STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v

CR 2019-272593-FC
HON. JAMES ALEXANDER

NICHOLAS MAXIMILLIA REMINGTON,

Defendant.
_____/

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OAKLAND COUNTY PROSECUTING ATTORNEY
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_____/

PEOPLE'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISQUALIFY THE OAKLAND COUNTY PROSECUTOR'S OFFICE

Defendant's motion to disqualify the Oakland County Prosecutor's Office is meritless. Defendant first attempts to disqualify this Assistant Prosecuting Attorney (hereinafter APA) by alleging that I am a material witness. The allegation is absurd.

FACTS

The Defendant was charged by complaint and warrant with one count of delivery of a controlled substance causing death on June 11, 2019. A preliminary examination was set for August 26, 2019. Prior to the preliminary examination date this APA met with witness Paul Wiedmaier to discuss his potential testimony. This meeting took place at the Novi Police

Department for the convenience of the witness. The meeting was on or about July 1, 2019. The fact that this interview took place subsequent to the charges being issued is a material fact completely omitted from Defendant's brief.

ARGUMENT

Defendant argues that this APA in now somehow a material witness because I interviewed a potential witness for preliminary examination. A witness whom, as an aside, was not called to testify. Defendant asserts that my objection to Detective Balog testifying as to my end of the conversation with Wiedmaier makes me a material witness. Defendant is in error. Defendant relies on *People v Tesen*, 276 Mich App 134 (2007). *Tesen* is completely inapplicable to the case at hand. In *Tesen* the prosecutor interviewed the victim before charges were issued in the course of an investigation. *Tesen* has been distinguished by multiple cases.

In *People v Brannon*, COA number 030267, dec'd August 27, 2013 (unpublished; copy attached) the court stated:

> The evidence at the pretrial evidentiary hearing did not establish that the prosecutor's pretrial involvement in the case made her a necessary witness. This case is distinguishable from *Tesen*, 276 Mich App at 136, in which an assistant prosecutor took a lead role in interviewing a child to investigate a complaint that the child was sexually abused by his father before authorizing a warrant charging the father with multiple counts of first-degree CSC and other charges. In this case, the evidence did not show that the prosecutor had any role in investigating the charges.

See also: *People v Petri*, 279 Mich App 707(2009) (published; copy attached), where the court held:

> The trial court's decision did not deprive defendant of a substantial defense. Defense counsel presented evidence at trial regarding the prosecutor's interview through his cross-examination of Detective Domine. Defendant has not identified any issue that actually arose at trial, or was raised by defense counsel on the basis of the trial evidence, that demonstrates a need for the prosecutor's testimony to support the defense. The right to present a defense may be limited by rules of procedure and evidence designed to ensure fairness and reliability. *People v Toma*, 462 Mich 281, 294; 613 NW2d 694 (2000). Because we find no error in the trial court's ruling not to disqualify the prosecutor, and defendant has not demonstrated that he was deprived of his right to present a substantial

defense at trial, reversal is denied.

In *People v Westbrook*, COA number 33161, dec'd March 27, 2018 (unpublished; copy attached) the assistant prosecutor interviewed a witness after charges were issued. The assistant prosecutor in that case did not have another witness present. The defense moved to disqualify the prosecutor. The trial court denied, and the Court of Appeals affirmed. In *Westbrook* the court found that:

> Defendant also maintains that the prosecutor learned certain details during her interview with Jessica that were not disclosed in Detective Huttenlocker's report. Defense counsel had the opportunity to interview Jessica but did not do so. The mere fact that a third person is not present when, during witness preparation, a witness discloses details not previously disclosed does not require disqualification of the prosecutor. See *United States v Tamura*, 694 F2d 591, 600-601 (CA 9, 1982) (concluding that a prosecutor was not a necessary witness when the prosecutor's testimony would have been duplicative of the testimony given by the witness the prosecutor spoke with). While a prosecutor could avoid even the possibility of crossing the prosecutorial/investigatory line by having a detective or other third person present whenever she meets with a witness, see *Bin Laden*, 91 F Supp 2d at 623-624, defendant has not shown on this record that the prosecutor crossed that line in this case.

In the instant case the Defendant's attorney is free to interview and has in fact interviewed the same witness. Upon information and belief, Mr. Rockind recorded the interview. Mr. Rockind can cross examine the witness. All attorneys are free to question a witness prior to calling them to testify. The jury instructions explain the process to the jury. You have heard that a lawyer [or lawyer's representative] talked to one of the witnesses. There is nothing wrong with this. A lawyer [or lawyer's representative] may talk to a witness to find out what the witness knows about the case and what the witness's testimony will be. M Crim JI 5.3

Defendant next asserts that not only this APA should be disqualified for speaking to a witness prior to preliminary examination but that the **entire** Oakland County Prosecutor's Office must be disqualified. Defendant partially cites the case of *People v Mayhew*. The entire cite is 236 Mich App 112 (1999). *Mayhew* is inapplicable to the instant case. In *Mayhew*, the brother of an

assistant prosecutor in Oakland County was killed. The Defendant moved to disqualify the office from prosecution. The court found no conflict existed. The assistant prosecutor whose brother was killed was the head of the Family Support Division. The court went on to state that even if they had found a conflict existed, (they did not) that since the assistant prosecutor in question did not supervise the assistant prosecutor who tried the case that disqualification of the entire office was not necessary.

In the case before this Honorable Court this APA is not a witness, let alone a material witness. As is done by any competent attorney, this APA spoke to a potential witness. This conversation took place in front of another person, Detective Balog, who can be called to testify at trial. Additionally, the witness interviewed can be called by either party if desired. Additionally, although the People do not concede this Court need even consider Defendant's other argument regarding disqualification of the office, this APA supervises three other assistant prosecutors. The Oakland County Prosecutor's Office has approximately 90 attorneys.

WHEREFORE, the People respectfully request that this Honorable Court deny the Defendant's Motion to Disqualify the Oakland County Prosecutor's Office.

Respectfully submitted,

JESSICA R. COOPER
PROSECUTING ATTORNEY

By: _____
Beth M. Hand
Assistant Prosecuting Attorney

DATED: MARCH 16, 2020

BMH-20/Remington-N (Brf-Disqualify OCPO).docx

ATTACHMENT ONE

People v. Brannon

Court of Appeals of Michigan

August 27, 2013, Decided

No. 303267

Reporter
2013 Mich. App. LEXIS 1463 *; 2013 WL 4528453

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v ROBERT K. BRANNON, Defendant-Appellant.

Subsequent History: Leave to appeal denied by *People v. Brannon, 495 Mich. 935, 843 N.W.2d 191, 2014 Mich. LEXIS 113 (Jan. 31, 2014)*

Writ of habeas corpus granted *Brannon v. Rapelje, 2016 U.S. Dist. LEXIS 33 (E.D. Mich., Jan. 4, 2016)*

Prior History: **[*1]** Monroe Circuit Court. LC No. 06-035769-FC.

People v. Brannon, 486 Mich. 1070, 784 N.W.2d 205, 2010 Mich. LEXIS 1483 (July 16, 2010)

Core Terms

aunt's, trial court, guidelines, sentence, ineffective, defense counsel, new trial, sexual assault, departure, sexual, sentencing guidelines, argues, evidentiary hearing, defendant argues, sexual act, proportionality, circumstances, remarks, effective assistance of counsel, assistance of counsel, court's decision, sexual conduct, case doctrine, great weight, years old, credibility, investigate, factors, score

Judges: Before: MURPHY, C.J., and MARKEY and RIORDAN, JJ.

Opinion

PER CURIAM.

In October 2008, a jury convicted defendant of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a). Before defendant was sentenced, he filed a motion for a new trial on the ground that he was denied the effective assistance of counsel. Following a *Ginther*[1] hearing, the trial court granted defendant's motion in June 2009. The prosecution appealed and this Court affirmed the trial court's decision in *People v Brannon, unpublished opinion per curiam of the Court of Appeals, issued March 23, 2010 (Docket No. 292617), 2010 Mich. App. LEXIS 543*. However, in lieu of granting leave to appeal, our Supreme Court reversed this Court's decision, vacated the trial court's order granting defendant a new trial, and remanded the case to the trial court for reinstatement of defendant's conviction and further proceedings. *People v Brannon, 486 Mich 1070; 784 NW2d 205 (2010)*. On remand, the trial court sentenced defendant to 20 to 40 years' imprisonment, with credit for time served. Defendant now appeals as of right, and we affirm.

I. BACKGROUND

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

Defendant was convicted **[*2]** of engaging in sexual penetration with a six-year-old niece in the summer of 1995, at the home of the victim's maternal grandparents in Temperance, Michigan. The alleged act of penetration involved defendant's insertion of a crayon into the victim's anal opening. The victim did not tell anyone else about the incident until approximately ten years later, after she learned that defendant had sexually molested one of her aunts (defendant's sister-in-law). That aunt testified that she was 15 years old when defendant first sexually assaulted her and that defendant engaged in inappropriate sexual contact with her on several subsequent occasions. Like the victim, the aunt delayed telling anyone about the sexual assaults. The aunt testified that she did not tell anyone because defendant threatened to leave her sister if she told. The aunt additionally testified that she did not want to disrupt the family and that defendant assured her that he was not engaging in inappropriate conduct with anyone else. Defendant argued at trial that the victim's[2] testimony was not credible, and he also presented an alibi defense to show that he was never at the home of the victim's grandparents during the summer **[*3]** of 1995.

II. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant first argues on appeal that he was denied the effective assistance of counsel at trial because defense counsel failed to conduct a reasonable investigation before deciding not to present expert testimony regarding the effect of the victim's delayed reporting on the reliability of her trial testimony.

A claim of ineffective assistance of counsel involves a mixed question of fact and constitutional law, which are reviewed, respectively, for clear error and de novo. *People v Seals, 285 Mich App 1, 17; 776 NW2d 314 (2009)*. To establish ineffective assistance of counsel, a defendant bears the burden of showing both deficient performance and prejudice. *People v Carbin, 463 Mich 590, 599-600; 623 NW2d 884 (2001)*. Counsel's performance is deficient if it falls below an objective standard of professional reasonableness. *People v Fyda, 288 Mich App 446, 450; 793 NW2d 712 (2010)*. To establish prejudice, defendant must show a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.*

Here, defendant's **[*4]** claim regarding the presentation of expert testimony was the subject of a prior appeal. We agree with the trial court that our Supreme Court's prior decision with respect to this matter precludes appellate relief in this appeal. Although the trial court's reliance on res judicata was misplaced, inasmuch as there was no prior final judgment, see *Richards v Tibaldi, 272 Mich App 522, 531; 726 NW2d 770 (2006)*, the law of the case doctrine precludes this Court from revisiting this specific issue. The law of the case doctrine provides that if an appellate court decides a legal question and remands for further proceedings, the legal question will not be determined differently by the appellate court in a subsequent appeal where the facts are materially the same. *Grievance Administrator v Lopatin, 462 Mich. 235, 259; 612 N.W.2d 120 (2000)*. "[T]he appellate court's decision likewise binds lower tribunals because the tribunal may not take action on remand that is inconsistent with the judgment of the appellate court." *462 Mich. at 260*; see also *People v Whisenant, 384 Mich 693, 702; 187 NW2d 229 (1971)*. The doctrine applies to issues that were decided in the prior appeal, either implicitly or explicitly. **[*5]** *Grievance Administrator, 462 Mich at 260*. Stated otherwise, "[t]he law of the case doctrine applies only to questions actually decided in the prior decision and to those questions necessary to the court's prior determination." *City of Kalamazoo v Dep't of Corrections, 229 Mich App 132, 135; 580 NW2d 475 (1998)*.

To avoid application of the law of the case doctrine, defendant attempts to separate defense counsel's strategic decisions from the adequacy of his investigation. But as our Supreme Court explained in *People v Trakhtenberg, 493 Mich 38, 52; 826 NW2d 136 (2012)*, counsel's investigation is not a separate component from strategy, but rather a product of the investigation:

> In examining whether defense counsel's performance fell below an objective standard of reasonableness, a defendant must overcome the strong presumption that counsel's performance was born from a sound trial strategy. *Strickland [v. Washington, 466 U.S. 668, 689; 104 S. Ct. 2052; 80 L. Ed. 2d 674 (1984)]*. Yet a court cannot insulate the review of counsel's performance by calling it trial strategy. Initially, a court must determine whether the "strategic choices [were] made after less than complete investigation," and **[*6]** any choice is "reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *466 U.S. at 690-691*. Counsel always retains the "duty to make

[2] Our reference to the "victim" throughout this opinion pertains to defendant's niece, not the aunt.

> reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.*

The essence of the trial court's June 1, 2009, order granting defendant a new trial on the basis of ineffective assistance of counsel was that defense counsel failed to fully investigate the benefit of expert witnesses. This Court affirmed on this same ground, stating, "As the trial court concluded, under the specific facts of this case, defense counsel failed to adequately investigate the benefit of expert witnesses, denying defendant the effective assistance of counsel." *Brannon, 486 Mich at 1070.* Our Supreme Court expressly reversed this Court's judgment and vacated the trial court's order granting the new trial. *Brannon, 486 Mich at 1070.* The Supreme Court reasoned that "[t]he record clearly established that defense counsel discussed issues of delayed reporting of sexual assault by a child witness with a potential expert witness, and made a reasonable strategic decision to forego expert **[*7]** testimony in light of the possibility that the witness might also provide testimony favorable to the prosecution." *Id.* Although the Supreme Court did not provide a detailed discussion of the investigation conducted by trial counsel, it clearly considered both the investigation and its impact on the strategic decision to forego expert testimony, and it reversed this Court's determination that counsel did not reasonably investigate the benefit of expert witnesses. Because there was no change in the material facts, the trial court reached the correct result in declining to revisit this issue, and we too are bound by our Supreme Court's prior decision. Thus, the law of the case doctrine precludes relief with respect to this matter.

Defendant presents additional ineffective assistance of counsel claims that were not raised in the prior appeal. He argues that defense counsel was ineffective for not raising a hearsay objection to the victim's testimony on direct examination by the prosecutor that she knew that her aunt had claimed to have been sexually assaulted by defendant. We disagree. Hearsay is "a statement, other than one made by declarant while testifying at the trial or hearing, offered **[*8]** in evidence to prove the truth of the matter asserted." MRE 801(c). A statement offered to show an individual's state of mind is not precluded by the hearsay rule. *People v Fisher, 449 Mich 441, 449; 537 NW2d 577 (1995).* It is apparent from the record that the purpose of the victim's testimony regarding her knowledge of defendant's sexual assault against the victim's aunt was to show its effect on the victim's decision to come forward after several years to report the crayon incident. Indeed, defense counsel testified at the *Ginther* hearing that he was aware that evidence regarding what the victim learned about her aunt was part of the reason for her decision to report the crayon incident. As the trial court found when denying defendant's posttrial motion for a new trial with respect to this issue, the evidence was admissible to explain the victim's motivation for her delayed report of the charged sexual assault, a nonhearsay purpose. Because a hearsay objection would have been futile, defense counsel was not ineffective for failing to object. Counsel is not required to make a futile objection. *People v Ericksen, 288 Mich App 192, 201; 793 NW2d 120 (2010).* Moreover, given that the **[*9]** aunt herself testified to the sexual assaults committed against her by defendant, the requisite prejudice has not been established.

Defendant also argues that defense counsel was ineffective for failing to challenge the admissibility of the victim's aunt's testimony under MRE 404(b)(1). We again disagree. The aunt's testimony was admitted under MCL 768.27a, which governs over MRE 404(b). See *People v Watkins, 491 Mich 450, 475; 818 NW2d 296 (2012)*; *People v Watkins, 277 Mich App 358, 365; 745 NW2d 149 (2007).* Because any challenge to the admissibility of the evidence under MRE 404(b) would not have precluded its admissibility under MCL 768.27a, defense counsel was not ineffective for failing to advance a challenge based on MRE 404(b). *Ericksen, 288 Mich App at 201.*

Defendant additionally argues that defense counsel was ineffective for failing to argue that the aunt's testimony should have been excluded under MRE 403, notwithstanding that it was subject to admission under MCL 768.27a. We agree with defendant that evidence admissible under MCL 768.27a is still subject to exclusion under MRE 403. *Watkins, 491 Mich at 482-485*; *People v Pattison, 276 Mich App 613, 620-621; 741 NW2d 558 (2007).* **[*10]** Under MRE 403, relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice[.]" However, when applying MRE 403 to evidence that is 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.* Considerations that might lead a court to exclude the evidence as overly prejudicial include the following:

> (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. [491 Mich at 487-488.]

The aunt's testimony that defendant began sexually molesting her at age 15 was admissible under MCL 768.27a "for its bearing on any matter to which it is relevant." The aunt's testimony was probative of the credibility of the victim's testimony that defendant, her adult relative, engaged in an act of sexual penetration **[*11]** with her when she was a minor. The victim's credibility was a principal issue at trial. Weighing the propensity inference in favor of the evidence's probative value rather than its prejudicial effect, we agree with the trial court that MRE 403 would not have required exclusion of the aunt's testimony. Therefore, defense counsel was not ineffective for failing to raise an MRE 403 objection.

Next, defendant argues that defense counsel was ineffective for not attempting to obtain the victim's medical and psychological records. Although defendant raised this claim below, he failed to proffer any medical or psychological records for the court to review. Defendant bears the burden of establishing the factual predicate for his claim of ineffective assistance of counsel. Carbin, 463 Mich at 600. Because defendant has not established any factual basis for concluding that the victim's medical and psychological records contained any information helpful to the defense, this ineffective assistance of counsel claim cannot succeed.

In sum, defendant has not established any errors by trial counsel, whether considered singularly or cumulatively, that deprived him of the effective assistance of counsel. **[*12]** Carbin, 463 Mich at 599-600; People v Bahoda, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995); People v Brown, 279 Mich App 116, 145-146; 755 NW2d 664 (2008).

III. PROSECUTORIAL MISCONDUCT

Defendant argues that the prosecutor violated his Fifth Amendment rights during rebuttal argument by improperly directing the jury's attention to his failure to testify at trial. Defendant did not object to the prosecutor's argument at trial, leaving this issue unpreserved. Brown, 279 Mich App at 134. Therefore, our review is limited to determining whether plain error affected defendant's substantial rights. *Id.*; see also People v Carines, 460 Mich 750, 763; 597 NW2d 130 (1999). Error requiring reversal will not be found where a curative instruction could have cured any prejudice from a prosecutor's remarks. People v Unger, 278 Mich App 210, 235; 749 NW2d 272 (2008). Issues of constitutional law are reviewed de novo. People v Armstrong, 490 Mich 281, 289; 806 NW2d 676 (2011).

A prosecutor's remarks are reviewed as a whole and evaluated in light of defense arguments and their relationship to the evidence admitted at trial. Brown, 279 Mich App at 135. A prosecutor's remark that infringes on the defendant's **[*13]** right not to testify may constitute error. People v Fields, 450 Mich 94, 115; 538 NW2d 356 (1995). But a distinction exists between remarks suggesting to the jury that a defendant's silence should be treated as substantive evidence of guilt and remarks that respond to a claim made by the defendant. 450 Mich at 111. A prosecutor properly may comment on the weakness of an alibi defense, and may observe that inculpatory evidence is uncontroverted, even if the defendant is the only person who could have contradicted the evidence. 450 Mich at 115.

Viewed in context, the prosecutor's rebuttal argument did not violate defendant's right to remain silent. The prosecutor remarked, "Defendant doesn't challenge that it occurred. He simply has a question about when it occurred." The prosecutor's comment was plainly directed at the fact that defendant had presented an alibi defense, which had to account for the victim's determination before trial that the charged incident occurred in 1995, and not 1996. Further, the prosecutor's earlier use of the word "uncontroverted" was simply for the purpose of expressing the belief that no contradictory evidence had been presented. Thus, there was no plain error. Moreover, **[*14]** to the extent defendant believes that the jury could have interpreted the prosecutor's remarks as a comment on his failure to testify, appellate relief is not warranted because a curative instruction could have cured any perceived prejudice.[3] Unger, 278 Mich App at 235.

IV. GREAT WEIGHT OF THE EVIDENCE

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[3] Although defendant alternatively asserts that defense counsel was ineffective for failing to object to the prosecutor's argument, he fails to address this claim in the body of his brief, and thus has abandoned this alternative claim. People v McPherson, 263 Mich App 124, 136; 687 NW2d 370 (2004). Regardless, counsel's failure to object did not constitute deficient performance.

Defendant argues that he is entitled to a new trial because the jury's verdict is against the great weight of the evidence. The trial court denied defendant's motion for a new trial on this basis. A trial court's grant of a new trial on this ground is permissive in nature. *People v Lemmon, 456 Mich 625, 634-635; 576 NW2d 129 (1998)*. Thus, we review the trial court's decision for an abuse of discretion. *People v Miller, 482 Mich 540, 544; 759 NW2d 850 (2008)*.

"The test to determine whether a verdict is against the **[*15]** great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Musser, 259 Mich App 215, 218-219; 673 NW2d 800 (2003)*. We reject defendant's argument that the expert opinion evidence that he offered in support of his motion for a new trial is relevant to this issue. Because that evidence was not offered at trial, it has no bearing on whether the jury's verdict was against the great weight of the evidence. Defendant's reliance on *People v Mechura, 205 Mich App 481; 517 NW2d 797 (1994)*, is misplaced because that case did not involve a motion for a new trial based on the great weight of the evidence. Rather, the defendant in that case sought a new trial on the basis of newly discovered evidence. Defendant does not argue that the proffered expert opinion evidence satisfies the requirements for a new trial based on newly discovered evidence. See *Mechura, 205 Mich. App. 481, 483, 517 N.W.2d 797*.

Defendant's additional great-weight arguments essentially consist of an attack on the victim's credibility; however, the credibility of a witness is generally not a sufficient ground to grant a new trial. **[*16]** *Lemmon, 456 Mich at 643*. Here, defendant's conviction is supported by the victim's testimony, and that testimony was not so far impeached that it was deprived of all probative value or that the jury could not believe it. *456 Mich at 645-646*; *Musser, 259 Mich App at 219*. We further note that "[t]he testimony of a victim need not be corroborated in prosecutions under sections 520b [applicable here] to *520g*." *MCL 750.520h*. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

V. *MCL 768.27*A EVIDENCE

Defendant next challenges the admissibility of the aunt's testimony under *MCL 768.27a*. Although defendant argues that the statute is unconstitutional because it infringes on our Supreme Court's rule-making authority, he acknowledges that our Supreme Court expressly rejected this argument in *Watkins, 491 Mich at 475*, in which it held that *MCL 768.27a* is a valid enactment of substantive law. Thus, we reject defendant's challenge to the constitutionality of *MCL 768.27a*.

Next, we agree with defendant that evidence admissible under *MCL 768.27a* is still subject to exclusion under *MRE 403*. As discussed previously, however, *MRE 403* did not require exclusion **[*17]** of the aunt's testimony in this case.

Defendant also argues that the trial court violated his right to due process by failing to conduct an evidentiary hearing to determine the scope of the aunt's allowable testimony under *MCL 768.27a*. Defendant's position is that the aunt's testimony referred to some sexual acts that did not qualify as a "listed offense" for purposes of *MCL 768.27a* and, therefore, were not admissible under that statute. We consider this evidentiary claim unpreserved because there is no indication in the record that defendant requested an evidentiary hearing to determine the scope of the aunt's testimony. See *MRE 103(a)(1)*. Indeed, defendant asserts that defense counsel was ineffective for failing to ensure that the aunt's testimony would be limited to acts described by *MCL 768.27a*. Because this issue is unpreserved, defendant has the burden of showing a plain error affecting his substantial rights. *Carines, 460 Mich at 763*; *People v Coy, 258 Mich App 1, 12; 669 NW2d 831 (2003)*.

Although defendant frames this issue as implicating constitutional due process concerns, absent a claim that evidence implicates a specific constitutional right, evidentiary errors are generally **[*18]** considered nonconstitutional in nature. *People v Blackmon, 280 Mich App 253, 260-261; 761 NW2d 172 (2008)*. Defendant's argument does not refer to any specific constitutional right, but rather relates to the scope of *MCL 768.27a*. We conclude that, absent a request, the trial court did not have a duty to conduct an evidentiary hearing to determine the scope of testimony admissible under *MCL 768.27a*. Moreover, defendant has failed to establish any testimony by the victim's aunt that was clearly inadmissible under *MCL 768.27a*.

