STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 15, 2005
v	No. 252801 Bay Circuit Court
WILLIAM ALBERT MEYER, Defendant-Appellant.	LC No. 03-010070-FC

Before: Hoekstra, P.J., and Neff and Schuette, JJ.

PER CURIAM.

Defendant was convicted of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a), for engaging in fellatio with his daughter, who was under the age of thirteen and a second count of first-degree criminal sexual conduct for engaging in fellatio with his son, who was also under the age of thirteen. Defendant was sentenced to concurrent terms of 210 to 450 months' imprisonment for his convictions. He appeals as of right. We affirm.

In January 2002, defendant's wife, Terry Meyer, moved out of the family home and took her four children with her. Defendant was not the father of Terry's two older children. The victims were defendant's natural children, who were born during the marriage of Terry and defendant. Defendant's daughter was on born January 18, 1995, and his son was born on August 10, 1996.

In February 2002, defendant began exercising scheduled visitation with the victims. He had visitation every weekend. Defendant's daughter testified that, during one visit, defendant called her into the bedroom. When she entered, he removed his pants and pulled down his underwear. He instructed her to "suck" his "private" between his legs. He pushed the back of her head down and put his penis into her mouth. After some time passed, defendant told the victim to stop sucking and get her brother to come to the bedroom. Defendant's daughter found her brother pretending to sleep on a couch and told him that defendant wanted him. Defendant's son testified that defendant asked him to open his mouth. When he did, defendant inserted his penis and "squishy" stuff came out of it. Defendant's son testified that he threw up after the incident. Like his sister, he confirmed that the incident occurred during a weekend visit.

Defendant's daughter additionally corroborated that defendant put his penis into his son's mouth. She peeked into the bedroom through a door crack and observed the incident. She described defendant's penis as "wiggly" when he was with his son. It was not straight like it was when she was with him. Defendant threatened both children, indicating that he would kill either their mother or one of their family members if they told anyone about his conduct.

Defendant's mother and one of his neighbors testified that defendant was always with his parents during visits. He was never alone with the children unsupervised. Defendant, testifying on his own behalf, claimed that he was alone with the victims only during his first visit in February 2002. Thereafter, his parents came and stayed at his home every weekend to help with the victims. Defendant denied the victims' accusations and pointed out that he was injured in a work accident in July 2000. He had difficulty with mobility after a related surgery in January 2002.

I

Defendant first argues that the trial court erred in utilizing a non-random system of jury selection. The trial court conducted voir dire on twenty-one jurors at a time. Fourteen were seated in the jury box while seven others were seated in chairs. As jurors from the box were excused, the jurors from the chairs replaced those in the box. When the seven potential jurors from the chairs were "used up," seven more potential jurors would be called to the chairs. Defense counsel not only agreed to this type of selection process, but he expressed his preference for this type of selection, calling it a "more rational approach." MCR 2.511(A)(4) provides that counsel may agree to juror selection by "any other fair and impartial method" which differs from the random selection process set out in §§ (A)(2) and (3) of the rule.

Because defense counsel approved of the selection process, the issue is waived for appeal. Waiver is the "intentional relinquishment or abandonment of a known right." *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). Waiver is available in a broad array of constitutional and statutory provisions. *Id.* at 217-218. Although there are some basic rights that an attorney may not waive without the fully informed and publicly acknowledged consent of his client, a lawyer has full authority to manage the conduct of trial and make decisions pertaining to the conduct of trial. *Id.* Jury selection is generally a matter of trial conduct or strategy. *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001). Thus, the manner of jury selection is capable of being waived by defense counsel and, in this case, was waived. Waiver extinguishes any error. *Carter*, *supra* at 215. Accordingly, there is no error to review. *Id.* at 219.

