sufficiently reliable and sufficiently related to seeking medical treatment to fall under MRE 803(4).

F. HARMLESS ERROR

Defendant is correct that some inadmissible hearsay evidence was admitted. Nevertheless, an evidentiary error must be considered in context, and it "is not a ground for reversal unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999) (quotation omitted). In this case, the trial court stated, "Regardless of the admissibility of the statements, . . . there is no evidence that the outcome of the trial would have been any different had the statements not been admitted." We agree that the inadmissible hearsay testimony from Detective Cutright, Officer Urena, and the therapist did not likely affect the outcome of trial.

"In a trial where the evidence essentially presents a one-on-one credibility contest between the victim and the defendant, hearsay evidence may tip the scales against the defendant, which means that the error is more harmful." *People v Gursky*, 486 Mich 596, 621-621; 786 NW2d 579 (2010). However, this was not strictly a credibility contest. See *id*. at 624. As discussed, defendant admitted to having sex with the victim, and there was objective medical evidence that the victim had been assaulted and injured. The therapist's mention of defendant's name is clearly harmless because the issue in this case was consent, not identity. The statements from Officers Cutright and Urena were essentially cumulative, which is more likely to be harmful in a pure credibility contest and less likely to be harmful where, as here, the victim's statements were corroborated and the victim was available for cross-examination. *People v Douglas*, 496 Mich 557, 580-581; 852 NW2d 587 (2014). Accordingly, we conclude that the improper hearsay accounts of defendant's assault on the victim neither resulted in the conviction of an innocent person, nor cast doubt upon "the fairness, integrity, or public reputation of judicial proceedings." *Carines*, 460 Mich at 763-764 (quotation omitted). The trial court did not abuse its discretion by denying defendant's motion for a new trial insofar as it was based on the admission of hearsay.

III. ASSISTANCE OF COUNSEL

A defendant's right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. This "right to counsel encompasses the right to the effective assistance of counsel." *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007) (quotation marks omitted). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). "To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense." *People v Taylor*, 275 Mich App 177, 186; 737 NW2d 790 (2007) (quotation omitted). Counsel's performance will be deemed to have prejudiced the defense if it is reasonably probable that, but for counsel's error, "the result of the proceeding would have been different." *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Defendant argues that his trial attorney was ineffective for failing to object to the hearsay evidence discussed above. To the extent the evidence was not inadmissible hearsay, counsel could not be faulted for failing to raise a meritless objection. *Ericksen*, 288 Mich App at 201. Because the inadmissible hearsay was harmless, counsel's failure to object could not have affected the

outcome of the proceedings. *Joran*, 275 Mich App at 667. Furthermore, defense counsel's argument to the jury relied in part on portraying the victim as not credible due to the lies she initially told about where she worked, why she was there that day, and how she came to know defendant. In other words, defense counsel based crucial argument on the testimony, including the now-challenged hearsay, that the victim repeatedly offered falsehoods, along with the undisputed fact that intercourse occurred in the woods. Trial counsel's strategy relied, in part, on exploiting all the testimony attributing false statements to the victim, rather than attempting to exclude any of it on hearsay grounds. Declining to raise objections can often be consistent with sound trial strategy, which a reviewing court should not second-guess with the benefit of hindsight. *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008). "The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Further, the trial court stated that, "due to defendant admitting to certain acts, this court finds no probability that objections would have resulted in a different outcome." As discussed above, the unexcepted hearsay was cumulative to properly admitted evidence. For that reason, and because there was physical evidence of injuries supporting the victim's account of suffering a sexual assault, it was not probable that admission of certain hearsay affected the outcome of the trial. The trial court did not abuse its discretion by denying defendant's motion for a new trial based on the ineffective assistance of counsel.

IV. SCORING OF OFFENSE VARIABLES

Defendant challenges his sentence, arguing that the trial court improperly scored two offense variables (OVs). Specifically, defendant argues that the trial court improperly assessed 10 points for OV 10 solely on the basis of the victim's age, and the trial court improperly assessed 25 points for OV 13 because there was no evidence he committed more than one other uncharged crime against a person. Defendant moved for resentencing in the trial court, and the trial court denied defendant's motion. We likewise disagree with defendant's challenges.

