STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHEILA NGEM,

Defendant-Appellant.

UNPUBLISHED
October 26, 2001

No. 215672
Macomb Circuit Court
LC No. 97-3230-FC
97-3231-FH
97-3232-FC
97-3233-FH
97-3234-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SOKHORN NGEM,

Defendant-Appellant.

No. 215676
Macomb Circuit Court
LC No. 97-3225-FH
97-3226-FH
97-3227-FC
97-3228-FH
97-3229-FC

Before: Wilder, P.J., and Hood and Collins, JJ.

PER CURIAM.

In these consolidated appeals, defendants Sheila Ngem and Sokhorn Ngem were convicted, following separate jury trials, of various sexual offenses involving minors.[1] Defendants appeal as of right, and we affirm.

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[1] Defendant Sheila Ngem was convicted of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(d), five counts of contributing to the delinquency of a minor, MCL 750.145,
(continued…)

Defendants, formerly a married couple, asked the principal victim, B.K., to come to their home and babysit the couple's three children. The victim also introduced the couple to three friends, C.C., B.R., and T.R., as well as the victim's sister, R.K. The victim, her sister, and her friends, all minors, began to spend time at the couple's home. The couple would proposition or encourage the minors to engage in sexual acts. The minors, when sober, would not agree. The couple provided alcohol and marijuana, engaged the minors in games that encouraged the consumption of alcohol, exposed the minors to pornographic materials and sexual devices, and encouraged the minors to engage in sexual "dares." B.K. testified that she was sent by Sheila into the marital bedroom when Sokhorn was in the bedroom alone. B.K. testified that she was drunk when Sokhorn removed her clothing and engaged in sexual intercourse with her. B.K. told Sokhorn, "no," but he ignored her. B.K. further testified that, during the sexual act, Sheila entered the room and did not stop the act from occurring. B.K. remained at the home overnight. The next day, the couple provided alcohol to her again, and Sokhorn had sexual intercourse with her while Sheila was present. B.K. testified that she continued to go to defendants' home because she liked the couple's children, did not want to be at her own home because of her mother's terminal illness, and could do whatever she wanted at defendants' home.

B.R. testified that he met defendants through B.K. During his first visit to defendants' home, B.R. did not become intoxicated because he did not like the taste of beer. However, defendants began to provide vodka and orange juice for B.R. B.R. was drunk when defendants called him into their bedroom. There, B.R. was instructed by Sokhorn to engage in sexual acts with Sheila, and he complied. Sheila then performed a sexual act on the minor. While at the home, B.R. was also exposed to sexual materials and sexual devices. B.R. testified that he stopped visiting defendants' home because he was embarrassed about what had happened there.

The remaining minors also testified regarding the provision of alcohol and exposure to sexual materials. T.R. and R.K. were dared to expose themselves when they were drunk or high and complied. T.R. was also dared to touch Sokhorn's genital area and complied with this request. R.K. testified that Sokhorn touched her breasts. Additionally, Sheila displayed her two clitoris rings to the minors. The minors testified that they could not tell anyone about what was transpiring at defendants' home. If they did, defendants' children would be removed from their care, rumors would be spread about B.R., and B.K.'s mother would be jailed, deprived of her

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and five counts of distributing obscene matter to a minor, MCL 722.675. She was sentenced to concurrent terms of fifteen to thirty years' imprisonment for the first-degree criminal sexual conduct convictions, ninety days for the contributing to the delinquency of a minor convictions, and 291 days for the distributing obscene matter to a minor convictions. Defendant Sokhorn Ngem was convicted of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(d), two counts of third-degree criminal sexual conduct, MCL 750.520d, two counts of fourth-degree criminal sexual conduct, MCL 750.520e(1)(a), five counts of contributing to the delinquency of a minor, MCL 750.145, and five counts of distributing obscene matter to a minor, MCL 722.675. He was sentenced to concurrent terms of fifteen to thirty years' imprisonment for the first-degree criminal sexual conduct convictions, ten to fifteen years' imprisonment for the third-degree criminal sexual conduct convictions, one year for the fourth-degree criminal sexual conduct convictions, one year for the distributing obscene matter to a minor convictions, and ninety days for the contributing to the delinquency of a minor convictions.

medication, and would die. Although there were discrepancies in their testimony, the minors attributed any discrepancy due to the amount of alcohol consumed. Additionally, B.R. suffered from a medical condition that had affected his memory.