MCL 768.27a 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." *MCL 768.27a(1)*. A listed offense includes acts of criminal sexual conduct proscribed by

MCL 750.520b — MCL 750.520e. See MCL 768.27a(1) and MCL 28.722(k), (s)(iv), (w)(iv). Defendant concedes that the aunt's testimony regarding defendant's sexual conduct toward her when she was 15 years old was admissible under MCL 768.27a, but argues that any testimony involving sexual acts **[*19]** committed when she was 16 or 17 years old was inadmissible because she was beyond the age of consent. We disagree.

First, for purposes of MCL 768.27a, the term "minor" is defined as "an individual less than 18 years old." MCL 768.27a(2)(b). Second, it is not at all apparent from the aunt's testimony that the sexual acts she described were consensual. The criminal sexual conduct statutes prohibit a person from engaging in sexual contact or penetration accomplished by force or coercion. MCL 750.520d(1)(b); MCL 750.520e(1)(b). Force of coercion is determined in light of all circumstances. People v Premo, 213 Mich App 406, 410; 540 NW2d 715 (1995). Coercion "'may be actual, direct, or positive, as where physical force is used to compel [an] act against one's will, or implied, legal or constructive, as where one party is constrained by subjugation to other to do what his free will would refuse.'" 213 Mich App at 410-411, quoting Black's Law Dictionary (5th ed), p 234). The aunt's testimony indicated that she submitted to defendant's sexual conduct, which began when she was 15 years old, because defendant was married to her sister (who had several children), and he threatened to leave her sister if **[*20]** she said anything, so she did what she thought had to be done. The aunt's testimony supports a finding that defendant accomplished the sexual acts through the use of coercion. Thus, defendant has not shown that any testimony regarding his sexual acts toward the victim's aunt were clearly outside the scope of MCL 768.27a. Moreover, assuming that testimony regarding some of the sexual acts involving the aunt should have been excluded, the presumed error was harmless, as those acts were simply in addition to the acts of sexual assault committed against the aunt that were the proper subject of testimony. MCL 769.26; People v Lukity, 460 Mich 484, 495; 596 NW2d 607 (1999) (reversal only required if it affirmatively appears that it is more probable than not that the error was outcome determinative).

Although defendant also presents a cursory claim that defense counsel was ineffective for failing to ensure that the aunt's testimony was limited in scope, given his failure to establish that any testimony clearly exceeded the scope of MCL 768.27a and was prejudicial, this ineffective assistance of counsel claim cannot succeed.

VI. DISQUALIFICATION OF TRIAL PROSECUTOR

Defendant next argues that **[*21]** the trial court erred in denying his motion to disqualify the assistant prosecutor. We disagree.

We review a trial court's findings of fact on a motion to disqualify a prosecutor for clear error and review the court's application of relevant law to the facts de novo. ***People v Tesen, 276 Mich App 134, 141; 739 NW2d 689 (2007)***. The party seeking to disqualify a prosecutor as a necessary witness has the burden of showing the need for the prosecutor's testimony. ***276 Mich App at 144***. The trial court conducted an evidentiary hearing on this issue and found no basis for disqualification.

Defendant argues that the prosecutor should have been disqualified because she was an essential witness. A prosecutor is not a necessary witness if the substance of the testimony can be elicited from other witnesses and the party seeking disqualification did not previously state an intent to call the prosecutor as a witness. *Id.*; see also People v Petri, 279 Mich App 407, 417; 760 NW2d 882 (2008).

The evidence at the pretrial evidentiary hearing did not establish that the prosecutor's pretrial involvement in the case made her a necessary witness. This case is distinguishable from ***Tesen, 276 Mich App at 136***, in which **[*22]** an assistant prosecutor took a lead role in interviewing a child to investigate a complaint that the child was sexually abused by his father before authorizing a warrant charging the father with multiple counts of first-degree CSC and other charges. In this case, the evidence did not show that the prosecutor had any role in investigating the charges. Defendant's reliance on the victim's preliminary examination testimony to support his claim that the prosecutor took an investigative role is misplaced. It is apparent from the victim's testimony that she had difficulty distinguishing between actions by herself and her mother. Ultimately, however, the victim clarified that it was her mother who telephoned the prosecutor and, based on that discussion, was directed to go to the police to make a report. This was consistent with the prosecutor's testimony at the evidentiary hearing that she spoke with an individual with the same name as the victim's mother, but did not talk directly with the victim. This brief discussion does not establish that the prosecutor assumed an investigative role in the case or would otherwise be a necessary witness.

Accordingly, the trial court did not clearly err **[*23]** in

finding that the prosecutor was not a necessary witness, nor did it err in denying defendant's motion for disqualification.

VII. SENTENCING

Defendant lastly raises several claims of sentencing error. Because defendant was convicted of an offense committed before January 1, 1999, the trial court properly declined to use the legislative sentencing guidelines and instead used the former judicial sentencing guidelines. MCL 769.34(2); see also People v Reynolds, 240 Mich App 250, 253; 611 NW2d 316 (2000).

Defendant argues that the trial court erred in scoring 25 points for offense variable 2 (OV 2) of the judicial sentencing guidelines. The scoring of the judicial sentencing guidelines was not an end in itself but rather a means to arrive at a proportionate sentence. People v Raby, 456 Mich 487, 496; 572 NW2d 644 (1998). Because the judicial guidelines did not have a legislative mandate, adherence to the guidelines was not required, and given that the judicial guidelines lacked the force of law, a guidelines error or miscalculated variable did not violate the law nor constitute legal error. *Id.* There was no cognizable claim for relief "'based on alleged misinterpretation of the guidelines, **[*24]** instructions regarding how the guidelines should be applied, or misapplication of guideline variables.'" 456 Mich at 497 (citation omitted). "'Thus, application of the guidelines state[d] a cognizable claim on appeal only where (1) a factual predicate [was] wholly unsupported, (2) a factual predicate [was] materially false, *and* (3) the sentence [was] disproportionate.'" 456 Mich at 497-498 (citation omitted; emphasis added).

In this case, the trial scored 25 points for OV 2, which permited a 25-point score where the victim sustains a "bodily injury." See Michigan Sentencing Guidelines (2d ed, 1988), p 26; see also People v Cathey, 261 Mich App 506, 511; 681 NW2d 661 (2004). The trial court relied on the victim's trial testimony that she received a bump on her head during the offense when defendant spun her over and put her onto the floor, causing her head to hit a screen dividing the bedroom. Because defendant does not dispute the facts determined by the trial court, but only the trial court's interpretation of, and the application of the facts to, OV 2, he has not established a cognizable basis for appellate relief.

Defendant also challenges the trial court's decision to depart from the guidelines **[*25]** range of 96 to 180 months and impose a minimum sentence of 20 years. A trial court was not obligated to impose a sentence within the judicial sentencing guidelines range, but it was required to articulate a basis for departure from the recommended range. People v Hegwood, 465 Mich 432, 438; 636 NW2d 127 (2001). We reviewed imposed sentences for an abuse of discretion. People v Milbourn, 435 Mich 630, 636; 461 NW2d 1 (1990). A given sentence constituted an abuse of discretion where it violated the principle of proportionality, requiring sentences to be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.*

Where there was a departure from the guidelines, an appellate court's first inquiry was whether the case involved circumstances that were inadequately embodied within variables used to score the guidelines. 435 Mich at 659-660. In the absence of such circumstances or factors, the appellate court was alerted "to the possibility that the trial court . . . violated the principle of proportionality[.]" 435 Mich at 660. "A court [could] justify an upward departure by reference to factors considered, but adjudged inadequately weighed, within the guidelines, **[*26]** as well as by introducing legitimate factors not considered by the guidelines." People v Castillo, 230 Mich App 442, 448; 584 NW2d 606 (1998). Ultimately, however, "the key test [was] whether the sentence [was] proportionate to the seriousness of the matter, not whether it depart[ed] from or adhere[d] to the guidelines' recommended range." Milbourn, 435 Mich at 661.

In this case, the trial court considered the factors set forth in People v Oliver, 242 Mich App 92, 98, 617 NW2d 721 (2000), in deciding whether to exceed the guidelines range. Those factors included "the severity and nature of the crime, the circumstances surrounding the criminal behavior, the defendant's attitude toward his criminal behavior, the defendant's social and personal history, and the defendant's criminal history, including subsequent offenses." *Id.*

The trial court discounted defendant's attitude toward his criminal behavior based on his right to maintain his innocence, but found that the severity and nature of the defendant's crime was reflected by both the legislative penalty and the victim's need for counseling. The trial court found that the offense was committed against a minor child, who was also a relative, **[*27]** in a secluded area. The court also determined that the crime partially fit the modus operandi used by defendant against the victim's aunt, and considered defendant's sexual offenses against the aunt in evaluating defendant's

recidivist tendencies.

This case is distinguishable from *People v Fisher (After Remand), 176 Mich App 316, 317-318; 439 NW2d 343 (1989)*, in which the trial court attempted to tailor a sentence to prevent the defendant's release from prison until after he exceeded the "age of violence." This Court found that such reasoning was an inappropriate basis for departure under *People v Fleming 428 Mich 408, 423 n 17; 410 NW2d 266 (1987)*, in which our Supreme Court disapproved of the use of status characteristics, such as age, as alone being used to depart from the guidelines. *Fisher, 176 Mich App at 318*. In this case, defendant's chance of recidivism was evaluated in light of his multiple offenses involving minors. See *People v Armstrong, 247 Mich App 423, 425; 636 NW2d 785 (2001)* (upward departure from legislative guidelines affirmed where the trial court did not err in finding that the need to protect children was a proper factor to consider in fashioning sentence).

We **[*28]** conclude that the trial court did not abuse its discretion in imposing a minimum sentence of 20 years. Considering the seriousness of the circumstances surrounding the offense and the offender, the sentence does not violate the principle of proportionality.

Lastly, we reject defendant's claim that the trial court was required to state substantial and compelling reasons for its departure from the guidelines range, or explain the extent of its departure. These obligations apply to a departure sentence under the legislative guidelines. *MCL 769.34(3)*; *People v Smith, 482 Mich 292; 754 NW2d 284 (2008)*. Under the former judicial guidelines, a trial court was only required to state "the aspects of the case that . . . persuaded the judge to impose a sentence outside the recommended minimum range." Michigan Sentencing Guidelines Manual (2d ed, 1988), p 7. In this case, the trial court explained its reasons for departing from the guidelines. Because defendant has not demonstrated that the sentence imposed is disproportionate, he is not entitled to resentencing. *Raby, 456 Mich at 497-498*.

Affirmed.

/s/ William B. Murphy

/s/ Jane E. Markey

/s/ Michael J. Riordan

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ATTACHMENT TWO

People v. Petri

Court of Appeals of Michigan

May 6, 2008, Submitted ; May 15, 2008, Decided

No. 275019

Reporter
279 Mich. App. 407 *; 760 N.W.2d 882 **; 2008 Mich. App. LEXIS 1340 ***

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v MARK ROBERT PETRI, Defendant-Appellant.

Subsequent History: [***1] The Publication Status of this Document has been Changed by the Court from Unpublished to Published June 16, 2008.

Application denied by *People v. Petri, 482 Mich. 1186; 758 N.W.2d 562; 2008 Mich. LEXIS 2591 (Mich., Dec. 30, 2008)*

Prior History: Livingston Circuit Court, Stanley J. Latreille, J. LC No. 06-015781-FH.

Core Terms

defense counsel, trial court, sentence, disqualify, interview, ineffective, guidelines, convictions, grooming, criminal sexual conduct, minimum sentence, departure, probation, sexual, forensic, score, defendant argues, second-degree, argues, bottle, depart

Case Summary

Procedural Posture

Defendant appealed a judgment of the Livingston Circuit Court (Michigan) that convicted him of second-degree criminal sexual conduct in violation of *MCL 750.520c(1)(a)* and sentenced him as a second habitual offender under *MCL 769.10*, arguing that his counsel was ineffective for failing to challenge the admissibility of his two prior conviction for second-degree criminal sexual conduct and that the circuit court erred in sentencing him.

Overview

On review, the court held that defense counsel was not ineffective for failing to challenge the admissibility of prior convictions under *MRE 404(b)*. The admissibility of the evidence did not depend on *MRE 404(b)* because the prosecutor also relied on *MCL 768.27a* as authority for admission. When a defendant was charged with second-degree criminal sexual conduct against a minor, evidence that he committed another crime of second-degree criminal sexual conduct against a minor was admissible under *MCL 768.27a*, independent of *MRE 404(b)*, even if there was no conviction for the other crime because defendant's propensity to commit criminal sexual behavior could be relevant and admissible under the statutory rule to demonstrate the likelihood of the defendant committing criminal sexual behavior toward another minor. The court further rejected the argument that the circuit court erred in imposing a minimum sentence that was a 71-month departure from the sentencing guidelines recommended range. The circuit court's determination that the guidelines failed to adequately consider the similar nature of defendant's pattern of felony crimes and the aggravating circumstances justified the departure.

