# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVE ADAMS, JR.,

Defendant-Appellant.

UNPUBLISHED
January 16, 2001

No. 214698
Wayne Circuit Court
LC No. 97-008272

Before: Neff, P.J., and Talbot and J. B. Sullivan,* JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of two counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(h); MSA 28.788(2)(1)(h), and one count of second-degree CSC, MCL 750.520c(1)(h); MSA 28.788(3)(1)(h). Defendant was sentenced to thirty to fifty years for each first-degree CSC conviction and ten to fifteen years for the second-degree CSC conviction. We affirm.

I

Defendant first contends that the trial court erred in excluding evidence that the victim had made unfounded allegations of sexual abuse in the past. We review the trial court's decision regarding the admissibility of evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion is found if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

In *People v Yarger*, 193 Mich App 532, 538; 485 NW2d 119 (1992), this Court held that evidence of prior false allegations may be properly excluded where the defendant fails to establish that the allegations were, in fact, false. Here, defendant generally noted the existence of the allegations without making an offer of proof concerning specific allegations that were false. Absent an offer of proof establishing that any of the sexual allegations were indeed false, we hold that the trial court did not abuse its discretion in ruling that the evidence was inadmissible.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

II

Defendant next contends that the evidence presented was insufficient as a matter of law to prove that the victim was mentally incapable as required by the relevant statutes. This Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found the evidence sufficient to prove the essential elements of the crime beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999); *People v Jones (On Rehearing)*, 201 Mich App 449, 451; 506 NW2d 542 (1993).

MCL 750.520b(1)(h); MSA 28.788(2)(1)(h) required that the prosecution show that penetration occurred; defendant was related to the victim by blood or affinity to the fourth degree; and that the victim was mentally incapable. MCL 750.520c(1)(h); MSA 28.788(3)(1)(h) required that the prosecution show that sexual contact occurred; defendant was related to the victim by blood or affinity to the fourth degree; and that the victim was mentally incapable.

MCL 750.520a(f); MSA 28.788(1)(f) provides as follows:

> "Mentally incapable" means that a person suffers from a mental disease or defect which renders that person temporarily or permanently incapable of appraising the nature of his or her conduct.

In the instant case, the prosecution presented significant evidence that the victim was mentally incapable. Gary Golbesky testified that, as a psychologist for the Wyandotte Public Schools, he performed three evaluations of the victim between 1990 and 1995. He stated that the victim required special education and that she fell somewhere between trainable and educable in the mental impairment spectrum. Golbesky determined that the victim's Intelligence Quotient was approximately fifty-three to fifty-four. Her test scores were typical for an average eight-year-old and her short term memory was equivalent to that of a seven-year-old.

Defendant specifically contends that the prosecution failed to demonstrate that the victim was unable to comprehend the physical and moral aspects of the sexual act as required by *People v Breck*, 230 Mich App 450; 584 NW2d 602 (1998). In *Breck*, this Court observed that the statutes prohibiting sexual acts with a mentally incapable person presume that such a person is incapable of consenting to the sexual act. *Id.* at 455. The Legislature intended to protect those individuals "who know what is happening to them but are incapable of protesting or protecting themselves because of a severely diminished intellectual capacity." *Id.* at 453.

Here, the victim was able to comprehend the physical sexual act. She testified in detail concerning the physical acts performed by defendant on her body. The victim testified that what defendant did to her was a "bad thing" and that she was worried that she would have a baby. She told defendant to stop, but to no avail. We hold that although the victim was cognizant of the physical acts and some of their more obvious consequences, she was unable to truly understand the act in a societal sense. See *id*. at 454-455, quoting *People v Easley*, 42 NY2d 50, 56-57; 396 NYS2d 635; 364 NE2d 1328 (1977). When viewed in the light most favorable to the prosecution, sufficient evidence was presented such that a rational trier of fact could have found beyond a reasonable doubt that the victim was mentally incapable.

III

Defendant next contends that the trial court erred in failing to sua sponte determine whether the victim was competent to testify. The determination of competency is within the sound discretion of the trial court and will be reversed only for an abuse of discretion. *Breck, supra* at 457.

MRE 601 governs the general rule of witness competency and provides:

> Unless the court finds after questioning a person that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in these rules.