The prosecution did not charge defendants with criminal sexual conduct based on the age of the victims, all minors. Instead, the prosecutor chose to charge defendants with first-degree criminal sexual conduct, alleging that the minors were forced or coerced to engage in sexual relations. The trial court denied defendants' motion to quash those charges. In separate trials, Sheila alleged that the minors had fabricated testimony because of a dispute that she had with B.K. Sheila's mother, Barbara Siress, also testified that Sheila was an abused wife who suffered mental distress as a result of Sokhorn's sexual relationship with the babysitter. Sokhorn also alleged that the minors' testimony was fabricated as evidenced by the numerous contradictions between the statements given to police and sworn testimony provided in other proceedings.

I. Common Issue

Defendants both argue that there was insufficient evidence of force or coercion to support the first-degree criminal sexual conduct convictions. We disagree. When reviewing the sufficiency of the evidence in a criminal case, the evidence is viewed by this Court in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt. *People v Knapp*, 244 Mich App 361, 368; 624 NW2d 227 (2001). MCL 750.520b provides, in relevant part:

> (1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:
>
> (d) The actor is aided or abetted by 1 or more other persons and either of the following circumstances exists:
>
> (i) The actors knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.
>
> (ii) The actor uses force or coercion to accomplish the sexual penetration. Force or coercion includes **but is not limited to any of the circumstances listed** in subdivision (f)(i) to (v).
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> ***
>
> (f)(i) When the actor overcomes the victim through the actual application of physical force or physical violence.
>
> (ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats.
>
> (iii) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the

> actor has the ability to execute this threat. As used in this subdivision, "to retaliate" includes threats of physical punishment, kidnapping, or extortion.
>
> (iv) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable.
>
> (v) When the actor, through concealment or by the element of surprise, is able to overcome the victim. [Emphasis added.]

During the trials, the victims were asked whether they were "held" down or "forced" to consume the alcohol, smoke the marijuana, and engage in the sexual acts with defendants. Defendants argued that the first-degree criminal sexual conduct charges based on force or coercion were inappropriate because the Legislature intended that this charge be limited to those circumstances.

However, review of case law reveals that physical acts are not required to satisfy the force or coercion requirement. In *People v Brown*, 197 Mich App 448, 450; 495 NW2d 812 (1992), this Court held that the element of force or coercion upon the victim was satisfied. In that case, the defendant gave money to a man, who had brought the victim to a home, then had sex with the victim. When the defendant found the victim, she was sitting in a bedroom, alone, naked, and crying. The defendant disregarded the victim's statements that she wanted to go home, did not want to be there, and did not want to have intercourse. *Id*. The statements, indicating that she did not consent to sexual intercourse, and the defendant's disregard of the victim's statements were sufficient evidence of force or coercion to support the conviction. This Court noted that force or coercion was not limited to physical violence, but should be determined in light of all of the circumstances. *Id.*

Additionally, in *People v Kline*, 197 Mich App 165, 167; 494 NW2d 756 (1992), the sixteen-year-old victim testified that she believed that she was being forced to engage in sexual acts by the defendant, her stepfather. The defendant grabbed the victim's breasts, told her to remove her panties, and told her not to tell her mother what happened. The victim told the defendant to stop, but the defendant failed to comply. One act of penetration occurred in the basement where, arguably, the victim was isolated from help. Accordingly, this Court held that the evidence was sufficient to establish that the defendant compelled the victim to participate in sexual intercourse by force or coercion. *Id*.