Outcome
The judgment of conviction and the sentence imposed by the circuit court were affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of Review > Plain Error > General Overview

HN1[] **Standards of Review, Plain Error**

Where a defendant does not move for a new trial or Ginther hearing, appellate review is limited to mistakes apparent on the record.

Criminal Law & Procedure > ... > Reviewability > Waiver > Triggers of Waivers

HN2[] **Waiver, Triggers of Waivers**

A defendant has waived an issue if the record on appeal does not support the defendant's assignments of error.

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Effective Assistance of Counsel

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Ineffective Assistance of Counsel

HN3[] **Clearly Erroneous Review, Effective Assistance of Counsel**

An ineffective assistance of counsel claim is a mixed question of law and fact. A trial court's findings of fact, if any, are reviewed for clear error, and the ultimate constitutional issue arising from an ineffective assistance of counsel claim is reviewed by the appellate court de novo.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

Evidence > Burdens of Proof > Allocation

Evidence > Inferences & Presumptions > Presumptions

HN4[] **Effective Assistance of Counsel, Trials**

Effective assistance of counsel is presumed, and defendant bears the burden of proving otherwise. To succeed on a claim of ineffective assistance of counsel, the defendant must show that, but for an error by counsel, the result of the proceedings would have been different and that the proceedings were fundamentally unfair or unreliable. The defendant bears a heavy burden on these points. Defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. The reviewing court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight.

Criminal Law & Procedure > ... > Sexual Assault > Abuse of Children > General Overview

Evidence > Admissibility > Conduct
Evidence > Prior Acts, Crimes & Wrongs

HN5[] **Sexual Assault, Abuse of Children**

When a defendant is charged with second-degree criminal sexual conduct against a minor, evidence that the defendant committed another crime of second-degree criminal sexual conduct against a minor may be admitted under *MCL 768.27a*, independent of *MRE 404(b)*, even if there was no conviction for the other crime. The evidence may be considered for its bearing on any matter to which it is relevant. *MCL 768.27a*. A defendant's propensity to commit criminal sexual behavior can be relevant and admissible under the statutory rule to demonstrate the likelihood of the defendant committing criminal sexual behavior toward another minor.

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

HN6[] **Exclusion of Relevant Evidence, Confusion,**

Prejudice & Waste of Time

Under *MRE 403*, evidence is admissible where its probative value vastly outweighs the prejudicial value.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

HN7 **Effective Assistance of Counsel, Trials**

A failed strategy does not constitute deficient performance.

Criminal Law & Procedure > Appeals > Procedural Matters > Briefs

HN8 **Procedural Matters, Briefs**

Where a defendant has not supported his argument with citations to the record as required by *MCR 7.212(C)(7)*, the reviewing court need not consider his argument. Defendant may not leave it to the reviewing court to search for a factual basis to sustain or reject his position.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

Evidence > ... > Testimony > Examination > General Overview

HN9 **Effective Assistance of Counsel, Trials**

The questioning of witnesses is presumed to be a matter of trial strategy.

Criminal Law & Procedure > Trials > Jury Instructions > Curative Instructions

HN10 **Jury Instructions, Curative Instructions**

Jurors are presumed to follow instructions, and instructions are presumed to cure most errors.

Evidence > ... > Preliminary Questions > Admissibility of Evidence > General Overview

HN11 **Preliminary Questions, Admissibility of Evidence**

That the Michigan Rules of Evidence preclude the use of evidence for one purpose does not render the evidence inadmissible for other purposes.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

HN12 **Effective Assistance of Counsel, Trials**

Counsel need not make a futile objection.

Criminal Law & Procedure > ... > Sexual Assault > Abuse of Children > General Overview

Evidence > ... > Testimony > Expert Witnesses > Qualifications

HN13 **Sexual Assault, Abuse of Children**

A police witness can be qualified as an expert based on experience or training in a child sexual abuse cases. *MRE 702*.

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Conclusions of Law

Evidence > Burdens of Proof > Allocation

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Disqualification & Recusal

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Findings of Fact

HN14 **De Novo Review, Conclusions of Law**

A trial court's findings of fact are reviewed for clear error and its application of the law to the facts is reviewed de novo. A defendant seeking to disqualify a prosecutor as a necessary witness bears the burden of proof. A prosecutor is not a necessary witness if the substance of the testimony can be elicited from other witnesses,

and the party seeking disqualification did not previously state an intent to call the prosecutor as a witness.

Legal Ethics > Client Relations > Conflicts of Interest

HN15[] Client Relations, Conflicts of Interest

Michigan lawyers are governed by the Michigan Rules of Professional Conduct, under which a lawyer generally cannot simultaneously be a witness and an advocate at trial.

Legal Ethics > Client Relations > Conflicts of Interest

HN16[] Client Relations, Conflicts of Interest

See MRPC 3.7(a).

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Disqualification & Recusal

HN17[] Pretrial Motions & Procedures, Disqualification & Recusal

The timeliness of the motion to disqualify a prosecutor may be considered in determining the likelihood that the defendant's motion is made in good faith and not just for the purpose of gaining a tactical advantage. It can cause a hardship by disqualifying the prosecutor most familiar with the case and requiring duplicative work by a substitute prosecutor.

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Conclusions of Law

Criminal Law & Procedure > ... > Sentencing Guidelines > Departures From Guidelines > General Overview

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > General Overview

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Sentences

HN18[] De Novo Review, Conclusions of Law

In reviewing a trial court's grounds for departing from the sentencing guidelines, the appellate court reviews for clear error the trial court's factual finding that a particular factor in support of departure exists. However, whether the factor is objective and verifiable is a question of law that is reviewed de novo. Finally, the appellate court reviews for an abuse of discretion the trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence. A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes.

Criminal Law & Procedure > ... > Sentencing Guidelines > Departures From Guidelines > General Overview

HN19[] Sentencing Guidelines, Departures From Guidelines

A trial court shall not base a departure from the sentencing guidelines recommended range on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record that the characteristic has been given inadequate or disproportionate weight. MCL 769.34(3)(b).

Criminal Law & Procedure > ... > Sentencing Guidelines > Departures From Guidelines > General Overview

HN20[] Sentencing Guidelines, Departures From Guidelines

The requirement that a trial court base its decision to depart from the sentencing guidelines recommended range on objective and verifiable facts, i.e., actions and occurrences external to the minds of those involved in the decision and capable of being confirmed, does not preclude the court from drawing inferences about defendant's behavior from objective evidence.

Criminal Law & Procedure > Sentencing > General Overview

HN21 **Criminal Law & Procedure, Sentencing**

The U.S. Supreme Court's Blakely ruling does not apply to Michigan's indeterminate sentencing regime.

Counsel: Michael A. Cox, Attorney General, Thomas L. Casey, Solicitor General, David L. Morse, Prosecuting Attorney, and William J. Vailliencourt, Jr., Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by Brandy Y. Robinson) for the defendant.

Judges: Before: Wilder, P.J., and O'Connell and Whitbeck, JJ.

Opinion

[884]** **[*409]** PER CURIAM.

Following a jury trial, defendant was convicted of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (sexual contact with a person under 13), and was sentenced as a second-offense habitual offender, MCL 769.10, to imprisonment for a minimum of 14 years and 10 months and a maximum of 22 1/2 years. He appeals of right. We affirm.

I

The victim and her parents met defendant on July 5, 2005, during a family outing. Defendant then began arriving at the victim's house for breakfast when her father was leaving for work. Defendant was usually around the victim and her siblings during his visits, on one occasion jumping into bed with the victim and tickling her to wake her up. On more than one occasion he pinched the victim's bottom while they were swimming in a lake.

[885]** The incident that led to defendant's conviction occurred on July 14, 2005, while the victim's mother and defendant were helping a friend move to a new residence. The victim and a younger sister rode with **[***2]** defendant in his truck. The victim was seated next to defendant in the front passenger seat, while her sister sat behind them. Defendant stopped at a gas station and bought a bottle of Mountain Dew. After returning to the truck, defendant, while giving the 12-year-old victim a strange smile, used the bottle to open the victim's closed legs and then pushed it up her jean skort (a skirt with shorts stitched underneath) so that the bottle cap touched the clothing covering her genital area. The victim waited a few minutes before removing the bottle. She later told her sister and mother what defendant did with the bottle. The victim's mother reported the incident to the Livingston County Sheriff's **[*410]** Department, which investigated. During an interview conducted by Detective Scott Domine after his arrest, defendant denied that he was ever left alone with the victim and her sister.

II

Defendant now argues that he was denied the effective assistance of counsel at trial because trial counsel failed to raise several evidentiary objections. ***HN1*** Because defendant did not move for a new trial or *Ginther* [1] hearing, our review is limited to mistakes apparent on the record. People v Rodgers, 248 Mich App 702, 713-714; 645 NW2d 294 (2001).

HN2 A **[***3]** defendant has waived the issue if the record on appeal does not support the defendant's assignments of error. People v Sabin (On Second Remand), 242 Mich App 656, 658-659; 620 NW2d 19 (2000). ***HN3*** A claim of ineffective assistance of counsel is a mixed question of law and fact. People v LeBlanc, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact, if any, are reviewed for clear error, and this Court reviews the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo. *Id.*

HN4 Effective assistance of counsel is presumed and defendant bears the burden of proving otherwise. LeBlanc, supra at 578. To succeed on a claim of ineffective assistance of counsel, the defendant must show that, but for an error by counsel, the result of the proceedings would have been different, and that the proceedings were fundamentally unfair or unreliable. People v Odom, 276 Mich App 407, 415; 740 NW2d 557 (2007). The defendant bears a "heavy burden" on these points. People v Carbin, 463 Mich 590, 599; 623 NW2d

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

884 [*411] (2001). Defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. People v Riley (After Remand), 468 Mich 135, 140; 659 NW2d 611 (2003). [***4] "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." People v Garza, 246 Mich App 251, 255; 631 NW2d 764 (2001).

Defendant first argues that defense counsel was ineffective for failing to challenge the admissibility of evidence of his two prior convictions for second-degree criminal sexual conduct under MRE 404(b), which limits the admission of a defendant's other crimes, wrongs, or acts. We disagree. The admissibility of the evidence did not depend on MRE 404(b), because the prosecutor also relied on MCL 768.27a as authority to admit it. HN5[↑] When a defendant is charged with second-degree criminal sexual conduct against a minor, evidence that the defendant committed another crime of second-degree criminal sexual [**886] conduct against a minor may be admitted under MCL 768.27a, independent of MRE 404(b), even if there was no conviction for the other crime. See People v Pattison, 276 Mich App 613, 618-619; 741 NW2d 558 (2007). The evidence "may be considered for its bearing on any matter to which it is relevant." MCL 768.27a. A defendant's propensity to commit criminal sexual behavior can be relevant and [***5] admissible under the statutory rule to demonstrate the likelihood of the defendant committing criminal sexual behavior toward another minor. Pattison, supra at 619-620.

The trial court's remarks at trial indicate that there were off-the-record discussions with the prosecutor and defense counsel regarding the admissibility of defendant's two prior convictions of second-degree criminal [*412] sexual conduct involving minors. Although defense counsel did not object to the evidence on the record, it is clear from the trial court's remarks that it considered the evidence admissible under MCL 768.27a. The trial court also applied HN6[↑] MRE 403, stating that the probative value of such evidence "vastly outweighs" the prejudicial value, calling for its admission. Defendant has failed to show that an on-the-record objection by defense counsel, based on either MRE 404(b) or MCL 768.27a, would have caused the trial court to exclude the evidence.

Further, we agree with the prosecution's argument that the evidence was used by the defense. Defense counsel suggested to the jury in closing argument that the discovery of defendant's status as a convicted sex offender caused the victim's mother to perceive defendant's innocent [***6] conduct as a sexual assault. Defense counsel argued that the victim's mother was "in the front lines" of what happened, and concluded his closing argument by suggesting, "It's easy to--to point the finger at him and to agree that what he did was shameful--his past is shameful. . . . It's so dangerous in this case because of his past. That you would overlook something that was otherwise innocent that became something else, but I think that's exactly what happened in this case."