Defendant argues that because the psychologist testified that the victim had the mentality of a seven-year-old, the trial court was obligated to independently determine the victim's competency before allowing her to testify. Defendant's argument appears to stem from MCL 600.2163; MSA 27A.2163, which prior to its repeal by 1998 PA 323 (effective August 3, 1998) mandated a statutory procedure for determining the competency of witnesses under the age of ten.[1] However, this Court has recognized that the mandate is inapplicable to witnesses over the chronological age of ten. *People v Burch*, 170 Mich App 772, 775; 428 NW2d 772 (1988).

The factual record indicates that the victim was competent to testify. At the preliminary examination, the victim was questioned with regard to her ability to distinguish between the truth and a lie and the importance of testifying truthfully. Both parties and the court were satisfied that the victim was competent to testify. At trial, Golbesky, the victim's school psychologist, testified that the victim was able to distinguish the difference between an honest and dishonest answer and between something that actually happened to her and something she had merely heard. The victim's testimony was coherent and was also corroborated by another witness. We hold that the trial court's failure to sua sponte determine the victim's competency to testify was not an abuse of discretion.

IV

Defendant next contends that the admission of other acts evidence at trial was improper. We review the admission of other acts evidence for an abuse of discretion. *Starr, supra* at 494. Defendant objected to testimony of his eldest daughter that, in 1987, she was living in Taylor with defendant and her stepmother,[2] and one night, near her fifteenth birthday, she awoke to defendant fondling her vagina underneath her clothing.

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[1] The assaults occurred in the latter months of 1995. Defendant was tried in July 1998 and sentenced on August 23, 1998. Accordingly, the statute was in effect during defendant's trial.

[2] Defendant's factual citation for his argument is erroneous in several respects, e.g., attributing this testimony to defendant's younger daughter and citing testimony that was stricken from the record. We therefore respond only to his essential challenge, presumably to testimony of the fondling incident.

Defendant argues that the other acts evidence was inadmissible pursuant to MRE 404(b). Evidence of other acts may be admitted if (1) it is offered for a proper purpose; (2) it is relevant to an issue or fact of consequence at trial; and (3) its probative value is not substantially outweighed by its potential for unfair prejudice. *People v Crawford,* 458 Mich 376, 385; 582 NW2d 785 (1998); *People v VanderVliet,* 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). A proper purpose is one other than establishing the defendant's character or to show his propensity to commit the offense. *Crawford, supra* at 390. If the prosecutor fails to weave a logical thread linking the prior act to the ultimate inference, the evidence must be excluded, notwithstanding its logical relevance to character. *Id.*; *People v Sabin (After Remand),* 463 Mich 43, 57; 614 NW2d 888 (2000).

The prosecution argued that the other acts evidence was relevant to show the absence of mistake (to counter the allegation that the victim dreamed the events), to show a common scheme (the age of the family member when the abuse occurred), and to show opportunity (defendant preyed on family members). The trial court held that the other acts were admissible given defendant's general denial, which placed all elements of the charges at issue. The court noted that the evidence was admissible to rebut the claim that the allegations were fabricated and to show a common scheme.

The court did not abuse its discretion in admitting evidence of defendant's sexual assault of his daughter. As in *Starr, supra* at 500-501, the prosecutor articulated a proper noncharacter purpose for the admission of the evidence: to show the existence of a scheme, plan, or method by which defendant accomplished the sexual abuse, or to show the absence of either a mistake in the victim's allegations or perception. These were legitimate, material, and contested grounds on which to offer the evidence because defendant entered a general denial, which placed all elements of his CSC charges at issue. *Id*. at 501.

The evidence was relevant because it had a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; see also *Crawford, supra* at 388-390. Defendant's argument that the victim's allegations were fabricated made the testimony of his assault of his daughter relevant. *Sabin, supra* at 72. In light of the trial court's instructions to the jury that it could only consider the evidence of defendant's prior acts to determine whether defendant acted purposely or as part of a scheme, and in light of the significant probative value of the evidence, we conclude that the danger of unfair prejudice to defendant did not substantially outweigh the probative value of the evidence. *Crawford, supra* at 385; *VanderVliet, supra* at 74-75.