These cases clearly establish that when a victim refuses to engage in sexual activities and the defendant ignores the refusal and penetrates the victim anyway, sufficient evidence exists to satisfy the force or coercion requirement. Furthermore, the case of *People v Reid*, 233 Mich App 457, 470-471; 592 NW2d 767 (1999), instructs that the use of alcohol may satisfy the coercion requirement. In *Reid*, the defendant knew the complainant's father through work. The complainant son was having problems in school. The defendant stated that he used to be a counselor at a church and worked with kids. He offered to speak to the complainant. At the request of complainant's father, complainant began to spend time with the defendant. On the first visit, they went to a mall. On the second and third visits, they went to the defendant's residence. *Id*. at 460-462.

On the fourth visit, the defendant brought the complainant to the home of his parents. The defendant knew that the complainant smoked and purchased cigarettes for him. At the home, the defendant brought the complainant to the basement where there was a computer and a bed. They played on the computer for approximately two hours. The complainant asked for something to drink. The defendant gave the complainant what appeared to be "7 Up." The beverage "tasted funny" but the complainant continued to drink it because he had not had the beverage for a long time. After finishing a drink or two, the complainant saw the defendant pour a liquid into his pop. The defendant told the complainant that it was vodka. The complainant began to feel dizzy, hot, sweaty, and light-headed. The defendant told the complainant not to go upstairs to use the bathroom because it could wake the defendant's parents. Rather, he instructed the complainant to urinate into a two liter bottle. *Id*. at 462-464.

The defendant eventually told the complainant that he was so drunk, he might get sick. The defendant instructed the complainant to remove his shirt and pants to avoid getting sick on them because then his mother would know that he had been drinking. The complainant laid on the bed, wearing his underwear. The defendant brought up pictures of men holding their genitals on the computer. The defendant eventually got into bed with the complainant. The complainant testified that he felt "numb" at that point in time. The defendant ultimately reached under the complainant's underwear, touched him, removed the underwear, and performed oral sex on the complainant. The defendant then asked the complainant to perform oral sex on him, and the complainant complied. The complainant described himself as feeling dizzy and light-headed when he performed this sex act on the defendant. *Id*. at 464-465.

The defendant in *Reid* was charged under the theory that the defendant utilized a position of authority to *coerce* the victim to submit. This Court concluded that the presentation of alcohol coupled with the showing of pornographic images in the basement of the defendant's home was sufficient evidence to constitute coercion when examined in light of the totality of the circumstances. *Reid, supra*. Likewise, in the present case, defendants knew that the minors were emotionally vulnerable. Defendants knew of the condition of B.K.'s mother and B.K.'s own health problem that caused her to be hospitalized and placed on birth control pills. Defendants knew that B.R. was on his own much of the time because his mother worked 3:00 p.m. to midnight. Defendants represented to the minors' parents that the minors were babysitting when defendants were not home. In fact, defendants were at home with the minors providing them drugs and alcohol. Additionally, defendants provided the beverage of choice for the minors that would result in intoxication. When the minors would not perform the sex acts as "dares," defendants played drinking games that caused the minors to consume more alcohol, get drunk, then engage in the sex act. Pursuant to *Reid, supra*, the totality of the circumstances reveals that the coercion element of first-degree criminal sexual conduct was satisfied. Viewing the facts in the light most favorable to the prosecution, there was sufficient evidence of the "force" or "coercion" element to convict defendant of first-degree CSC. *Knapp, supra*.[2]

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[2] Defendants also argue that the trial court, at sentencing, stated that it had obtained the "original notes" from MCL 750.520d and that the Legislature intended alcohol as a means of coercion. On appeal, it is argued that the trial court refused to disclose the materials and the failure to turn the materials over alone warrants a new trial. Review of the record reveals that there is no indication that counsel for either defendant asked the trial court for the materials or that the court