Defendant has failed to overcome the presumption that defense counsel engaged in sound trial strategy by not making an on-the-record objection to evidence that was ultimately used by the defense. Defense counsel stipulated the admission of a certified copy of the convictions during the victim's mother's testimony regarding information that she acquired from defendant about him being a registered sex offender. HN7[↑] A failed strategy does not constitute deficient performance. [*413] People v Kevorkian, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). In any event, defendant's claim of ineffective assistance of counsel on this ground cannot succeed because there is no reasonable probability that an objection [***7] would have made a difference in the outcome.

Defendant also argues that defense counsel was ineffective by not adequately cross-examining Detective Domine to dispel any suspicion that defendant was involved in "scoping out" a day-care center. HN8[↑] Because defendant has not supported his argument with citations to the record, as required by MCR 7.212(C)(7), we need not consider this argument. "Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position." People v Norman, 184 Mich App 255, 260; 457 NW2d 136 (1990). But even if we were to overlook this deficiency, appellate relief on this ground would not be warranted.

HN9[↑] The questioning of witnesses is presumed to be a matter of trial strategy. People v Rockey, 237 Mich App 74, 76; 601 NW2d 887 (1999). Here, defense counsel made an initial hearsay objection [**887] to the victim's mother giving testimony regarding what a friend told her about an incident at a day-care center in Pinckney. The trial court overruled the objection, because the prosecutor was not offering the evidence for a substantive purpose (to prove the truth of the matter asserted), but rather to show how the information affected the victim's mother. [***8] The prosecutor was

cautioned not to suggest that defendant committed the act, and the prosecutor responded by using leading questions to question the victim's mother. The victim's mother testified that information about the day-care incident caused her to contact defendant's probation agent, who told her to contact Detective Domine, which in turn led her to **[*414]** report the incident involving the victim to Detective Domine. Defense counsel later elicited testimony from Detective Domine that he received information from the Pinckney Police Department that defendant had an alibi for the day-care-center incident.

Defendant's argument is cursory. And we are not persuaded that defense counsel's failure to further cross-examine Detective Domine on the fact that defendant was not linked to the day-care incident, or to emphasize the matter more strongly to the jury, constituted deficient performance or caused the requisite prejudice. This is especially true given that defense counsel established that defendant had an alibi for the incident.

Defendant next argues that defense counsel was ineffective for stipulating the admission of a certified copy of his prior convictions. Defendant argues that a **[***9]** simple verbal stipulation would have been sufficient to inform the jury about the prior convictions. Alternatively, defendant argues that defense counsel should have requested that the documents be redacted to exclude information that he was sentenced to probation and was not allowed to have unsupervised contact with children under 16 years of age. Limiting our review to the record, defendant has not met his burden of showing either deficient performance or prejudice.

Although we agree that penalty is not an appropriate consideration for the jury, the jury was instructed that "[p]ossible penalty should not influence your decision." ***HN10***[↑] Jurors are presumed to follow instructions, and instructions are presumed to cure most errors. *People v Abraham, 256 Mich App 265, 279; 662 NW2d 836 (2003)*.

Further, there is no evidence that the jury was informed of the possible penalty; it was only informed of the sentences that defendant received for prior crimes. **[*415]** Considering that the victim's mother testified that she spoke with defendant's probation agent, the jury could have reasonably inferred that defendant was on probation, regardless of the content of the exhibit. Defense counsel evidently made a strategic **[***10]** decision to have the jury see the entire judgment of sentence, rather than risk the jury speculating about the applicable conviction for the probationary sentence or the terms of probation. The information that defendant was not permitted to have unsupervised contact with children was consistent with defense counsel's closing argument that it did not make sense that defendant would take the children into his truck and assault one of them.

And while the prosecutor used this information in her closing argument to suggest that defendant lied to Detective Domine, because of concern that his probation would be revoked if he told the truth, we are not persuaded that the argument was improper. ***HN11***[↑] That our rules of evidence preclude the use of evidence for one purpose does not render the evidence inadmissible for other purposes. *People v Sabin (After Remand), 463 Mich 43, 56; 614 NW2d 888 (2000)*. Therefore, we reject defendant's claim **[**888]** that defense counsel was ineffective by not objecting to the prosecutor's argument. ***HN12***[↑] Counsel need not make a futile objection. *Rodgers, supra at 715*.

Finally, defendant argues that defense counsel was ineffective for failing to object to Detective Domine's testimony **[***11]** about "grooming." We disagree. Detective Domine did not testify that defendant engaged in "grooming"; only that he was concerned that there might have been grooming going on, based on what he was told by the victim's mother, and that this was a factor in his decision to go forward with an investigation and prosecution. Although Detective Domine also **[*416]** provided a definition of "grooming," we reject defendant's position that the definition required expert testimony.

In *People v Ackerman, 257 Mich App 434, 443-445; 669 NW2d 818 (2003)*, this Court upheld the admissibility of a psychotherapist's expert testimony about patterns of behavior exhibited by child sex abusers. Unlike in *Ackerman*, Detective Domine was attempting to explain his decision to move forward with an investigation. Detective Domine did not testify regarding typical patterns of behavior, but only described a process in his definition of "grooming" where "you start with small things with children and they progress to greater things. Touching can progress to more intense sexual contact later on."

Because there is no indication that Detective Domine was offering a technical or scientific analysis of the behavior of child sex **[***12]** abusers, it was not necessary that the prosecutor qualify Detective Domine

as an expert. Cf., e.g., *People v McLaughlin, 258 Mich App 635, 657-658; 672 NW2d 860 (2003)* (lay opinion admissible under *MRE 701* where it was largely based on common sense and did not involve highly specialized knowledge).

Even assuming that it was necessary that Detective Domine be qualified as an expert witness to give his brief testimony regarding "grooming," any error was harmless, because Detective Domaine would have qualified. Detective Domine testified that he had 15 years of experience with the Livingston County Sheriff's Department, and received training in the forensic interviewing of children. ***HN13***[↑] A police witness can be qualified as an expert on the basis of experience or training in child sexual abuse cases. *MRE 702*; *People v Dobek, 274 Mich App 58, 76-79; 732 NW2d 546 (2007)*. In any event, we conclude that expert testimony was not necessary to **[*417]** assist the jury in evaluating the evidence of the events leading up to the July 14, 2005, incident underlying the charge. Finally, because no reasonable probability exists that Detective Domine's brief testimony regarding "grooming" affected the outcome of the trial, **[***13]** defendant's claim of ineffective assistance of counsel fails.

III

Defendant next argues that the trial court erred by denying his motion to disqualify the prosecutor from trying the case on the ground that she had interviewed the victim and was therefore a necessary witness. ***HN14***[↑] We review the trial court's findings of fact for clear error and its application of the law to the facts de novo. ***People v Tesen, 276 Mich App 134, 141; 739 NW2d 689 (2007)***. A defendant seeking to disqualify a prosecutor as a necessary witness bears the burden of proof. ***Id. at 144***. A prosecutor is not a necessary witness if the substance of the testimony can be elicited from other witnesses, and the party seeking disqualification did not previously state an intent to call the prosecutor as a witness. *Id.*

HN15[↑] Michigan lawyers are governed by the Michigan Rules of Professional Conduct **[**889]** (MRPC), under which a lawyer generally cannot simultaneously be a witness and an advocate at trial. *MRPC 3.7(a)* provides:

> ***HN16***[↑] *A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness* except where:
> (1) the testimony relates to an uncontested issue;
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) disqualification of the lawyer would work **[***14]** substantial hardship on the client. [Emphasis added.]

[*418] In *Tesen,* a prosecutor, in investigating a complaint that the defendant sexually abused his son, took a lead role by conducting a forensic interview of the son [2] while other team members observed all or part of the interview. ***Tesen, supra at 135-136***. The next day, the prosecutor authorized a warrant charging the defendant with first-degree criminal sexual conduct and other charges. ***Id. at 136***. The defendant moved to disqualify the prosecutor before the preliminary examination, asserting that he reasonably intended to call him as a witness. *Id.* The district court denied the motion, but the circuit court later granted a defense motion to disqualify the prosecutor. ***Id. at 139***. This Court affirmed the disqualification order, finding no clear error in the circuit court's determination that the prosecutor was likely to be a necessary witness at trial. ***Id. at 135***.

We find ***Tesen*** distinguishable, because here defendant did not make **[***15]** a timely demand to disqualify the prosecutor, nor did he demonstrate that the prosecutor would be a necessary witness at trial. The issue was first raised at defendant's preliminary examination. Defense counsel acknowledged that the prosecutor was a highly qualified, trained forensic interviewer, and that another trained forensic interviewer also observed the interview. The district court did not disqualify the prosecutor, but indicated that its decision could change, and that defense counsel would have a right to cross-examine the prosecutor if there was information that only she possessed. Any notes of the interview of the victim were to be given to defense counsel.

Ultimately, only the victim and her mother testified at the preliminary examination. After defendant was **[*419]** bound over for trial in the circuit court, defendant's counsel withdrew. Much later, substitute counsel filed a motion to disqualify the prosecutor. The prosecutor filed a response that, among other things, challenged defense counsel's claim that no hardship would result if she were disqualified. The trial court denied the motion, ruling that the prosecutor was not a necessary witness

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[2] The goal of the forensic interview was to obtain a statement from the child "in a developmentally sensitive, unbiased, and truth-seeking manner" to support accurate and fair decision-making. ***Tesen, supra at 136***.

because other witnesses could bring forth the information **[***16]** at issue, and ruling that, because the motion was on the eve of trial, granting the motion would be prejudicial to the prosecution.

We affirm the trial court's reasoning. The trial court appropriately questioned the timeliness of the motion. ***HN17***[↑] "[T]he timeliness of the motion may be considered in determining the likelihood that the defendant's motion is made in good faith and not just for the purpose of gaining a tactical advantage." *People v Paperno, 54 NY2d 294, 303; 429 NE2d 797; 445 NYS2d 119 (1981)*. It can cause a hardship by disqualifying the prosecutor most familiar with the case and requiring duplicative work by a substitute prosecutor. *United States v Johnston, 690 F2d 638, 645 (CA 7, 1982)*.

[890]** Further, we agree with the trial court's determination that defense counsel failed to establish that the prosecutor was a necessary witness. Although given an opportunity to identify a particular issue on which the prosecutor would be a necessary witness, the gist of defense counsel's argument was that any prosecutor should be automatically disqualified if he or she becomes part of an interview team or conducts a forensic interview. Because defense counsel failed to offer any particularized basis **[***17]** for concluding that the prosecutor's testimony would be material to the defense, we uphold the trial court's denial of the motion to disqualify.

[*420] The trial court's decision did not deprive defendant of a substantial defense. Defense counsel presented evidence at trial regarding the prosecutor's interview through his cross-examination of Detective Domine. Defendant has not identified any issue that actually arose at trial, or was raised by defense counsel on the basis of the trial evidence, that demonstrates a need for the prosecutor's testimony to support the defense. The right to present a defense may be limited by rules of procedure and evidence designed to ensure fairness and reliability. *People v Toma, 462 Mich. 281, 294; 613 N.W.2d 694 (2000)*. Because we find no error in the trial court's ruling not to disqualify the prosecutor, and defendant has not demonstrated that he was deprived of his right to present a substantial defense at trial, reversal is denied.

IV

Next, defendant seeks to set aside his minimum sentence of 14 years and 10 months. [3] Defendant argues that the trial court erred by imposing a minimum sentence of 178 months, a 71-month (about a six-year) departure from the sentencing guidelines recommended range of 43 to 107 **[***18]** months for the minimum sentence. As explained in *People v Young, 276 Mich App 446, 448; 740 NW2d 347 (2007)*:

> ***HN18***[↑] In reviewing a trial court's grounds for departing from the sentencing guidelines, this Court reviews for clear error the trial court's factual finding that a particular factor in support of departure exists. *People v Babcock, 469 Mich 247, 264; 666 NW2d 231 (2003)*. However, whether **[*421]** the factor is objective and verifiable is a question of law that this Court reviews de novo. *Id.* Finally, this Court reviews for an abuse of discretion the trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence. *Id. at 264-265*. A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes. *Id. at 269*.