V

Defendant contends that his sentences were disproportionate despite the fact that they were within the guidelines. The proportionality of a sentence is reviewed by this Court for an abuse of discretion. *People v Phillips (On Rehearing),* 203 Mich App 287, 290; 512 NW2d 62 (1994).

The principle of proportionality requires that the sentence imposed by the trial court be "proportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Milbourn,* 435 Mich 630, 636; 461 NW2d 1 (1990). "A sentencing court must

articulate on the record the criteria considered and the reasons supporting its decision regarding the length and nature of the sentence imposed." *People v Rice*, 235 Mich App 429, 445-446; 597 NW2d 843 (1999).

Defendant contends that the trial court "entertain[ed] improper considerations" in sentencing, citing a letter written by defendant's youngest daughter, alleging that defendant had threatened her. The trial judge indicated on the record that he did not consider the letter in sentencing and was guided instead by factors in the record itself. We find no error.

The sentencing guidelines range, as calculated for defendant's first-degree criminal sexual conduct convictions, was twenty to forty years. A sentence within the sentencing guidelines range is presumptively proportionate. *People v Hogan*, 225 Mich App 431, 437; 571 NW2d 737 (1997). Moreover, defendant bears the burden of presenting unusual circumstances that would overcome that presumption. *Id.* Here, defendant was sentenced to thirty to fifty years for each count of first-degree CSC and ten to fifteen years for the count of second-degree CSC. The sentences are to be served concurrently. Because defendant merely states the conclusion that the sentences were disproportionate without offering any justification, he fails to overcome the presumption of proportionality.

Nonetheless, we do not find the sentences disproportionate. Defendant was convicted of sexually assaulting his mentally incapable fifteen-year-old niece. The defendant's own ten-year-old daughter testified that she witnessed the assault. Defendant's blatant abuse of the victim's trust under these circumstances supports a conclusion that the sentences were proportionate.

VI

Defendant next contends that the trial court erred in proceeding with defendant's trial despite his inappropriate attire. The issue whether the defendant was denied the right to wear appropriate clothing is reviewed for an abuse of discretion. *People v Turner*, 144 Mich App 107, 111-112; 373 NW2d 255 (1985).

Defendant's claims are unsupported by the record and, in fact, some of his contentions are explicitly contradicted by the record. The trial court apparently was unaware, until the end of the first day of trial, that defendant's family had brought him clothing. Accordingly, defendant's contention that the trial court refused to allow him to change during the first day of trial is without merit. Likewise, the trial court instructed the prosecutor not to stand when the jury entered the courtroom, and the record is devoid of any indication that the prosecutor ignored the court's directive. There is also nothing in the record to indicate that defendant was forced to wear prison shower slippers on the second day of trial. Regardless, because this latter allegation was not preserved by an objection, any claim of error is forfeited. *People v Reginald Harris*, 80 Mich App 228, 230-231; 263 NW2d 40 (1977).

A criminal defendant is entitled to wear civilian clothes rather than prison clothing at his trial. *People v Shaw*, 381 Mich 467, 474; 164 NW2d 7 (1969). In this case, defendant wore civilian clothing, and although the clothing was ill-fitting, the trial court took measures to eliminate any prejudice that might occur. Defendant was allowed to secure properly fitting

clothes for the second day of trial. Thus, we hold that the trial court did not abuse its discretion in allowing the trial to proceed.

VII

Defendant next contends that the trial court erred in failing to give the requested instruction of fourth-degree CSC with respect to both counts of first-degree CSC and the single count of second-degree CSC. Jury instructions are reviewed de novo on appeal. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999).

If either party requests an instruction on a necessarily included lesser offense, the court must instruct the jury on the lesser offense. *People v Lemons*, 454 Mich 234, 254; 562 NW2d 447 (1997); *People v Reese*, 242 Mich App 626, 629; 619 NW2d 708 (2000). An offense is a necessarily included lesser offense if it is impossible to commit the greater offense without also committing the lesser offense. *People v Bailey*, 451 Mich 657, 667-668; 549 NW2d 325, amended 453 Mich 1204 (1996).