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Irrespective of the case decisions addressing force or coercion, application of the rules of statutory construction reveal that the trial court properly allowed the issue of coercion to be presented to the jury, and there was sufficient evidence to support the convictions. Statutory interpretation presents a question of law that we review de novo. *People v Nimeth*, 236 Mich App 616, 620; 601 NW2d 393 (1999). The function of a reviewing court resolving disputed interpretations of statutory language is to effectuate the legislative intent. *People v Valentin*, 457 Mich 1, 5; 577 NW2d 73 (1998). When the language of the statute is clear, the Legislature intended the meaning plainly expressed, and the statute must be enforced as written. *Id*. Technical words and phrases, such as those words that may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to the appropriate meaning. MCL 8.3a. We presume that every word has some meaning, and we must avoid any construction that would render any part of the statute surplusage or nugatory. *People v Borchard-Ruhland*, 460 Mich 278, 285; 597 NW2d 1 (1999). To discover legislative intent, provisions of a statute must be read in the context of the entire statute to produce, if possible, an harmonious and consistent whole. *Weems v Chrysler Corp*, 448 Mich 679, 699-700; 533 NW2d 287 (1995). Statutes are to be construed to prevent absurd results, injustice, or prejudice to the public interest. *People v Stephan*, 241 Mich App 482, 497; 616 NW2d 188 (2000). Statutory language should be construed in a reasonable manner, keeping in mind the purpose of the statute. *People v Seeburger*, 225 Mich App 385, 391; 571 NW2d 724 (1997). Nothing may be read into a statute that is not within the manifest intent of the Legislature as gathered from the act itself. *In re Juvenile Commitment Costs*, 240 Mich App 420, 427; 613 NW2d 348 (2000). If reasonable minds can differ regarding the meaning of a statute, judicial construction is appropriate. *Id*. The construing court looks to the object of the statute in light of the harm it is designed to remedy and applies a reasonable construction that will accomplish the Legislature purpose. *Id*. Statutes that relate to the same subject matter or share a common purpose are in pari materia and must be read together as one law, even if they contain no reference to one another and were enacted on different dates. *Stephan, supra*.

Review of the plain language of the statute in accordance with the rules of statutory construction reveal that defendants' position is without merit. While the Legislature defined the term "force" or "coercion," it expressly noted that the definition was not a limitation on what constituted force or coercion. MCL 750.520b(1)(f). When construction of a statute is required, the construing court looks to the object of the statute in light of the harm it is designed to remedy and applies a reasonable construction to accomplish the Legislative purpose. *In re Juvenile Commitment Costs, supra*. Under the circumstances of these cases, the supply of alcohol and marijuana coupled with the demonstration of sex toys and the revealing of the clitoris rings as a precursor to penetration and oral sex was sufficient to satisfy the "coercion" requirement. B.K. testified that on numerous occasions, she said no to sexual contact and was not forced to engage in sexual relations. However, she also testified that she was sober when she said no.

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refused to turn them over. Additionally, there is no indication appellate counsel independently attempted to locate the notes or legislative history to determine whether the Legislature intended alcohol as a means of coercion for purposes of the statute. However, irrespective of what the legislative history provides, our interpretation, in accordance with the rules of statutory construction and the application of case law, reveals that alcohol may be considered in the totality of the circumstances as a factor for determining coercion.

Consequently, Sheila would either serve her more alcohol or tip the glass as B.K. drank to cause her to consume more at one time. It appears that defendants utilized drugs and alcohol to avoid the need to apply actual physical force to obtain sexual favors.

Regarding victim B.R., the evidence was sufficient to support the conviction based on force or coercion. While B.R. consumed alcohol, he did not like the taste of beer. Therefore, B.R. did not become intoxicated on his first visit to defendants' home. However, after the first visit, defendants provided vodka and orange juice, an alcoholic beverage that B.R. would consume. Then, defendants summoned B.R. into the bedroom for a group sexual encounter. When sober, B.R. would not engage in a game of truth or dare where the dare required him to engage in self-gratification. However, after the alcohol consumption, B.R. engaged in sexual acts. The alcohol and marijuana coupled with the games and display of sexual materials served as a coercive mechanism to convince the minors to engage in sexual acts.