To the extent that the issue was not waived, it is unpreserved. *People v Colon*, 233 Mich App 295, 300; 591 NW2d 692 (1998) (to preserve a jury selection error for appeal, a defendant must object to the jury selection procedure before the process begins). Unpreserved allegations of error, constitutional and nonconstitutional, are reviewed for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). While the method of jury selection may have been improper, *Colon*, *supra* at 303, automatic reversal is not

required. *People v Green (On Remand)*, 241 Mich App 40, 45; 613 NW2d 744 (2000). Defendant has not demonstrated that the method utilized was unfair or partial. *Id.* Thus, defendant's substantial rights were not affected. Defendant has not demonstrated that any error in the jury selection affected the outcome of his trial. *Carines, supra.* Even if prejudice existed or is presumed, reversal is not required. Any error did not result in the conviction of an actually innocent defendant or "seriously affected the fairness, integrity or public reputation" of defendant's trial. *Id.*

Defendant additionally argues that his counsel was ineffective for failing to object to the jury selection process. In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Defendant makes a conclusory assertion that, but for counsel's failure to object to the selection process, there was a reasonable probability that the result of his trial would have been different. He argues that he was prejudiced, but does not support this argument. The argument is insufficient to establish a claim of ineffective assistance of counsel. *Id.*

II

Defendant next argues that he was denied the effective assistance of counsel for numerous reasons, including that defense counsel was ineffective for failing to object to the prosecutor's opening and closing arguments, for failing to object when the prosecutor vouched for the credibility of her witnesses, for failing to object when the prosecutor elicited "similar acts" testimony and information about uncharged offenses, for failing to object to leading questions and the prosecutor's personal testimony about key parts of the case, for failing to object to the qualifications of the prosecution's expert witness, and for failing to object when the prosecutor went outside the scope of cross-examination during redirect examination. Defendant states his positions in a cursory fashion with little or no citation to authority and leaves it to this Court to analyze and rationalize his positions and to explain whether the alleged conduct affected the outcome of the trial. An appellant may not merely announce his positions and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Therefore, defendant's arguments are abandoned.

Nevertheless, we have considered defendant's allegations and conclude that he has failed to meet his burden with respect to his claims. *Stanaway, supra* at 687-688. Defendant has failed to *affirmatively demonstrate* that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). His conclusory claim that, without his counsel's alleged errors and failures to object there is a reasonable likelihood that the result of the proceeding would have been different is insufficient to establish that defense counsel was ineffective.

III

Defendant next challenges the trial court's ruling permitting the prosecutor to present other-acts evidence pursuant to MRE 404(b). We review this preserved evidentiary issue for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). If error is found, reversal is not required unless defendant meets his burden of establishing that, more probably than not, a miscarriage of justice occurred because of the error. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).[1]

Before trial, the prosecution filed a notice of intent under MRE 404(b). The prosecutor intended to call the victims, Terry Meyer (the victims' mother), and two of the victims' female relatives to testify about defendant's other acts of sexual misconduct. The prosecutor argued that the evidence was relevant to motive, opportunity, intent, preparation, plan or system, identity, absence of mistake or accident. Defendant moved to exclude the proposed testimony. The trial court ruled that testimony about other acts perpetrated upon the victims by defendant was admissible, but testimony by two female relatives about defendant's conduct toward them could not be admitted. It gave several reasons for permitting the evidence, including to show "familiarity," contemporaneous happenings, the complete story, and defendant's propensity to engage in unusual or abnormal sexual relationships. The trial court found that the probative value of the evidence was not outweighed by the danger of unfair prejudice.

MRE 404(b) provides:

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in this case.

MRE 404(b) is a rule of inclusion. *People v Katt*, 248 Mich App 282, 303; 639 NW2d 815 (2001). Relevant, other-acts evidence does not violate MRE 404(b) unless offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith. *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), The *VanderVliet* Court clarified the test to be used when determining the admissibility of other bad acts evidence:

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair

[1] We reject defendant's argument that the issue raises questions of a constitutional dimension. The issue is evidentiary, and evidentiary errors are reviewed under the nonconstitutional standard of review set forth in *Lukity*, *supra*. See *People v Watson*, 245 Mich App 572, 582; 629 NW2d 411 (2001).

> prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury. *Id* at 55

The prosecution must demonstrate that the evidence is relevant. *Crawford, supra* at 387.

> Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence. [*Id.* (citation omitted).]

Where the evidence is relevant, "admissibility depends on whether its probative value outweighs its prejudicial effect, taking into account the efficacy of a limiting instruction." *Id.* at 385.

In this case, the prosecutor articulated proper purposes for the other-acts evidence under MRE 404(b), including common plan or scheme, opportunity, and lack of fabrication. The prosecutor also demonstrated that the challenged evidence was logically relevant and not offered solely to show defendant's propensity to commit crime. Specifically, the evidence was relevant and highly probative to show that defendant had opportunity. Defendant offered evidence that he had difficulty with mobility and was constantly with other adults during visitation. He implied a lack of opportunity. The evidence of his other acts against the victims provided a complete picture of the surrounding events for the jury. This is permissible under MRE 404(b). See *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996). The complete picture supported that there were times, apart from the charged conduct, when other adults were not present and defendant was able to take advantage of the children. We note that the trial court permitted the evidence, in part, to give the jury the complete story, to place the incident in context, and to show defendant's familiarity with the victims. These articulated reasons correspond with the permissible purpose of demonstrating opportunity.

The other-acts evidence was also relevant to rebut the charge of fabrication. In refuting the charges, defendant emphasized that the children did not disclose the charged conduct contemporaneously with its occurrence but did so only after repeated interviews. He implied fabrication. Evidence that defendant committed other acts against the children and that his acts were disclosed in stages supported the prosecutor's theory that the events were not fabricated and were disclosed in a fashion typical to sexually abused children. Without the evidence, the jury would have been left with a conceptual void in the victims' testimony. *People v Starr*, 457 Mich 490, 501-502; 577 NW2d 673 (1998). The evidence of the uncharged acts was relevant. We note that the prosecutor used the evidence of the uncharged conduct to argue that the incidents were disclosed in a fashion typical of abused children and to point out that, while the children could not recall certain unimportant details, they were credible with respect to the details that mattered and would not know certain details if they had not experienced the events.

We additionally find that the probative value of the evidence was not outweighed by the danger of unfair prejudice. MRE 403. While all relevant evidence is inherently prejudicial and damaging, only unfairly prejudicial evidence requires exclusion. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909, mod 450 Mich 1212 (1995) (citations omitted). Relevant considerations in determining unfair prejudice include whether the jury will give the evidence undue or pre-emptive weight. *Id.* at 75-76. The record does not demonstrate any danger that the jury gave the evidence undue or pre-emptive weight or that the jury was confused by the evidence. Further, a

cautionary instruction with respect to the use of the evidence was provided. The trial court did not abuse its discretion in admitting the other-acts evidence.

We note that, in addressing this issue, the trial court commented that the evidence was relevant as "propensity" evidence in addition to being relevant for other purposes. MRE 404(b) forbids other-acts evidence to be used as propensity evidence. The trial court's ruling, however, was made outside the presence of the jury, and the prosecutor did not use the evidence as propensity evidence. Further, the jury was instructed that the other-acts evidence was to be considered for limited purposes, specifically showing familiarity and the context and circumstances of the events. The trial court clearly informed the jury that the evidence could not be used as propensity evidence.