The guidelines range **[***19]** was based on a score of 60 total prior record variable (PRV) points and 45 total offense variable (OV) points. A score of 50 points for PRV 1 reflected that defendant had two prior high-severity felony convictions, *MCL 777.51(1)(b)*, and a score of 10 points for PRV 6 reflected that defendant was on probation, *MCL 777.56(1)(c)*. A score of 10 points each for OV 4 and OV 10 reflected that the victim suffered serious psychological injury requiring professional treatment, *MCL 777.34(1)(a)*, and that defendant exploited the victim's youth, *MCL 777.40(1)(b)*. Finally, the score of 25 **[**891]** points for OV 13 reflected that the "offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." *MCL 777.43(1)(b)*.

We agree with defendant that the trial court's reason for departure reflects some of the characteristics already considered in OV 13 and PRV 1. But this is not necessarily fatal to the minimum sentence imposed. ***HN19***[↑] A trial court "shall not base a departure on an

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[3] Although it appears that the trial court intended to impose the statutory maximum sentence of 15 years, the trial court was dissuaded from doing so by the prosecutor's erroneous calculation that two-thirds of the 22 1/2 year maximum was 14 years and 10 months.

offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range *unless the court finds from the facts contained in the court record . . . [***20] that the characteristic has been given inadequate or disproportionate weight.*" MCL 769.34(3)(b) (emphasis added). Here, the trial court's determination that the guidelines failed to adequately consider the similar nature of defendant's pattern of **[*422]** felony crimes, and the aggravating circumstances, satisfied the exceptions permitted by statute.

HN20[↑] The requirement that the trial court base its decision on objective and verifiable facts--i.e., actions and occurrences external to the minds of those involved in the decision and capable of being confirmed, *People v Abramski, 257 Mich App 71, 74; 665 NW2d 501 (2003)*-did not preclude the court from drawing inferences about defendant's behavior from objective evidence. For instance, in *People v Claypool, 470 Mich 715, 718; 684 NW2d 278 (2004)*, our Supreme Court determined that if it could be objectively and verifiably shown that police conduct or some other precipitating cause altered a defendant's intent, the altered intent could be considered by a sentencing judge as a basis for a downward departure. Here, while the trial court described defendant's conduct as "grooming" and "stalking," it reached these conclusions on the basis of objective **[***21]** evidence that defendant arrived at the victim's home after her father left the home, that defendant crawled into her bed, and that defendant pinched the victim when they were swimming. The trial court drew reasonable conclusions about defendant's actual behavior to depart from the guidelines, and we find no error in its consideration of these aggravating circumstances as a basis for exceeding the guidelines range.

We are also satisfied that the trial court's observations regarding the reversal of convictions of first-degree criminal sexual conduct in another case did not affect its decision to depart from the guidelines range, nor did it affect the extent of the departure. We find no support for defendant's suggestion that the trial court improperly assumed that he committed the prior offenses. Examined in context, the trial court's remarks indicate only that it was summarizing defendant's criminal history. Therefore, resentencing on this ground is not warranted. *Babcock, supra at 271-272*.

[*423] In sum, defendant has not established sufficient basis for disturbing the trial court's determination that substantial and compelling reasons existed to depart from the guidelines recommended range for **[***22]** the minimum sentence. Further, the degree of departure was not an abuse of discretion. To be sure, this case presented a difficult sentencing decision. But we conclude that a minimum sentence of 178 months is within the range of reasonable and principled outcomes. *Babcock, supra at 268-269*; *Young, supra at 448*. The sentence is proportionate to the seriousness of defendant's crimes, past and present. *Babcock, supra at 262*.

V

Finally, defendant argues that he is entitled to resentencing, because the trial court enhanced the sentence on the basis of facts neither admitted by defendant nor proven to a jury beyond a reasonable doubt. Defendant relies on the *Due Process Clause*, **[**892]** as well as the *Fourth* and *Sixth amendments to the United States Constitution*. We disagree.

Defendant relies on *Blakely v Washington, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004)*, contending that the trial court erred by relying on facts not found by the jury when scoring the sentencing guidelines. But defendant concedes that he did not preserve his argument. In any event, defendant's argument lacks merit, because HN21[↑] *Blakely* does not apply to Michigan's indeterminate sentencing regime. See*People v McCuller, 479 Mich 672, 694-695; 739 NW2d 563 (2007)*.

VI

The **[***23]** trial court did not infringe defendant's constitutional right to the effective assistance of counsel. The **[*424]** trial court did not abuse its discretion in denying defendant's eleventh-hour motion to disqualify the prosecutor. The trial court did not abuse its discretion in imposing a minimum sentence in excess of the range recommended by the statutory sentencing guidelines, and did not impose a disproportionate sentence. Finally, the trial court's sentence did not violate defendant's federal *Sixth Amendment* rights.

Affirmed.

/s/ Kurtis T. Wilder

/s/ Peter D. O'Connell

/s/ William C. Whitbeck

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ATTACHMENT THREE

People v. Westbrook

Court of Appeals of Michigan

March 27, 2018, Decided

No. 335161

Reporter
2018 Mich. App. LEXIS 945 *; 2018 WL 1512397

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v SHANE RUSSELL WESTBROOK, Defendant-Appellant.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Subsequent History: Leave to appeal denied by *People v. Westbrook, 2018 Mich. LEXIS 2440 (Mich., Dec. 5, 2018)*

Prior History: **[*1]** Jackson Circuit Court. LC No. 15-005088-FC.

Core Terms

defense counsel, interview, other-acts, witnesses, ineffective, investigate, trial court, sexual assault, character evidence, termination, discovery, argues, counsel's failure, unfair prejudice, parental rights, plain error, disqualified, prejudicial, misconduct, assaults, details, futile, reasonably probable, substantial rights, pretrial notice, sexual abuse, fair trial, outweighed, pedophile, verbally

Counsel: For PEOPLE OF MI, PLAINTIFF-APPELLEE: JERROLD SCHROTENBOER.

For SHANE RUSSELL WESTBROOK, DEFENDANT-APPELLANT: JEFFREY MICHAEL SCHRODER.

Judges: Before: O'CONNELL, P.J., and HOEKSTRA and SWARTZLE, JJ.

Opinion

PER CURIAM.

Following a jury trial, defendant was convicted of five counts of first-degree criminal sexual conduct (CSC-I), *MCL 750.520b(1)(a)*, and two counts of second-degree criminal sexual conduct (CSC-II), *MCL 750.520c(1)(a)*. Defendant was found not guilty of two additional counts of CSC-I. On appeal, defendant challenges the prosecutor's involvement in investigating the alleged assault, evidence allegedly discovered as a result of that involvement, and his counsel's assistance in navigating these issues. We affirm.

I. BACKGROUND

This case involves defendant sexually assaulting his former girlfriend's daughter, TS, when the victim was 5 to 11 years old. The charges against defendant stem from the victim's disclosure of the assaults when the victim was 22 years old. TS did not disclose the sexual assaults to anyone for years until after her half-sister, SW, disclosed that defendant also sexually assaulted her and Child Protective Services (CPS) became involved. TS and SW share the same biological **[*2]**

mother, Shane Rose.[1] Defendant is SW's biological father and lived with TS when he and Shane were together. The two separated in 2005.

After SW reported the assault, a detective was assigned to investigate the case and, eventually, CPS sought to terminate defendant's parental rights. Sometime between the filing of the termination petition and the filing of the criminal charges in this case, TS met with the prosecutor without the detective being present. TS and the prosecutor met for approximately one hour and appear to have discussed defendant's alleged abuse of TS, although the exact details of this conversation are not apparent from the record.

Defendant subsequently terminated his parental rights to SW and two other children, thereby ending the termination case. Defendant was then charged criminally for the sexual assault of TS. It appears that TS met again with the prosecutor before trial to go over her testimony and discuss the legal definition of "penetration." Before trial, TS also had a 15-minute phone conversation with the detective and met briefly with the detective in-person so that the detective could pull evidence off of her phone. Additionally, one week before trial, SW's **[*3]** stepmother, Jessica Westbrook, met with the prosecutor outside of the presence of the detective and disclosed details regarding defendant's alleged sexual assault of a third victim, AS.

At a pretrial hearing, defense counsel brought to the trial court's attention a potential issue regarding the prosecutor acting as an investigator before any charges were filed against defendant. Defense counsel requested the prosecutor's notes from her interviews with TS and Jessica, arguing that it was evidence required to be turned over during discovery. The prosecutor refused to turn over her notes, claiming that defense counsel was not entitled to them because they were protected work product. Defense counsel noted that he anticipated filing a motion to have the prosecutor's office recused from the case; however, no such motion was ever filed. Similarly, defense counsel did not place the prosecutor on his witness list. Defense counsel raised the issue again on the first day of trial. The trial court did not force the prosecutor to turn over her notes to defendant, but it noted that defense counsel could continue to raise the objection during trial. The prosecution provided pretrial notice of its **[*4]** intent to admit other acts of sexual conduct involving a minor, but did not provide pretrial notice of its intent to admit other-acts evidence under MRE 404(b).

At trial, TS testified that defendant sexually assaulted her nine times when she was 5 to 11 years old. According to TS, defendant touched her vagina with his fingers, digitally penetrated her vagina, penetrated her vagina with his penis, and attempted to penetrate her anus with his penis. TS testified that, on multiple occasions, the assaults caused her to bleed. According to TS, defendant told her that, if she told anyone about the assaults, defendant would hurt her and her sisters. SW and AS testified, under MCL 768.27a, that defendant sexually assaulted them.

Several other pieces of other-acts evidence were also admitted at trial. A CPS investigator testified regarding the termination petition and defendant's voluntary termination of his parental rights. Shane testified that defendant would cheat on her during their relationship and that numerous custody battles followed their split. TS testified that defendant would verbally abuse her and AS and hit both of them with a belt. TS also testified that defendant duct-taped her and AS and that defendant **[*5]** put AS in a dog cage. Jessica testified that defendant confessed to her that he had a sexual encounter with AS and that the experience was "exhilarating." Jessica also testified that she and defendant would use duct tape during sex.

Defendant objected to the evidence that he duct-taped TS, that Jessica and defendant used duct tape during sex, that defendant hit TS and AS with a belt, and that defendant put AS in a dog cage. The trial court found each of these pieces of evidence relevant, but did not perform a prejudice analysis. Defendant did not contemporaneously object to any lack of pretrial notice, nor did the trial court determine whether pretrial notice could be excused for good cause. Defendant did not object to the remaining other-acts evidence. Through cross-examination, defense counsel identified several pieces of evidence that were not reported to the detective: (1) TS experienced bleeding following the alleged assaults; (2) defendant would duct-tape TS and AS; (3) defendant put AS in a dog cage; (4) defendant threatened TS; and (5) defendant confessed to Jessica that he had a sexual encounter with AS.

A jury found defendant guilty of the above offenses. The trial court sentenced **[*6]** defendant to concurrent terms of 25 to 50 years of imprisonment for the CSC-I convictions and six to ten years of imprisonment for the

[1] Because of the shared last name and familial relationships, we will use first names when referring to defendant's wife and ex-girlfriend.

CSC-II convictions. This appeal followed.

II. ANALYSIS

Defendant raises several claims on appeal. Specifically, defendant argues that the prosecutor should have been disqualified because she took on the role of investigator and, relatedly, the prosecutor should have disclosed to defendant the notes she took during her interviews with witnesses. Defendant also claims that the admission of certain other-acts evidence denied him a fair trial. The prosecutor engaged in misconduct by personally attacking and denigrating defendant, according to defendant. Finally, defendant asserts that he received ineffective assistance of trial counsel. As explained below, we reject all of defendant's claims of reversible error.

A. Necessary Witness and Discovery of Prosecutor's Notes

First, defendant argues that he was denied due process and a fair trial because the prosecutor "adopted the role of investigator when she was the primary interviewer" of TS and other witnesses. Defendant claims that the prosecutor should have been disqualified from being the trial attorney in **[*7]** this case and that the trial court should have required her to disclose her interview notes to defendant.

Although defense counsel requested the prosecutor's notes on several occasions and made reference during trial to the prosecutor interviewing witnesses and learning details not disclosed to the detective, defense counsel never moved to disqualify the prosecutor as a necessary witness or request an evidentiary hearing on the matter. Thus, the issue of disqualification is unpreserved and we review for plain error affecting defendant's substantial rights. *People v Carines, 460 Mich 750, 764; 597 NW2d 130 (1999)*.