A cognate lesser offense is one that shares some common elements with and is of the same class as the greater offense, but also has elements not found in the greater offense. *People v Perry*, 460 Mich 55, 61; 594 NW2d 477 (1999). If the defendant requests an instruction regarding a cognate lesser included offense, the trial court must examine the specific evidence to determine whether it would support a conviction of the cognate offense. *Bailey, supra* at 668.

Regarding the two counts of first-degree CSC, this Court has held that fourth-degree CSC is not a necessarily included offense of first-degree CSC. *People v Baker #2*, 103 Mich App 704, 712-713; 304 NW2d 262 (1981). Therefore, we must examine the evidence to determine whether an instruction was warranted. *Bailey, supra* at 668.

Criminal sexual conduct in the fourth degree, MCL 750.520e; MSA 28.788(5), differs from CSC in the first degree, MCL 750.520b; MSA 28.788(2), in that fourth-degree CSC requires only sexual contact, whereas first-degree CSC requires actual penetration. The key issue is whether the evidence supported a conclusion that penetration did not occur.

Defendant's only argument that actual penetration did not occur is based on the testimony of defendant's youngest daughter, who stated that she saw defendant "raping" the victim. She saw defendant on top of the naked victim wearing shorts "[g]oing back and forth." Defendant argues that the jury could have interpreted the testimony as describing sexual contact without actual penetration.

The victim, on the other hand, testified that defendant inserted his penis inside her "private part" two different times on the night of the incident. The victim's testimony was corroborated by defendant's daughter; both testified to the unusual occurrence of defendant leaving his shorts on while performing the sexual act. The events leading up to the assault, including the fight as to where the victim would sleep, were also corroborated by Brenda Taggart. The only evidence that penetration did not occur is a negative inference based on the testimony of an eyewitness who was not the victim. The trial court need not "blind itself to uncontroverted proof of an element of the greater crime that would necessarily raise a

defendant's culpability to that of the more serious crime, if all elements common to the two offenses were found to be proven beyond a reasonable doubt." *Bailey, supra* at 671. Accordingly, this Court holds that the trial court did not err in refusing to give a fourth-degree CSC instruction with respect to the two charges of first-degree CSC.

With regard to defendant's contention concerning the second-degree CSC charge, we agree that fourth-degree CSC is a necessarily lesser included offense of second-degree CSC in this case. MCL 750.520c(1)(h)(i), 750.520e(1)(c); MSA 28.788(3)(1)(h)(i), 28.788(5)(1)(c); see *People v Norman,* 184 Mich App 255, 260-261; 457 NW2d 136 (1990); *People v Gorney,* 99 Mich App 199, 205; 297 NW2d 648 (1980). Accordingly, the trial court erred in refusing to give the requested instruction.

Despite this error, reversal is unwarranted. The failure to instruct on a necessarily lesser included offense is subject to harmless error analysis. *People v Mosko*, 441 Mich 496, 501-503; 495 NW2d 534 (1992); *Reese, supra* at 635. The error is harmless in this case because the prosecution established the aggravating circumstance that elevates the offense from fourth-degree CSC to second-degree CSC, i.e., "[t]he actor is related to the victim by blood or affinity to the fourth degree." MCL 750.520c(1)(h)(i); MSA 28.788(3)(1)(h(i).

This case was sent to the jury on a theory of a familial relationship. The jury found defendant guilty of second-degree CSC, and, apparently, there was no dispute concerning the relationship element because defendant is the victim's uncle by marriage. Thus, there was no basis for a finding of guilt on fourth-degree CSC because the aggravating circumstance to establish second-degree CSC was undisputed. Where the only distinguishing feature between degrees of CSC is the familial relationship, which is undisputed, the failure to instruct on the lesser included offense is harmless. *Mosko, supra* at 505-506.

VIII

Defendant next contends that the trial court erred in failing to ascertain whether defendant made a constitutionally valid waiver of his right to testify. Constitutional issues are reviewed de novo on appeal. *People v Brown*, 239 Mich App 735, 750; 610 NW2d 234 (2000). After a thorough review of the colloquy between defendant and the trial judge, we find that defendant did declare, after hearing his rights, that he did not want to testify. However, this Court has held that a trial court has no duty to advise a defendant of his right to testify, nor is it required to determine whether the defendant made a knowing and intelligent waiver of that right. *People v Harris,* 190 Mich App 652, 661-662; 476 NW2d 767 (1991). Accordingly, we find no error.[3]

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[3] Defendant's claim that he was threatened with harm by a court officer if he chose to testify is without merit. Defendant's contention is unsupported by the record (and is contradicted by his trial counsel, who termed this claim an "outright fabrication"). A party's mere assertion that the party's constitutional rights were violated, without citations to the record, cogent argument, and supporting authority, is insufficient to present an issue for review. MCR 7.212(C)(7); *Jones (On Rehearing), supra* at 456-457.