Defendants argue that the alcohol and marijuana should not be utilized to demonstrate "force" or "coercion" because the minors voluntarily consumed what was provided. That interpretation is contrary to the purpose behind the statute. A review of the plain language of the statute reveals that the objective was to punish individuals for acts of penetration achieved by positions of authority, achieved through family relationship, achieved with other crimes, achieved through the use of a weapon, or acts upon victims with some form of incapacity. MCL 750.520d. While the minors did not suffer from a mental impairment, arguably, the alcohol and marijuana contributed to the sexual acts that occurred with defendants and allowed them to be manipulated by defendants. Additionally, at the time pertinent to this action and before its repeal by 1998 PA 58, MCL 436.33(1) provided: "Alcoholic liquor shall not be sold or furnished to a person unless the person has attained 21 years of age." Defendants knew that the minors could not purchase alcohol for their own use, but were curious and accepted the alcohol. Defendants attempt to absolve themselves of wrongdoing by alleging "voluntary" consumption is without merit.

II. Docket Number 215672

Sheila argues that the trial court deprived her of due process when it refused to allow her to plead guilty as charged to the misdemeanor offenses of contributing to the delinquency of minors and distributing obscene matter to minors. We disagree. A trial court has the authority, pursuant to MCR 6.302(C)(3), to exercise its discretion by rejecting a defendant's guilty plea. *People v Grove*, 455 Mich 439, 444; 566 NW2d 547 (1997). A decision constitutes an abuse of discretion when it is so grossly violative of fact and logic that it evidences perversity of will, defiance of judgment, and the exercise of passion or bias. *People v McAllister*, 241 Mich App 466, 471; 616 NW2d 203 (2000). In the present case, we cannot conclude that the trial court's refusal to accept the guilty pleas was an abuse of discretion. Review of the record reveals that defense counsel surprised the prosecutor by raising this issue on the fifth day of trial. Furthermore, defense counsel did not offer the plea unconditionally. Rather, the plea was offered *if* the trial court granted defendant's motion in limine to exclude the pornographic videotapes and sexual devices. In light of the untimely request to plead guilty and the conditional nature of the plea, we cannot conclude that the trial court abused its discretion. *Grove, supra*. Sheila's reliance on the staff commentary accompanying MCR 6.302 is without merit because our Supreme Court rejected that interpretation of the court rule. *Grove, supra* at 456.

Furthermore, admission of the pornographic videotapes and sexual devices was proper. *People v Sharbnow*, 174 Mich App 94, 97-98; 435 NW2d 772 (1989). Defendants attacked the credibility of the minor victims and alleged that the stories were fabricated. Defendants further insinuated that the materials were present in defendants' home, and the victims discovered the materials while babysitting. The minors' knowledge of the devices and how they worked revealed that they had not just discovered the items in the home while babysitting. Rather, the testimony regarding the use of the products indicated that they had been demonstrated by someone with knowledge of how to use the sex toys. Accordingly, even if the guilty plea had been allowed, the evidence nonetheless would have been admissible at trial. *Sharbnow, supra*.

Sheila next argues that she was deprived due process when the trial court flatly refused to provide a transcript requested by the jury. We disagree. The jury requested photographs and a transcript of the answering machine messages. A transcript of the messages was not prepared. The trial court did not provide a written transcription, but played the messages for the jury. At trial, defense counsel asked the trial court to explain why it would take time to prepare the transcript, and the trial court complied. The jury resumed deliberations, but asked if written transcripts of the trial were available. Defense counsel asked the trial court to explain that it would take weeks or months to prepare a transcript, and the jury should rely on their own collective memory. The trial court complied. Pursuant to MCR 6.414(H), the trial court may order the jury to deliberate without the requested testimonial or evidentiary review, but must not foreclose the possibility of review at a later time. However, approval of the trial court's refusal extinguishes any error and precludes appellate review. *People v Carter*, 462 Mich 206, 208-209; 612 NW2d 144 (2000). Accordingly, any error was extinguished by trial counsel's recommended course of action and satisfaction with the trial court's instruction. *Id*.