Michigan attorneys are governed by the Michigan Rules of Professional Conduct (MRPC), under which a prosecutor generally cannot be both a witness and an advocate at trial. *People v Petri, 279 Mich App 407, 417; 760 NW2d 882 (2008)*. Pertinent to this dispute, *MRPC 3.7(a)(1)* provides that a "lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness" except where the testimony relates to an uncontested issue. "While there is no Michigan case explicitly defining the term 'necessary witness,' both the Michigan Supreme Court and this Court have found that attorneys are not necessary witnesses if the substance of their testimony can be elicited from other witnesses." **[*8]** ***People v Tesen, 276 Mich App 134, 144; 739 NW2d 689 (2007)***. It follows that to disqualify a prosecutor, the defendant bears the burden of showing that the prosecutor's testimony is relevant to a contested issue and cannot be elicited from any other witness. *Petri, 279 Mich App at 417*.

In this case, Detective Huttenlocker was the lead detective. He interviewed TS over the telephone and in-person. He also interviewed Jessica, Shane, SW, AS, and defendant. He memorialized his findings in a police report, and defendant had access to the detective's report before trial. While the prosecutor did interview TS by herself before criminal charges were filed—an act that could suggest, standing alone, that the prosecutor was investigating, not preparing for a criminal trial, see *United States v Bin Laden, 91 F. Supp. 2d 600, 623-624 (SD NY, 2000)*—it is noteworthy that the abuse-and-neglect case in family court was still open. Given the open family court case, the prosecutor's pre-criminal-charge interview with TS is not alone sufficient to show that she stepped out of her role as prosecutor and into the role of investigator.

Defendant also maintains that the prosecutor learned certain details during her interview with Jessica that were not disclosed in Detective Huttenlocker's report. Defense counsel had the opportunity to interview Jessica but **[*9]** did not do so. The mere fact that a third person is not present when, during witness preparation, a witness discloses details not previously disclosed does not require disqualification of the prosecutor. See *United States v Tamura, 694 F2d 591, 600-601 (CA 9, 1982)* (concluding that a prosecutor was not a necessary witness when the prosecutor's testimony would have been duplicative of the testimony given by the witness the prosecutor spoke with). While a prosecutor could avoid even the possibility of crossing the prosecutorial/investigatory line by having a detective or other third person present whenever she meets with a witness, see *Bin Laden, 91 F. Supp. 2d at 623-624*, defendant has not shown on this record that the prosecutor crossed that line in this case.

Related to defendant's argument that the prosecutor should have been disqualified is his argument that the prosecutor's notes should have been discoverable. Defense counsel asked the trial court for the prosecutor's notes several times, and thus the issue is preserved for appellate review. "A trial court's decision regarding discovery is reviewed for [an] abuse of discretion." *People v Phillips, 468 Mich 583, 587; 663 NW2d 463 (2003)*. "An abuse of discretion occurs when

the court chooses an outcome that falls outside the range of reasonable and principled outcomes." People v Unger, 278 Mich App 210, 217; 749 NW2d 272 (2008). This **[*10]** Court reviews de novo defendant's claim that the prosecutor's failure to disclose evidence violated his constitutional right to due process. People v Schumacher, 276 Mich App 165, 176; 740 NW2d 534 (2007).

MCR 6.201(A)(2) requires that, upon request, a party in a criminal proceeding must provide all other parties " any written or recorded statement . . . by a lay witness whom the party may call at trial." As applied to notes from a witness interview, the rule makes discoverable those parts of the notes that: (1) contain a contemporaneous recording of a "substantially verbatim recital of an oral statement by the person making it"; (2) were signed by the witness; or (3) were otherwise unambiguously and specifically adopted or approved by the witness. People v Holtzman, 234 Mich App 166, 178-179; 593 NW2d 617 (1999). Additionally, MCR 6.201 must be read in light of MCR 2.302(B)(3)(a), which protects from discovery "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." See People v Gilmore, 222 Mich App 442, 449-450; 564 NW2d 158 (1997). The purpose of these rules is to separate the actual evidentiary statements of witnesses from the subjective impressions of the attorney interviewing them. See Holtzman, 234 Mich App at 179.

As noted above, this record does not support defendant's assertion that the prosecutor crossed the line and became an investigator. Thus, **[*11]** the prosecutor's notes are entitled to the protection afforded to an attorney's work product. Moreover, there is nothing in the record to suggest that TS or any other witness signed or otherwise adopted or approved the prosecutor's notes, and therefore there is nothing to suggest that these notes included any statements subject to disclosure under the court rules. Nor has defendant identified any *favorable* detail that came out of the prosecutor's interview with TS or Jessica, undermining any claim of a violation of MCR 6.201(B)(1) or Brady v Maryland, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). See United States v Bagley, 473 US 667, 676; 105 S Ct 3375; 87 L Ed 2d 481 (1985) (holding that *Brady* does not require the prosecutor to "deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial).

B. Other-Acts Evidence

Next, defendant argues that he was denied due process and a fair trial by the prosecution's introduction of other-acts evidence. During the trial, the prosecution introduced multiple instances of other-acts evidence. Defense counsel objected to the evidence that Jessica and defendant used duct tape during sex; that defendant hit TS and AS with a belt; that defendant duct taped TS; and that defendant put AS in a dog cage. **[*12]** Accordingly, defendant preserved his argument regarding those instances of other-acts evidence. See People v Considine, 196 Mich App 160, 162; 492 NW2d 465 (1992). Defense counsel, however, did not object to testimonial evidence regarding the prior CPS involvement and defendant's voluntary termination of his parental rights; that defendant and Shane had many custody battles; that defendant cheated on Shane during their relationship; and that defendant verbally abused TS and AS. Defendant's appellate objections to the admission of these pieces of evidence are therefore unpreserved. *Id.*

We review preserved objections regarding the admission of evidence for an abuse of discretion. People v Aldrich, 246 Mich App 101, 113; 631 NW2d 67 (2001). Unpreserved evidentiary issues are reviewed for plain error affecting defendant's substantial rights. Carines, 460 Mich at 764.

The admissibility of other-acts evidence involves the interplay of several rules of evidence. People v Vandervliet, 444 Mich 52, 74-75; 508 NW2d 114 (1993). In Vandervliet, 444 Mich at 74-75, the Michigan Supreme Court outlined a four-step process for evaluating the admissibility of evidence under MRE 404(b). First, the evidence must be relevant to an issue other than propensity under MRE 404(b). Id. at 74. "Stated otherwise, the prosecutor must offer the other acts evidence under something other than a character to conduct theory." *Id.* Second, the evidence must be relevant under MRE 402 to **[*13]** an issue or fact that was of consequence at the trial. *Id.* Third, the trial court must determine, under MRE 403, whether the danger of undue prejudice substantially outweighed the probative value of the evidence considering the availability of other means of proof and other facts appropriate for making the decision. Id. at 74-75. Lastly, the trial court may, upon request, provide a limiting instruction under MRE 105. Id. at 75; see also People v Denson, 500 Mich 385, 398; 902 NW2d 306 (2017) (explaining that, to be admissible under MRE 404(b), other-acts evidence must be offered for a proper purpose as well as be logically relevant (i.e., material and probative), and the probative value must not be substantially

outweighed by unfair prejudice).

Relatedly, in a criminal case involving sexual abuse of a minor, MCL 768.27a provides that evidence that defendant committed a similar offense against a minor may be admitted for any purpose for which it is relevant, including propensity purposes. People v Watkins, 491 Mich 450, 469-470; 818 NW2d 296 (2012). Evidence admissible under MCL 768.27a, however, may be "excluded under MRE 403 if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." Id. at 481 (internal **[*14]** citation and quotation marks omitted).

As an initial matter, both MRE 404(b) and MCL 768.27a require the prosecutor to give pretrial notice of the intent to introduce other-acts evidence. Defendant points out on appeal that the prosecutor failed to provide pretrial notice of the intent to admit other-acts evidence under MRE 404(b). The prosecutor did provide such notice of the intent to admit other acts of sexual conduct of a minor under MCL 768.27a. Nevertheless, defendant did not contemporaneously object to the admission of the other-acts evidence on this ground. Accordingly, defendant has waived this argument on appeal. Considine, 196 Mich App at 162.

Turning to the merits, regarding Jessica's testimony that defendant and she used duct tape during sex, we conclude that the trial court abused its discretion in admitting the evidence because the evidence was not relevant to anything other than propensity under MRE 404(b). The evidence was not submitted to show motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, because the victim never testified that defendant duct taped her during any of the sexual assaults. We conclude, however, that such error was harmless. As we discuss next, the victim's testimony that defendant duct taped her **[*15]** was admissible. Erroneously admitted evidence that is cumulative of admissible evidence may be considered harmless error. See People v McRunels, 237 Mich App 168, 185; 603 NW2d 95 (1999) (finding the improperly admitted testimony harmless because it was cumulative). Because the victim's testimony in that regard was admissible, we conclude that a different result would not have been achieved had the error in admitting Jessica's statements not occurred. That is, it does not "affirmatively appear that the error complained of has resulted in a miscarriage of justice," MCL 769.26, or was outcome determinative, People v Douglas, 496 Mich 557, 566; 852 NW2d 587 (2014).

Regarding the victim's testimony surrounding the leather belt, duct tape, and the dog cage, we conclude that such testimony was admissible under MRE 404(b). First, we conclude that the evidence was relevant to issues other than propensity—particularly to the victim's reasons for nondisclosure or late disclosure, i.e., that she was afraid of defendant, and to defendant's "grooming" behavior. Second, we conclude that the evidence was relevant under MRE 401 and thus admissible under MRE 402. Lastly, we conclude that the probative value of the evidence outweighed the risk of unfair prejudice. The victim's testimony was "tailored to its proper purpose, and did not delve into unnecessary **[*16]** detail or unduly invite the jury to draw an impermissible character-to conduct inference from it." People v Jackson, 498 Mich 246, 277; 869 NW2d 253 (2015). The evidence was probative of the victim's reasons for delayed disclosure and of defendant's grooming techniques. And although the evidence was prejudicial, it was not unfairly prejudicial.

Regarding the testimony about CPS's efforts to terminate defendant's parental rights to his children and that defendant voluntarily gave up his parental rights, we conclude that such evidence was admissible under MCL 768.27a. In this case, the prosecution admitted testimonial evidence that defendant committed a sexual assault against SW, which was the basis of the abuse-and-neglect petition seeking to terminate defendant's parental rights. This evidence would potentially be inadmissible under MRE 404(b). But because MCL 768.27a precludes MRE 404(b), Watkins, 491 Mich at 476-477, we conclude that the trial court properly admitted the evidence. Additionally, we conclude that the probative value of the evidence outweighed the risk of unfair prejudice. Defendant claimed that he never sexually abused the victim. But evidence that he sexually abused SW was probative of his sexual abuse of the victim. Id. at 470; MCL 768.27a. The probative value of the evidence was not limited to propensity as **[*17]** it also demonstrated a plan or system in the commission of the sexual assault on the victim. Because the evidence was properly admitted under MRE 404(b), including for its probative value, defendant has not demonstrated plain error affecting his substantial rights.

With respect to the testimonial evidence that defendant cheated on Shane and had custody battles with her, we conclude that such evidence was irrelevant under MRE

401 and, thus, inadmissible under MRE 402. Accordingly, defendant has demonstrated plain error. We conclude, however, that defendant has not demonstrated that such plain error affected his substantial rights because it did not appear to affect the outcome of the lower court proceedings. Carines, 460 Mich at 763. Even after eliciting the testimony about defendant cheating on Shane, and the testimony about their custody issues, Shane continued to testify that, before she moved to Florida, she and defendant got along and that they shared joint custody of SW. Shane's statements about defendant essentially being untrustworthy, but that she also got along with him and shared joint custody of their daughter with him, were conflicting, and therefore, were matters of her credibility for the jury to judge. People v Lemmon, 456 Mich 625, 636-637; 576 NW2d 129 (1998). Defendant **[*18]** has not demonstrated that the error "resulted in the conviction of an actually innocent defendant" or "seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence." Carines, 460 Mich at 763 (internal citation and notation omitted).

As to the victim's testimony that defendant verbally abused her and AS, we conclude that such testimony was admissible under MRE 404(b). It does not appear that the purpose of the evidence was to show that because defendant called the girls names, he must have sexually abused the victim. We infer from the context of the direct examination of the victim that the purpose of the evidence was to demonstrate the progression of defendant's abusive behavior from verbal abuse to physical abuse to sexual abuse. We similarly conclude that the evidence was relevant under MRE 401, and was thus admissible under MRE 402. A fact or issue that was of consequence at the trial was whether defendant sexually assaulted the victim. That defendant verbally abused the victim first makes that fact or issue more probable than it would be without the evidence. MRE 401. Moreover, the probative value of the evidence outweighed the risk of unfair prejudice. The evidence **[*19]** was probative to show, as discussed, defendant's progression of abuse from verbal, to physical, to sexual. And although the evidence was prejudicial, it was not unfairly prejudicial. There was minimal risk that the jury would conclude that because defendant called the girls names, he must have sexually assaulted the victim. Accordingly, we conclude that defendant has not demonstrated plain error affecting his substantial rights regarding this evidence.