A. STANDARDS OF REVIEW AND APPLICABLE LAW

"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*. Decisions on motions for resentencing are reviewed for an abuse of discretion. *People v Puckett*, 178 Mich App 224, 227; 443 NW2d 470 (1989).

"A defendant is entitled to be sentenced by a trial court on the basis of accurate information." *People v Francisco*, 474 Mich 82, 88; 711 NW2d 44 (2006). "[W]hen a trial court sentences a defendant in reliance upon an inaccurate guidelines range, it does so in reliance upon inaccurate information." *Id*. at 89 n 7. The court must consult the advisory sentencing guidelines and assess the highest amount of possible points for all offense variables. *People v Lockridge*, 498 Mich 358, 392 n 28; 870 NW2d 502 (2015). The court "may consider all record evidence before it when calculating the guidelines, including, but not limited to, the contents of a presentence

investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial." *People v Johnson*, 298 Mich App 128, 131; 826 NW2d 170 (2012) (quotation omitted).

B. OV 10

Under OV 10, the trial court should assess 10 points where "[t]he 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 factors described in subsection (1) does not automatically equate with victim vulnerability." MCL 777.40(2). "Exploit" means to "manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(b). "Vulnerability" is defined as "the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." MCL 777.40(3)(c).

Defendant argues that the trial court could only have assessed points under OV 10 on the basis of the victim's age, pointing out that they were merely coworkers and he had no authority over her, and contending that, in any event, he did not know the victim's real age. Defendant further argues that his threats to the victim's family are not an enumerated basis for assessing points under MCL 777.40(1)(b). However, the evidence shows that defendant threatened *the victim* with the prospect of telling lies to her family. Furthermore, because the victim was a minor and had a poor understanding of English, she was highly reliant upon her family, so threats to her family for the purpose of controlling her would implicate exploiting her domestic relationship and youthfulness. The evidence showed that defendant successfully isolated, controlled, and repeatedly assaulted the victim through his threats. He kept the victim from disclosing his abuse to her family and deprived her of the support and guidance necessary to protect herself. Therefore, the evidence indicated that defendant used emotional and physical domination through fear caused by threats and actions in order to isolate, control, and manipulate the youthful defendant, resulting in the sexual assault. OV 10 was properly assessed at 10 points.

C. OV 13

Under OV 13, the trial court should assess 25 points where "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c). The crimes to be considered include "all crimes within a 5-year period, including the sentencing offense, . . . regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a).

Defendant argues that, at most, there were only two crimes against a person that could be attributed to him in the previous five years. Defendant acknowledges that the sentencing offense, of CSC-I, was one crime against a person. He further acknowledges that the victim testified that a second, uncharged, sexual assault took place, which could constitute a second crime against a person. The trial court reasoned that OV 13 was assessed properly because "defendant committed two separate offenses against the victim and assaulted her once prior to the incident, leading to this conviction." The trial court further noted that the presentence investigation report was

"unchallenged,"[1] and the court "relied on its contents." At the posttrial hearing, the trial court explained that it believed defendant's acts of trying to force the victim into a car, asporting her into the woods, and threatening her family with harm if she were to tell anybody about the assault would each constitute a felonious crime against a person.

The felony of kidnapping includes when a person "knowingly restrains another person with the intent to . . . engage in criminal sexual penetration or criminal sexual contact with that person." MCL 750.349(1)(c). For this purpose, to restrain is "to restrict a person's movements or to confine the person so as to interfere with that person's liberty without that person's consent or without legal authority." MCL 750.349(2). Such "restraint does not have to exist for any particular length of time and may be related or incidental to the commission of other criminal acts." *Id*. In this case, as the trial court noted in the posttrial hearing, defendant twice forced the victim to a vehicle in the parking lot, and also forced her into the woods, in order to sexually assault her. The trial court properly assessed 25 points for OV 13 in light of the evidence of defendant having committed two kidnappings along with two sexual assaults.

For these reasons, the trial court did not abuse its discretion by denying defendant's motion for resentencing.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Amy Ronayne Krause
/s/ Mark T. Boonstra

[1] At sentencing, defendant did not challenge the contents of the PSIR and declined to allocute.