Sheila next argues that the prosecutor made an improper civic duty argument and defense counsel's failure to object warrants a new trial based on ineffective assistance. We disagree. Prosecutorial misconduct issues are decided on a case by case basis, and the reviewing court must examine the pertinent record to evaluate the prosecutor's remarks in context. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). A civic duty argument is an argument that appeals to the fears and prejudices of jury members. *People v Cooper*, 236 Mich App 643, 651; 601 NW2d 409 (1999). Review of the record reveals that the prosecutor did not make a civic duty argument, but rather, sarcastically invited the jury to conclude that the sexual relations were consensual after the minors were plied with drugs and alcohol.

Nonetheless, assuming that the prosecutor's commentary was improper, effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). Defendant must show that the failure to object to the testimony deprived him of a substantial defense that would have affected the outcome of the proceeding. *People v Murray*, 234 Mich App 46, 65; 593 NW2d 690 (1999). Defendant must also overcome the presumption that the challenged action was sound trial strategy. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). In this case, Sheila failed to meet the heavy burden of establishing ineffective assistance of counsel based on the failure to object to this argument.

Lastly, Sheila argues that trial counsel was ineffective for failing to call Sokhorn to testify at her trial. We disagree. At the commencement of trial, the prosecutor moved to adjourn the trial because of marital privilege issues. While the couple was married at the start of trial, the

prosecutor had learned that divorce proceedings had commenced a month earlier. The trial court denied the motion to adjourn. Additionally, counsel for Sokhorn moved to sever trials because he had learned that Sheila would place blame for the offenses solely on Sokhorn. The trial court granted Sokhorn's motion to sever, and the prosecutor chose to try Sheila's case first. Sheila's counsel did not call Sokhorn as a witness at trial. Prior to or at sentencing, Sokhorn submitted a letter to the trial court. In the letter, Sokhorn denied Sheila's involvement or knowledge of his sexual relationship with B.K. As a result of the letter, Sheila's counsel moved for a new trial at sentencing based on "newly discovered evidence." The trial court denied the motion. On appeal, Sheila argues that her counsel was ineffective for failing to call Sokhorn as a witness at her trial. Specifically, she argues that the waiver of the privilege could only be asserted by Sokhorn personally, not his trial counsel, and therefore, he should have been called as a witness.

This issue is not preserved for appellate review because Sheila failed to move for a *Ginther*[3] hearing or a new trial based on ineffective assistance of counsel in the lower court. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). When a *Ginther* hearing is not held below, appellate review is limited to mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). Without testimony from a *Ginther* hearing establishing that Sokhorn would have waived his privilege, Sheila's claim is mere speculation. Additionally, we note that Sokhorn had no incentive to testify at Sheila's trial and accept blame for the offenses when there could be consequences at his own trial.[4]

Furthermore, Sheila's contention that this information constitutes "newly discovered evidence" is without merit. In *People v Dersa*, 42 Mich App 522, 533; 202 NW2d 334 (1972), this Court set forth the test of newly discovered evidence. Specifically, the new evidence must be "(a) newly discovered, (b) not cumulative, (c) not available at trial, and (d) likely to produce a different result upon retrial." *Id*. This letter was cumulative to the testimony given by Siress. Siress testified that she heard rumors that Sokhorn was having sexual relations with the babysitter. Sheila initially denied the rumors when confronted, then admitted that she walked in on Sokhorn having sex with B.K. Siress took Sheila to the hospital where she remained for a couple of hours, but was not admitted. Siress also testified that Sheila took steps to try to remove herself from Sokhorn by calling shelters and planning to move in with her parents. Additionally, defense counsel was able to bring out, through the "questioning" of Sergeant Keith, that medical records indicated that Sheila suffered from depression as a result of Sokhorn's sexual relationship with B.K. Thus, the claim, that Sheila was merely present at the home when Sokhorn began a sexual relationship with the babysitter, was before the jury and does not constitute newly discovered evidence. The allegation of ineffective assistance of counsel is without merit. *Effinger, supra*.[5]

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[3] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

[4] Although Sokhorn's letter has not been preserved in the record on appeal, the trial court stated that the predominant purpose of the letter did not seek to absolve Sheila of liability, but obtain a mitigated sentence for her so she could care for the couple's minor children.