C. Prosecutorial Misconduct

Defendant next claims that the prosecutor committed misconduct during her opening statement and closing argument when she said, "It's been said that a leopard doesn't change his spots. A zebra cannot change his stripes. Once a pedophile, always a pedophile and this defendant is on trial for nine counts of criminal sexual conduct." Defendant did not preserve this issue for appeal by contemporaneously objecting and requesting a curative instruction. People v Bennett, 290 Mich App 465, 475; 802 NW2d 627 (2010). Therefore, we review the issue for plain error affecting defendant's substantial rights. People v Brown, 279 Mich App 116, 134; 755 NW2d 664 (2008).

The federal and Michigan Constitutions guarantee a defendant's right to a fair trial. US Const, Am VI; Const 1963, art 1, § 20; People v Conley, 270 Mich App 301, 307; 715 NW2d 377 (2006). The test for prosecutorial misconduct is whether defendant was denied **[*20]** a fair and impartial trial. People v Dobek, 274 Mich App 58, 63; 732 NW2d 546 (2007). "The propriety of a prosecutor's remarks depends on all the facts of the case." People v Rodriguez, 251 Mich App 10, 30; 650 NW2d 96 (2002). "A prosecutor may not make a factual statement to the jury that is not supported by the evidence, but he or she is free to argue the evidence and all reasonable inferences arising from it as they related to his or her theory of the case." People v Dobek, 274 Mich App at 66 (internal citations omitted). A reviewing court cannot find error requiring reversal when a curative instruction could have alleviated any prejudicial effect. Unger, 278 Mich App at 235.

In this case, the prosecutor's statements regarding a leopard not changing its spots or a zebra not changing its stripes were a theme. It does not appear from the context of the statements that the prosecutor argued that defendant was "a preying animal hiding in the weeds to attack [the jury] and their families," as defendant claims in his brief on appeal. Rather, the theme seemed to be a euphemism for a proposition along the lines of "people do not change." Moreover, the prosecutor's statement of "once a pedophile, always a pedophile" was not misconduct because, as discussed, MCL 768.27a allows for the introduction of evidence that defendant committed a sexual assault against a different victim. **[*21]** We conclude that the prosecutor properly argued a fact—that defendant previously sexually assaulted a minor—and a reasonable inference from that fact—that he committed the sexual assaults charged in this case. Just because the prosecutor did not confine her argument to the blandest possible terms and instead argued a theme of leopard spots and zebra

stripes, or even "once a pedophile, always a pedophile," does not mean that the prosecutor committed misconduct. Regardless, the trial court's instruction to the jury that "[t]he lawyers' statements and arguments are not evidence" cured any prejudicial effect the comments generated. *People v Akins, 259 Mich App 545, 563; 675 NW2d 863 (2003)*. Accordingly, we hold that the prosecutor did not commit misconduct, and defendant was not denied a fair trial.

D. Ineffective Assistance of Counsel

Defendant lastly argues that his trial counsel was ineffective when counsel failed to list the investigating prosecutor as a necessary witness, failed to move to have her disqualified from being the trial attorney, and failed to file motions for discovery. Defendant additionally claims that defense counsel was ineffective when he failed to object concerning the other-acts and character evidence and when he failed **[*22]** to have the trial court conduct a probative-value/unfair-prejudice analysis of the other-acts and character evidence. Defendant further claims ineffective assistance of counsel for defense counsel's failure to object to the prosecutor's improper statements during opening statements and closing arguments. Lastly, defendant claims ineffective assistance of counsel for defense counsel's failure to meet with and investigate the prosecution's witnesses, failure to investigate the sisters' medical records, failure to consult with or use an expert witness of his own, and failure to meet with or call defendant's requested witnesses.

A claim of ineffective assistance of counsel is a mixed question of fact and law. We must review the trial court's findings of fact for clear error, and we must review questions of law de novo. *People v Trakhtenberg, 493 Mich 38, 47; 826 NW2d 136 (2012)*. Although defendant preserved the claim by filing a motion to remand, we denied the motion.[2] Because a *Ginther*[3] hearing was never held, review is limited to mistakes apparent on the record. See *People v Payne, 285 Mich App 181, 188; 774 NW2d 714 (2009)*.

To succeed on a claim of ineffective assistance of counsel, the defendant must prove: (1) that the attorney made an error, and (2) that the error was prejudicial **[*23]** to defendant. *Strickland v Washington, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984)*. That is, first, defendant must show that trial counsel's performance fell below an objective standard of reasonableness. *People v Russell, 297 Mich App 707, 715; 825 NW2d 623 (2012)*. The Court must analyze the issue with a strong presumption that trial counsel's conduct fell within the wide range of reasonable professional assistance, and this requires that the defendant overcome the presumption that the challenged action or inaction might be considered sound trial strategy. *People v Leblanc, 465 Mich 575, 578; 640 NW2d 246 (2002)*. Decisions about whether to call or question a witness are presumed to be matters of trial strategy. *Russell, 297 Mich App at 716*. Second, defendant must show that, but-for trial counsel's deficient performance, a different result would have been reasonably probable. *Id. at 716*. "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)* (internal citation omitted).

Defendant first argues that defense counsel was ineffective for failing to list the prosecutor as a necessary witness, failing to move to have her disqualified from being the trial attorney, and failing to file motions for discovery (presumably of the prosecution's interview notes). We disagree.

We acknowledge that defense counsel may have erred by not listing the prosecutor **[*24]** as a necessary witness. With that said, defendant cannot show that but-for defense counsel's purported error a different result would have been reasonably probable. Had defense counsel listed the prosecutor as a necessary witness, the trial court would have determined that she was not such a witness because the substance of the prosecutor's testimony could have been elicited from the victim and the witnesses that the prosecutor interviewed, all of whom defense counsel could have interviewed. Moreover, unlike in ***Tesen***, neither the victim nor Jessica—the witnesses from whom defendant claims provided details not found in the investigator's report—were minors when they were interviewed by the prosecutor, so whether the prosecutor was trained in the forensic-interview protocol appropriate for interviewing a child would have been irrelevant to the jury. ***Tesen, 276 Mich App at 144***. Thus, because the trial court would have determined that the prosecutor was not a necessary witness, defense counsel's attempt to show otherwise would have been futile. We conclude that defense counsel was not ineffective for failing to raise a futile objection or issue by listing the prosecutor as a

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[2] *People v Westbrook*, unpublished order of the Court of Appeals, entered April 25, 2017 (Docket No. 335161).

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

necessary witness or moving for her [*25] disqualification. Ericksen, 288 Mich App at 201.

Similarly, defendant cannot show that defense counsel was ineffective for not filing motions to compel discovery. First, defendant does not provide any information, argument, or offer of proof as to what discovery defense counsel should have obtained. Accordingly, we conclude that defendant has failed to establish the factual predicate of his claim. See People v Carbin, 463 Mich 590, 600; 623 NW2d 884 (2001). Even assuming that defendant is referring to the prosecutor's notes from her interviews with the victim and Jessica, as discussed, those notes were the prosecutor's work product and thus were not subject to mandatory disclosure. Any of defense counsel's attempts to obtain the prosecutor's notes through discovery motions would have been futile. Again, defense counsel was not ineffective for failing to raise a futile objection or motion. Ericksen, 288 Mich App at 201.

Defendant next argues that defense counsel was ineffective for failing to object concerning the other-acts and character evidence and failing to have the trial court conduct a probative-value/unfair-prejudice analysis of the other-acts and character evidence. We disagree.

First, defendant does not describe what specific other-acts or character references defense counsel should have [*26] objected to—only that he should have "challeng[ed] the many instances of other-acts and character evidence." Accordingly, we conclude that defendant has failed to establish the factual predicate of his claim. Carbin, 463 Mich at 600. Even assuming that defendant meant that defense counsel should have objected to the other-acts and character evidence identified above, we conclude that defendant's argument lacks merit. Defendant neglects to admit that defense counsel did in fact object to some of the other-acts evidence, and the trial court ruled those instances admissible. Moreover, defendant has not shown that he was prejudiced by defense counsel's failure to object to some of the other-acts and character evidence. As discussed, the instances of other-acts and character evidence were either harmless error, admissible under MRE 404(b), or did not prejudice defendant. Accordingly, defendant cannot show that, but-for defense counsel's errors, a different result was reasonably probable. Therefore, we conclude that defense counsel was not ineffective for failing to object to some of the other-acts and character evidence.

Regarding defendant's claim that defense counsel was ineffective for failing to request the trial court [*27] to do a probative value/unfair prejudice analysis, we agree that the trial court should have done such an analysis. And therefore, we conclude that defense counsel erred by not requesting it. Defendant has not, however, argued what said prejudice was, how it was unfair, or even how the trial court's analysis would have resulted. Accordingly, defendant has failed to establish the factual predicate of his claim. Carbin, 463 Mich at 600. Moreover, as discussed above, the evidence that would have required such an analysis would have resulted in the evidence's admissibility. Defendant has not demonstrated that but-for counsel's failure to request such an analysis a different result was reasonably probable. Accordingly, we conclude that defense counsel was not ineffective for failing to request that the trial court analyze the evidence's probative value compared to the risk of unfair prejudice.

Defendant next argues that counsel was ineffective for failing to object to the prosecutor's statements during her opening statement and closing argument. Because the prosecution's statements were proper, as explained above, any objection would have been futile. And defense counsel is not ineffective for making a futile [*28] objection. Ericksen, 288 Mich App at 201.

Defendant lastly argues that defense counsel was ineffective for failing to meet with and investigate the prosecution's witnesses, failing to investigate the sisters' medical records, failing to consult with or use an expert witness of his own, and failing to meet with or call defendant's requested witnesses. We disagree.

Regarding defense counsel's failure to meet with and investigate the prosecution's witnesses, we conclude that such a failure was an error on defense counsel's part. We discussed that the prosecutor was not a necessary witness because the substance of her testimony could have been elicited from the people she interviewed had defense counsel interviewed those witnesses himself. Defense counsel did not interview those witnesses, and then he was taken off guard by their testimony at trial. Had defense counsel interviewed and investigated those witnesses, he would have had an idea of their testimony going into trial, and he would have been better able to prepare for it. Therefore, we conclude that defense counsel erred by not interviewing and investigating the prosecution's witnesses.

With that said, we conclude that defendant has not shown that, but-for counsel's [*29] failure a different

result was reasonably probable. Defense counsel would be ineffective for failing to investigate the witnesses if it deprived defendant of a substantial defense, *People v Grant, 470 Mich 477, 497-498; 684 NW2d 686 (2004)*, or undermined confidence in the trial's outcome, *Russell, 297 Mich App at 716*. After reviewing the record, we conclude that despite being surprised by some details of the victim's and other witnesses' testimony, defense counsel was still able to cross-examine the witnesses effectively. Even though defense counsel erred by not interviewing the victim and the other witnesses, we conclude that defendant was not deprived of a substantial defense, and defense counsel's failure did not undermine confidence in the outcome of the trial. Therefore, defendant has not established that but-for counsel's error a different result was reasonably probable.

Defendant lastly claims that defense counsel was ineffective for failing to investigate the sisters' medical records, failing to consult with or utilize an expert witness of his own, and failing to meet with or call defendant's requested witnesses. Defendant has not submitted any evidence as to what information defense counsel would have gained from the sisters' medical records or how it would **[*30]** have helped his case. He similarly has not presented any evidence of what expert witness defense counsel should have retained, what that expert would have said, or how any supposed expert would have helped his case. Likewise, defendant has not presented any evidence of what defense witnesses defense counsel should have called, what those witnesses would have said, or how those witnesses would have helped defendant's case. Accordingly, defendant has failed to establish the factual predicate of his claim in this regard. *Carbin, 463 Mich at 600*; see also *People v Payne, 285 Mich App 181, 190; 774 NW2d 714 (2009)*.

Affirmed.

/s/ Peter D. O'Connell

/s/ Joel P. Hoekstra

/s/ Brock A. Swartzle

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