IV

Defendant next raises several challenges to the prosecutor's conduct at trial. With the exception of citing cases for the standard of review, however, his argument contains little citation to authority, and he fails to explain or rationalize his claim that the challenged conduct requires reversal. The issues may therefore be deemed abandoned. *Kelly*, *supra.* Nevertheless, we have reviewed most of the alleged errors and conclude that reversal is not warranted.[2] Because defendant did not object to the challenged conduct at trial, we review these unpreserved allegations of misconduct for plain error. *People v Aldrich,* 246 Mich App 101, 110; 631 NW2d 67 (2001). No error requiring reversal will be found if the prejudicial effect of the prosecutor's conduct could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant first argues that the prosecutor attempted to vouch for the victims' testimony during voir dire. The prosecutor questioned potential jurors about their knowledge and attitudes with respect to a child's delay in reporting abuse by a family member, whether providing inconsistent details would automatically discredit a child witness, and whether the lack of medical evidence would preclude a conviction. She also questioned a potential juror about her experience with a false accusation of sexual abuse, inquiring whether the juror understood that sometimes allegations are made and are true.

We disagree that the prosecutor engaged in improper vouching for the victims' credibility during voir dire. "A prosecutor may not vouch for witness credibility or suggest that the government has some special knowledge that a witness will testify truthfully." *People v Ramsdell,* 230 Mich App 386, 404; 585 NW2d 1 (1998). The prosecutor did not suggest that the government had special knowledge that the victims would testify truthfully, and she did not refer to their credibility during voir dire. Moreover, the questioning was not improper. Questioning

[2] With respect to two of defendant's claims of prosecutorial misconduct, specifically that the prosecutor exceeded the scope of cross-examination on redirect and that the prosecutor argued her own beliefs during closing argument and sentencing, defendant fails to cite to the record to demonstrate where the alleged errors occurred. A defendant may not leave it to this Court to find the factual basis for his position. *People v Traylor,* 245 Mich App 460, 464; 628 NW2d 120 (2001). Therefore, we do not address these issues.

that is necessary to determine whether a prospective juror should be excused is permissible. *People v Bell*, 209 Mich App 273, 278; 530 NW2d 167 (1995).

> The function of voir dire is to elicit sufficient information from prospective jurors to enable the trial court and counsel to determine who should be disqualified from service on the basis of an inability to render decisions impartially. In ensuring that voir dire effectively serves this function, the trial court has considerable discretion in both the scope and conduct of voir dire. What constitutes acceptable and unacceptable voir dire practice "does not lend itself to hard and fast rules." [*People v Sawyer*, 215 Mich App 183, 186; 545 NW2d 6 (1996).]

The prosecutor's voir dire questions constituted valid probes into the potential jurors' attitudes with respect to the type of case that would be presented and whether the jurors could be fair under the circumstances. There was no prosecutorial misconduct.

Defendant next argues that the prosecutor committed misconduct by injecting a personal experience into her closing argument. During his closing argument, defense counsel emphasized inconsistencies in the details of the victims' stories. For example, one victim testified that the penetrations occurred in the morning and the other in the evening. In response, the prosecutor argued:

> And what about our memories? We remember significant events. We talked to you early on when we were picking you as the jury about 9-11, and what do you remember of that day. Do you remember what you had for dinner? Do you remember what you were wearing? Some people wear uniforms so its gonna be the same thing every day. Some people go to Subway every day. But do you remember all the details?
>
> I'm going to tell you about an event in my life. On May 6th of 1999, my mother died. I don't remember what I was wearing. Probably jeans and tee shirt. That's what I wear when I'm home.
>
> I don't know how my furniture was arranged that day. I don't know if the couch was up by the window or if the love seat was there or if it was over by the bookcase. I don't know.
>
> I don't know what I had for lunch. I don't know exactly what time it was. I don't even know if my clock is set on the right time. I'll tell you this, one of my clocks isn't set on the right time, and we heard about time.
>
> I don't know any of those things. I can't tell you what I had for dinner that night 'cause I don't know if I ate dinner that night.
>
> But I can tell you my mom died. I can tell you it was my sister that called. I remember that event. Four years ago and I remember that event. But I can't give you detail.