[5] In a supplemental brief filed in propria persona, Sheila argues that the trial court erred when it excluded evidence, specifically medical records, that were admissible as rebuttal or diminished capacity evidence. The decision to exclude this evidence was not an abuse of discretion, *People*

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III. Docket Number 215676

Sokhorn argues that he was deprived of a fair trial based on the prosecutor's elicitation of improper testimony regarding other bad acts and the failure to object to this testimony amounts to ineffective assistance of counsel. We disagree. When an issue involves unpreserved, nonconstitutional error, defendant must demonstrate plain error to avoid forfeiture. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). That is, error must have occurred, it was clear or obvious, and the plain error affected substantial rights. *Id*. The last requirement mandates a showing of prejudice such that the error affected the outcome of the lower court proceedings. *Id*. The defendant bears the burden of persuasion with respect to prejudice. *Id*. Furthermore, the defendant must overcome the presumption that any challenged action or inaction might be considered sound trial strategy. *Knapp, supra*.

Review of the record reveals that the failure to object to this testimony was purposeful trial strategy. B.K. testified that, in her view, coercion occurred because Sokhorn, through words and the use of alcohol and drugs, was able to convince her to perform acts that she would not have performed under normal circumstances. Additionally, she testified that Sokhorn, through the use of drugs and alcohol, created an atmosphere that she would not resist or fight back. B.K.'s testimony regarding the oral sex incident indicated that she took steps to preclude Sokhorn from engaging in sexual acts and succeeded in her efforts. Specifically, B.K. testified that Sokhorn "made" her perform oral sex on him. B.K. testified that defendant tried to make her perform oral sex a second time when she bit him to stop the act from occurring. In response to B.K.'s act, she testified that defendant merely said, "that was mean." This testimony seemingly contradicted B.K.'s assertions that the sexual acts were coerced from her and any fear that she had if she failed to perform the acts. Thus, Sokhorn has failed to overcome the presumption that the challenged inaction was trial strategy. *Knapp, supra; Effinger, supra*.

Additionally, although Sokhorn was only charged with three sexual acts with B.K., Sokhorn's trial counsel asked B.K. to delineate the circumstances surrounding the fourth through tenth times that she had sex with defendant. B.K. could not delineate exactly where the acts occurred or who else was present in the home. It appears that the introduction of this testimony on cross-examination was purposeful. Trial counsel sought to highlight that there were other alleged bad acts of sexual occurrences, but B.K. could not recall any details. It appears that trial counsel introduced this lack of recollection to indicate that the instances were fabricated. Sokhorn has failed to demonstrate plain error affecting substantial rights. *Carines, supra*.

Sokhorn argues that the trial court erred in allowing Detective Keith to render an opinion regarding the credibility of the witnesses. We agree, but conclude that any error was harmless. The prosecutor asked Detective Keith to delineate the process of investigating the sexual assault charges. Detective Keith stated that he interviewed the witnesses, found them to be credible, and presented the case to the prosecutor. Following an objection, the trial court sua sponte concluded

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v Lukity, 460 Mich 484, 488; 596 NW2d 607 (1999), because the medical records were disclosed to the prosecutor during trial and a diminished capacity or insanity defense was not raised. In any event, we note that the relevant content of the records was cumulative to the testimony admitted during the questioning of Detective Keith and Siress.

that Detective Keith was an expert. However, there was no foundation to establish Detective Keith as an expert pursuant to MRE 702. Additionally, the trial court held that the testimony was proper testimony regarding the ultimate issue pursuant to MRE 704. While MRE 704 provides that a witness may testify regarding the ultimate issue, Michigan case law provides that it is improper for a witness to comment or provide an opinion regarding the credibility of another witness. *People v Buckley*, 424 Mich 1, 17; 378 NW2d 432 (1985). However, the admission of this evidence is subject to a prejudicial error analysis. *Id*. In *Buckey*, the Supreme Court concluded that any error was harmless even when it was *conceded* that the prosecutor's strategy was to discredit the defendant by inviting him to label the prosecution witnesses as liars. In the present case, the prosecutor did not invite Detective Keith to label Sokhorn as a liar. Rather, the detective described his investigative process that included a credibility assessment of the victims. Furthermore, the trial court instructed the jury that it was to decide issues of fact and the credibility of the witnesses. Accordingly, although the admission was improper, it did not result in prejudicial error. *Buckey, supra*.