IX

Defendant next contends that when he sought substitution of counsel during trial, the trial court erred in failing to conduct a reasonable inquiry into the nature of the alleged conflict between defendant and his counsel. The decision regarding substitution of counsel is within the sound decision of the trial court and will not be reversed absent a showing of abuse of that discretion. *People v Morgan*, 144 Mich App 399, 401; 375 NW2d 757 (1985).

An indigent person is entitled to appointed counsel, but is not entitled to choose his own attorney. *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973); *People v Ceteways*, 156 Mich App 108, 118; 401 NW2d 327 (1986). "Appointment of substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial proceedings." *In re Conley*, 216 Mich App 41, 46; 549 NW2d 353 (1996).

In the instant case defendant interrupted the questioning of a witness and demanded a new attorney. Defendant contends on appeal that he requested a new attorney because there was a fundamental breakdown in the relationship between counsel and client. Defendant did not argue this in his outburst, and the record is devoid of any evidence that suggests that the relationship had fundamentally broken down. Defendant's request was simply one of many apparent attempts to delay, disrupt, or create appealable error in his trial. Accordingly, the trial court did not abuse its discretion in refusing to grant defendant's mid-trial request for substitute counsel.

X

Defendant next contends that he was denied a fair trial due to various instances of ineffective assistance of counsel. To prove a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense so as to deny the defendant a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

A

Defendant first contends that his counsel was ineffective for failing to object to numerous instances of hearsay, including testimony of defendant's alleged threats against the victim. Hearsay is defined as:

> a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. [MRE 801(c).]

We hold that the statements were not hearsay because they were not used to prove the truth of the matter asserted, i.e., that defendant threatened the victim and her family. *People v Jones (On Rehearing After Remand)*, 228 Mich App 191, 204-205; 579 NW2d 82, mod on other grounds 458 Mich 862 (1998). Rather, the statements were used to prove why the victim did not tell her family about the sexual assault and to explain why the victim made false allegations of

abuse against her mother and stepfather. Accordingly, there was no ineffective assistance of counsel on this basis.

B

Defendant next contends that defense counsel was ineffective for failing to impeach defendant's daughter with a statement she made to the police and with documentary evidence that she was in foster care at the time of the alleged assault and could not have witnessed the claimed events.

Although defense counsel did not attempt to directly impeach defendant's daughter with her statement, he did cross-examine her extensively concerning the time period that she was in foster care and how little she saw of defendant during that time. Defense counsel also argued that the incident could not have occurred at the time defendant's daughter alleged because she was in foster care. Moreover, we disagree that the documentary evidence was unassailable proof that defendant's daughter was not living with Taggart at the time in question.

Defense counsel's decision not to impeach defendant's twelve-year-old daughter with her police statement may have been trial strategy in that a confrontational cross-examination using a police statement with a twelve-year-old witness may have hurt the defense more than help it. Accordingly, because defense counsel made the substantive argument that defendant's daughter was not at the house at the time of the alleged assault, and the decision concerning impeachment was a matter of trial strategy, defense counsel's alleged omission did not constitute ineffective assistance of counsel. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

C

Defendant contends that defense counsel was ineffective for failing to present as evidence government records indicating where his unemployment checks were mailed, which would have proved that he was not living in Melvindale and could not have assaulted the victim. Defendant's argument is without merit. Various witnesses testified to defendant's transient lifestyle, and four witnesses testified that he was staying at Taggart's house on the night of the alleged assault. Accordingly, we hold that defense counsel's omission in obtaining defendant's unemployment records did not constitute ineffective assistance of counsel. *Pickens, supra* at 326-327.