> Can [the victim daughter] give you detail? Can she remember which time that she was lookin' through the window and which time she was lookin' through the crack? And what day it was when he put her hands down - - his hands down her pants or what day it was when she put his penis in her mouth or he put his penis in her mouth? Or which day it was that - - . . .
>
> She can't give you dates. She can't give you times. She can't give you details and neither can [the victim son], but they remember the main event because the main event was yucky.

A prosecutor's comments need to be considered in light of defense counsel's arguments. *People v Vaughn,* 200 Mich App 32, 39; 504 NW2d 2 (1993).

> Generally, "[p]rosecutors are accorded great latitude regarding their arguments and conduct." They are "free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case." [*People v Bahoda,* 448 Mich 261, 282; 531 NW2d 659 (1995) (citations omitted).]

Here, the prosecutor's comments were responsive to defense counsel's closing argument. While the prosecutor referred to a personal experience, her argument was not designed to elicit sympathy for herself or her case but to illustrate her point with a common sense analogy. A timely instruction could have cured any prejudice. *Watson, supra.* Moreover, the jury was instructed that the lawyers' statements and arguments are not evidence and were meant only to help understand the evidence and the parties' legal theories. There was no plain error.

Defendant next argues that the prosecutor made numerous references to, and elicited testimony about, other acts that defendant committed against his daughter. Defendant fails to explain or rationalize his position that this conduct was improper. Because we have concluded that the other-acts evidence was properly admitted under MRE 403, we find no error in the prosecutor's conduct of eliciting that information.

Defendant additionally argues that the prosecutor used leading questions when questioning his daughter. He cites three portions of the record in support of this claim. In *Watson, supra* at 587, this Court stated:

> [A] considerable amount of leeway may be given to a prosecutor to ask leading questions of child witnesses. All but one of the questions defendant challenges on appeal were asked of the thirteen-year-old victim. Any leading of the witness was only to the extent necessary to develop her testimony. See MRE 611(c)(1).
>
> Further, reversal is not required simply because leading questions were asked during trial. In order to warrant reversal, "it is necessary to show some prejudice or pattern of eliciting inadmissible testimony." Where the defendant was not prejudiced by the leading question, reversal is not required. . . . See also *People v Hooper,* 50 Mich App 186, 196; 212 NW2d 786 (1973) ("[T]his Court does not believe a case should be reversed merely because a few technically improper questions are asked. In fact, it is hard to find a trial where every

question is exactly proper. In order to require reversal some prejudice or pattern of eliciting inadmissible testimony must be shown." [Citations omitted.]

In this case, defendant's daughter was an eight-year-old, child-victim. The leading questions were necessary to develop the victim's testimony and were minimal during her examination. Moreover, defendant has not shown any prejudice or pattern of eliciting inadmissible testimony by the prosecutor. We find no plain error.

Finally, defendant argues that the prosecutor acted improperly by interrupting the victim's testimony and offering testimony herself. The record does not support this allegation of error. A plain error has not been shown. *Aldrich, supra.*

V

Defendant argues that error requiring reversal occurred when the trial court sealed records from the Family Independence Agency (FIA) after an in camera review and did not permit defendant to access those records or admit them into evidence. We review a trial court's decision with respect to in camera inspection of potentially exculpatory evidence for an abuse of discretion. *Stanaway, supra* at 680. Unpreserved issues, however, are reviewed for plain error. *Carines, supra.*

Before trial, the parties stipulated that the trial court would review the FIA records pursuant to the procedure outlined in *Stanaway, supra* at 679-681. Defendant believed that the records may contain information indicating that someone other than himself engaged in sexual misconduct with the children. Defense counsel was interested in the victims' descriptions of what happened to them between January 2002 and August 2002. The trial court held an in camera inspection and provided a small portion of the records to the parties. Defendant does not challenge the trial court's exercise of discretion in this regard. Instead, he now argues that he should have been given access to the full records before trial because he could have used the records to discredit or impeach the victims.