Sokhorn next argues that a new trial is warranted based on prosecutorial misconduct. We disagree. As previously stated, prosecutorial misconduct issues are examined on a case by case basis. *Schutte, supra*. Specifically, Sokhorn contends that the number of interruptions and improper objections by the prosecutor, the number of admonitions by the trial court to the prosecutor, and the improper closing argument by the prosecutor warrant a new trial. Following a review of the record, we cannot conclude that the exchanges between the prosecutor and the trial court warrant a new trial. The trial judge was unhappy with the prosecutor's decision to charge Sokhorn with first-degree criminal sexual conduct. The trial judge repeatedly stated that if the prosecutor had charged the offenses based on the age of the victims, the trial would have been over in "fifteen minutes."

Additionally, the prosecutor's closing argument does not warrant a new trial. A prosecutor may not make a statement of fact to the jury that is not supported by the evidence, but may argue the evidence and all reasonable inferences arising from it. *Schutte, supra*. Review of the closing argument reveals that the prosecutor argued that the victims were thirteen and fourteen years of age. The prosecutor argued that the victims were brought to the home by Sheila. The prosecutor argued that the couple provided the victims with alcohol and marijuana, then had sex with them. This closing statement was an accurate assessment of the testimony given by the witnesses. Accordingly, this claim of error is without merit. *Schutte, supra*.

Sokhorn next argues that the trial court failed to properly instruct the jury and that trial counsel was ineffective for failing to object to the instructions. We disagree. Jury instructions are reviewed in their entirety to determine if error requiring reversal occurred. *People v Brown*, 239 Mich App 735, 746; 610 NW2d 234 (2000). Instructions must not be extracted piecemeal to establish error. *Id*. Somewhat imperfect instructions do not necessitate a reversal provided that the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id*. A party must object or request a given jury instruction to preserve the error for review. MCL 768.29. In the absence of an objection or request for an instruction, this Court will grant relief only when necessary to avoid manifest injustice. *People v Cooper*, 236 Mich App 643, 656; 601 NW2d 409 (1999). Based on this high standard, Sokhorn's claimed errors regarding the terminology, number of counts, and the statements impeaching defendant are without merit.

The jury did send a note to the trial court requesting a clearer definition of coercion. In response, defense counsel suggested that a definition from case law be submitted to the jury, specifically the definition found in *People v McGill*, 131 Mich App 465; 346 NW2d 572 (1984). The trial court complied with the request and gave the instruction. Based on the record, the claim that defense counsel failed to participate in the instruction and ensure that the trial court properly instructed the jury is without merit. Sokhorn has failed to meet his burden in establishing a claim of ineffective assistance of counsel. *Effinger, supra*.

Sokhorn next argues that the trial court committed reversible error when sentencing defendant. We disagree. The trial court's articulation of the sentence was sufficient. *People v Lawson*, 195 Mich App 76, 77; 489 NW2d 147 (1992). The proportionality of a sentence is reviewed for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). "A sentence constitutes an abuse of discretion if it violates the principle of proportionality by being disproportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Paquette*, 214 Mich App 336, 344-345; 543 NW2d 342 (1995). Based on the acts and the manner in which they occurred, we cannot conclude that the sentence was disproportionate. Sokhorn's allegation that the trial court intended on sentencing him to a period of months for the criminal sexual conduct offenses is without merit. The court speaks through its written orders, and a judgment is effective when reduced to writing. *People v Vincent*, 455 Mich 110, 123-124; 565 NW2d 629 (1997). Thus, any claim of error should have been directed to the trial court.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Harold Hood
/s/ Jeffrey G. Collins