D

Defendant next contends that defense counsel was ineffective for failing to call character witnesses on his behalf, as well as call his mother, who was prepared to testify that the victim admitted to her that she dreamed the incident. Decisions with regard to which witnesses to call are presumed to be trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). A defense counsel's failure to call a witness can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990).

1

At trial, defendant stated that he wanted his ex-wife and her three daughters to testify as character witnesses. Defendant has offered no evidence that these witnesses would have testified favorably on his behalf, nor do we find that he was deprived of a substantial defense. Accordingly, we hold that defense counsel's failure to call these character witnesses did not constitute ineffective assistance of counsel.

2

Addressing the issue of defendant's mother, defendant provided no proof that his mother would have testified as he alleged, and the lower court records provides no such support. Even assuming that she would have, defendant was not deprived of a substantial defense, and the evidence against defendant was overwhelming. Defendant's own daughter witnessed the incident, and the circumstances surrounding the incident were corroborated by several witnesses. We hold that defense counsel's decision not to call defendant's mother did not constitute ineffective assistance of counsel. *Pickens, supra* at 326-327.

E

Defendant next contends that defense counsel failed to object to erroneous other act instructions. After a thorough review of the instructions, we hold that the limiting instructions by the trial court adequately informed the jurors of the proper use of the other acts evidence. Accordingly, the instruction was proper, and defense counsel's failure to make a futile objection did not constitute ineffective assistance of counsel. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

XI

Defendant next contends that the trial court gave instruction to the jury that infringed on defendant's due process rights. Where, as here, defendant did not object at trial, appellate review of jury instructions is forfeited unless relief is necessary to avoid manifest injustice. *People v Henry*, 239 Mich App 140, 151; 607 NW2d 767 (1999). "Even if the instructions were somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Id*. Defendant essentially contends that the trial court erred in omitting the language of "moral certainty" in defining the beyond a reasonable doubt standard. This Court has previously addressed this issue and determined that the failure to include language regarding "moral certainty" in a definition of reasonable doubt does not require reversal. *People v Hubbard (After Remand)*, 217 Mich App 459, 487-488; 552 NW2d 403 (1996). We find no error warranting review of this unpreserved issue.

XII

Defendant next contends that his double jeopardy rights were violated when he was convicted on evidence that failed to demonstrate two separate and distinct sexual penetrations. A double jeopardy issue constitutes a question of law, which this Court reviews de novo on appeal. *People v Lugo*, 214 Mich App 699, 705; 542 NW2d 921 (1996). Defendant's contention that his

double jeopardy rights were violated is entirely factual, based on the victim's testimony that during the sexual penetration, defendant stopped and then did it again.

Defendant now contends that the victim's testimony was insufficient to support two separate counts of first-degree CSC. In interpreting the statute regarding first-degree CSC, Michigan courts have consistently held that the Legislature intended to separately punish each act of criminal sexual penetration. *People v Wilson*, 196 Mich App 604, 608; 493 NW2d 471 (1992). Here, the victim testified that, after defendant penetrated her, defendant stopped "for a minute," and then she answered "[y]es" to the prosecutor's question whether defendant did it again. Defendant contends that the victim's answer to a leading question was ambiguous and failed to show more than one distinct act of penetration.

Although couched in terms of double jeopardy, defendant's argument is essentially a sufficiency of the evidence issue. Accordingly, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found the evidence sufficient to prove beyond a reasonable doubt that two acts of penetration occurred. *Johnson, supra* at 722-723; *Jones (On Rehearing), supra* at 451. The victim testified that defendant stopped penetrating her with his penis and then did so again. Viewing the evidence in the light most favorable to the prosecution, we hold that a rational trier of fact could have found that defendant committed two acts of vaginal penetration on the victim. Thus, defendant's conviction on two counts of first-degree CSC did not constitute double jeopardy.

XIII

Lastly, defendant contends that even if none of the errors noted in the above issues was flagrant enough to warrant reversal, the cumulative effect of the errors requires relief from judgment. In an issue alleging cumulative error, the actual errors are aggregated to determine their cumulative effect and then the issue becomes whether the defendant received a fair trial despite the errors. *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995). Having found no individual error, we need not consider this claim.

Affirmed.

/s/ Janet T. Neff
/s/ Michael J. Talbot
/s/ Joseph B. Sullivan