"There is no general constitutional right to discovery in a criminal case." *Stanaway, supra* at 664, quoting *Weatherford v Bursey*, 429 US 545, 559; 97 S Ct 837; 51 L Ed 2d 30 (1977). When a defendant specifically articulates why privileged records may contain evidence necessary for his defense, an in camera inspection by the trial court should take place. *Stanaway, supra* at 678-681. If the trial court is satisfied that the records reveal evidence necessary to the defense, the evidence will be supplied to defense counsel. *Id.* Information discovered by way of an in camera review should be given to a defendant only if it is essential and reasonably necessary to the defense. *Id.* at 684.

If defendant had requested an in camera review for the generic reason asserted on appeal, specifically that the record may contain information to discredit or impeach the victims, the request properly would have been categorically denied. *Id.* at 681-682. Such a request falls short of the specific justification necessary to overcome the documents' privilege. See *id.* (an in camera review is not warranted where there is simply a claim that the privileged record may contain evidence of inconsistencies that may be used to impeach a witness). Defendant has not demonstrated that he was entitled to the entire privileged record as a potential source of impeachment information. Indeed, he was not even entitled to an in camera review to determine

if the records contained evidence that could have been used to impeach the victims. Thus, he has not established a plain error. *Carines, supra*.

VI

Defendant next argues that his right of confrontation was violated because the victims were permitted to testify through closed-circuit television. This issue is waived. Defense counsel expressly agreed to this procedure at trial, and assisted in drafting a cautionary instruction for the jury. A lawyer may make decisions with respect to the conduct of the trial, including agreements "regarding the admission of evidence," and his client is bound by those decisions. *Carter, supra* at 218. When a defendant knowingly relinquishes his rights, he may not seek appellate review for the claimed deprivation of his rights. *Id.* at 215. Waiver extinguishes any error. *Id.* See also *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999) (error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence and, where a defendant contributed to the error by plan or negligence, appellate review of the error is waived).

VII

Defendant also challenges the admission of Trooper Yvonne Brantley's testimony about the statements that defendant's daughter made during an interview in January 2003. Defendant argues that the evidence was inadmissible under MRE 803A because he did not have advance notice of the prosecution's intent to offer the challenged testimony and because the trial court made no determination that the statements met the trustworthiness criteria set forth in MRE 803A. In arguing his position, defendant fails to set out the contents of the court rule as required by MCR 7.212(C)(7), fails to explain or rationalize his positions, fails to cite any authority to support his positions, and offers only a cursory and conclusory argument. The issue is abandoned. *Kelly, supra.*

Nevertheless, we have reviewed this unpreserved allegation of error under the plain error rule. *Carines, supra.* MRE 803A provides:

> A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:
>
> (1) the declarant was under the age of ten when the statement was made;
>
> (2) the statement is shown to have been spontaneous and without indication of manufacture;
>
> (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and
>
> (4) the statement is introduced through the testimony of someone other than the declarant.

> If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule.

MRE 803A also provides that a statement may not be admitted under the rule unless the proponent of the statement provides sufficient notice in advance of trial to enable the adverse party to prepare to meet the statement at trial.

In this case, Officer Brantley's name was on the prosecution's witness list, attached to the Felony Information that was filed on August 4, 2003. On September 5, 2003, defendant filed a motion to limit testimony. In the motion, defendant acknowledged that the police reports contained information about the victims' statements concerning the charged conduct. Defendant further acknowledged that the discovery materials provided to him revealed that the investigating police officer had completed her investigation and summarized the victims' statements and that the prosecutor was present when the victims made their statements to the officer. Defendant requested that questioning *of the investigator* and children should be limited so the jury would not learn that the prosecutor was present during the interviews. Otherwise, the prosecutor may become a witness with respect to the previous statements made by the victims to the police. Based on the contents of the motion, it is clear that defendant anticipated that Officer Brantley would testify about the victims' statements concerning the charged conduct. We therefore reject any suggestion that defendant was prejudiced by a lack of advance notice. See *People v Dunham*, 220 Mich App 268, 272-273; 559 NW2d 360 (1996) (where the potential testimony could have been anticipated, a defendant is not prejudiced by the prosecutor's failure to inform him about the plan to introduce the testimony).

Additionally, the other elements of MRE 803A were met in this case. First, defendant's daughter was under the age of ten when she made the statements. Second, there was undisputed testimony that the statements were spontaneous. Officer Brantley testified that defendant's daughter indicated that she had something to say. When Officer Brantley asked defendant's daughter to tell her about it, defendant's daughter responded with a "free narrative." In *Dunham, supra* at 272, this Court found that the challenged statements were spontaneous because they were made in response to open-ended questions. Third, while the statements in this case were not made contemporaneously with the event, there was ample evidence that the delay in reporting was motivated by fear. Defendant threatened to kill family members if his daughter told anyone what happened. When defendant's daughter had her initial forensic interviews, she asked questions, which indicated her fear that defendant would come to the forensic center. In *Dunham*, this Court found that an eight or nine-month delay in reporting was excusable where the delay was based on the victim's well-grounded fear of the defendant. The victim here reported the allegations within a year of the acts for which defendant was charged, and her delay was excusable. Finally, the statements were introduced through Officer Brantley, and the record does not reveal that the victim made any previous corroborating statements about the charged conduct before talking to Officer Brantley. We note that defendant was charged on the date the challenged statements were made. Because the challenged evidence met the criteria of MRE 803A, it was admissible. There was no plain error. *Carines, supra.*

VIII

Defendant next argues that the trial court erred when it allowed a support person to sit with the victims at trial without proper notice under MCL 600.2163(a)(4). This issue is abandoned. In his cursory argument, defendant fails to set forth the language of the statute as required by MCR 7.212(C)(7), fails to explain or rationalize his position that reversal is required, and fails to cite authority for his position. *Kelly, supra.* Nevertheless, we have reviewed this unpreserved allegation of error and find it to be without merit. MCL 600.2163a(4) provides:

> A witness who is called upon to testify shall be permitted to have a support person sit with, accompany, or be in close proximity to the witness during his or her testimony. A notice of intent to use a support person shall name the support person, identify the relationship the support person has with the witness, and give notice to all parties to the proceeding that the witness may request that the named support person sit with the witness when the witness is called upon to testify during any stage of the proceeding. The notice of intent to use a named support person shall be filed with the court and shall be served upon all parties to the proceeding. *The court shall rule on a motion objecting to the use of a named support person before the date at which the witness desires to use the support person.* [Emphasis added.]

On September 8, 2003, the prosecutor filed a "Notice of Intent to Use Support Person." Defendant was informed that the prosecution intended to use victim advocate, Cynthia Howell, as the support person to sit with the minor victims during their testimony. Defendant never filed an objection to this notice. There was no motion on which the trial court could rule. Thus, we find no plain error in the use of the support person.

IX

Finally, defendant argues that the trial court erred in scoring three of the offense variables, offense variable 7 (OV 7), MCL 777.37, offense variable 9 (OV 9), MCL 777.39, and offense variable 11 (OV 11), MCL 777.41. At sentencing, defendant objected to the scoring of OV 7 and OV 11. The issues related to the scoring of these two offense variables are preserved. MCL 769.34(10).

> A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. "Scoring decisions for which there is any evidence in support will be upheld." [*People v Hornsby,* 251 Mich App 462, 468; 650 NW2d 700 (2002) (citations omitted).]

With respect to OV 7, fifty points may be scored if a victim was treated with terrorism, sadism, torture, or excessive brutality. MCL 777.37(1)(a). "Terrorism" is defined as "conduct designed to substantially increase the fear and anxiety a victim suffers during the offense." MCL 777.37(2)(a); *Hornsby, supra* at 468. In this case, defendant's daughter testified that defendant threatened to kill her relatives if she told on him. There was evidence that the threats were contemporaneous with the incident and may have been made both before and after the criminal sexual conduct occurred. The threats were designed to substantially increase the victims' fear

and anxiety so she would not disclose defendant's criminal conduct. The trial court found evidence of terrorism, as defined by the statute. Because there was evidence to support a score of fifty points, we affirm the court's scoring decision. *Id.*

With respect to OV 11, defendant objected to the scoring of fifty points. The prosecution responded by arguing that, while it believed fifty points was appropriate for OV 11, fifty points could alternatively be scored under OV 13, MCL 777.43. The trial court ultimately scored OV 11 at fifty points. This was an abuse of discretion.

OV 11 provides that fifty points should be scored if there are two or more criminal sexual penetrations. MCL 777.41(1)(a). However,

> All of the following apply to scoring offense variable 11:
>
> (a) Score all sexual penetrations of the victim by the offender arising out of the sentencing offense.
>
> (b) Multiple sexual penetrations of the victim by the offender extending beyond the sentencing offense may be scored in offense variables 12 and 13.
>
> (c) Do not score points for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense. [MCL 777.41(2).]

The language of the statute instructs that only penetrations *of the victim arising out of the sentencing offense are scored*, but the one penetration that forms the basis of the sentencing offense is excluded. *People v McLaughlin*, 258 Mich App 635, 674-676; 672 NW2d 860 (2003). In this case, there were two charged offenses and two convictions. The sentencing offense for which the guidelines were scored, however, was the first-degree criminal sexual conduct against defendant's daughter. There was only one penetration during that sentencing offense and that one penetration formed the basis of the first-degree criminal sexual conduct conviction. Thus, there were no penetrations to be scored under OV 11. The trial court erred in assessing fifty points.

We find the error harmless, however, because fifty points should have been scored under OV 13. OV 11, MCL 777.41(2)(b), specifically instructs that multiple sexual penetrations of a victim by the offender extending *beyond* the sentencing offense may be scored in offense variables 12 or 13. OV 13 provides for the scoring of fifty points if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more sexual penetrations against a person or persons less than 13 years of age." MCL 777.43(1)(a). Fifty points are scored if the sentencing offense is first-degree criminal sexual conduct, and all crimes within a five-year period, including the sentencing offense, may be counted. MCL 777.43(2).

In this case, there was evidence of a pattern of felonious criminal activity involving three penetrations against persons under the age of 13, including the sentencing offense, during one year. The first penetration formed the basis of the sentencing offense. The second penetration occurred when defendant placed his penis in his son's mouth. There was additional evidence of a third penetration. Defendant's daughter testified that defendant placed his hand down her

underwear and wiggled her vagina. His actions hurt her and made her feel like she had to go to the bathroom.

Under the circumstances, a score of fifty points was appropriate for OV 13. Had the trial court scored offense variables 11 and 13 correctly, the total offense variable score would remain the same. Where the guidelines were incorrectly scored, but the correct score will not change the minimum sentence range under the legislative guidelines, remand for resentencing is not required. *People v Houston*, 261 Mich App 463, 473; 683 NW2d 192 (2004). We therefore affirm defendant's sentence.

Defendant's argument with respect to OV 9 is not properly before this Court. "[I]f the sentence is within the appropriate guidelines sentence range, it is only appealable if there was a scoring error or inaccurate information was relied upon in determining the sentence *and* the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand." *People v Kimble*, 470 Mich 305, 310-312; 684 NW2d 669 (2004). Defendant's sentence is within the appropriate guidelines range regardless of whether OV 9 was incorrectly scored at ten points. Because defendant failed to object to the scoring of OV 9 at any time before this appeal and because his sentence is within the appropriate guidelines range, the scoring issue is not appealable. *Id.*

Affirmed.

/s/ Joel P. Hoekstra
/s/ Janet T. Neff
/s/ Bill Schuette