STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 1, 2008
v BRIAN BUYSSEE, Defendant-Appellant.	No. 267469 Wayne Circuit Court LC No. 04-011598-01

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant/Cross-Appellee,	
v BRIAN CHRISTOPHER BUYSSEE, Defendant-Appellee/Cross-Appellant.	No. 274748 Wayne Circuit Court LC No. 04-011598-01

Before: Zahra, P.J., and White and O'Connell, JJ.

PER CURIAM.

A jury convicted defendant of two counts of first-degree criminal sexual conduct (CSC), MCL 750.520b, three counts of contributing to the delinquency of a minor, MCL 750.145, and one count of allowing a minor to use alcohol, MCL 750.141a(2). The trial court sentenced defendant to concurrent terms of 10 to 25 years' imprisonment on each CSC count, 90 days for each count of contributing to the delinquency of a minor, and 30 days for the count of allowing a minor to use alcohol.

On defendant's motion for new trial, the trial court vacated defendant's first-degree CSC convictions, and reduced them to third-degree CSC. On resentencing, the court sentenced defendant to concurrent terms of 85 months to 15 years.

In Docket No. 274748, the prosecution appeals by leave granted the trial court's order vacating defendant's convictions of first-degree CSC, asserting that the court erroneously concluded that there was insufficient evidence of coercion to support CSC I convictions.

Defendant cross-appeals, challenging the jury instruction regarding coercion and asserting ineffective assistance of counsel. In Docket No. 267469, defendant appeals as of right, asserting error in the admission of prior acts, prosecutorial misconduct and other challenges.

We reverse the trial court's order vacating defendant's CSC I convictions and reducing them to CSC III, and reject defendant's challenges on cross-appeal.

Docket No. 274748

I

At trial, the prosecution advanced three alternative theories of CSC I, MCL 750.520b. Two of the three theories require that a defendant be "in a position of authority over the victim and used this authority to coerce the victim to submit." MCL 750.520b(1)(b)(iii) and MCL 750.520b(1)(h)(ii). The prosecution asserts that it presented sufficient evidence of coercion, in that defendant was the sole parental figure at a teenage sleepover, got the 14-year-old victim drunk, isolated her in his bedroom, and then sexually penetrated her while she was passed out.

This Court reviews de novo the trial court's determination that insufficient evidence existed to support defendant's CSC I convictions. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). This Court reviews the trial court's factual findings for clear error. MCR 2.613(C), *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

In a criminal case, due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). In reviewing the sufficiency of the evidence, the evidence is viewed in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Id*.

The essential elements of the two CSC I theories involving coercion are: 1) the defendant engages in sexual penetration with the victim; 2) the complainant is between 13 and 16 years old; and 3) the defendant "is in a position of authority over the victim and used this authority to coerce the victim to submit," MCL 750.520b(1)(b)(iii); and 1) the defendant engages in sexual penetration with the victim; 2) the complainant is mentally incapable, mentally disabled, or mentally incapacitated, physically helpless; and 3) the defendant "is in a position of authority over the victim and used this authority to coerce the victim to submit." MCL 750.520b(1)(h)(ii).

The trial court granted defendant's motion for new trial, finding that the evidence was insufficient to establish the element of coercion, vacated defendant's CSC I convictions and reduced them to CSC III:[1]

[1] The defense conceded that the evidence was sufficient to convict of CSC III.

> The testimony of [the complainant] was not that she gave in to a show of authority by the Defendant but she woke up and found him on top of her. That's in the transcript of October 31st. The evidence that he coerced her, that is evidence that he used his authority to get her to have – to agree to have sex with him is nonexistent in some respects.
>
> Now considering the Reid cases Premo and Asevedo, all of which citations have been provided to our reporter, and considering the definitions section of 750.520 - -.520. We talked about coercion, the mental anguish, the sleeping situation, I've heard all of the arguments, I'm still not convinced that there was sufficient evidence of first degree criminal sexual conduct, . . . , and I'm going to reverse and dismiss the first degree criminal sexual conduct, reduce it to third degree CSC. . . .

A

On appeal and below the prosecution relies on *People v Reid,* 233 Mich App 457; 592 NW2d 767 (1999), and *People v Premo,* 213 Mich App 406; 540 NW2d 715 (1995), arguing that in both cases, the victims did not give in to a show of authority by the defendant at the point of assault, and that the defendant instead used his position of authority to get the victim in a position to be unable to resist, and that was held sufficient to prove coercion.

In *Reid,* the defendant was convicted of two counts of CSC I under MCL 750.520b(1)(b)(iii), one of the charged theories in the instant case, which provides:

> 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:
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> * * *
>
> (b) That other person is at least 13 but less than 16 years of age and any of the following:
>
> (iii) The actor is in a position of authority over the victim and used this authority to coerce the victim to submit.

The defendant in *Reid* was charged with performing fellatio on the fifteen year-old complainant and having the complainant perform it on him. The defendant knew the complainant's father and offered to "counsel" the complainant, who was having problems in school. The defendant claimed to have counseled young persons before, through his church. After several meetings, the defendant asked the complainant to spend the night at the defendant's parents' house. On the way there, the defendant bought the complainant the brand of cigarettes he knew the complainant smoked. Once at the defendant's parents' house, they played on the computer for hours, and then the defendant gave the complainant three or four glasses of "7 Up" that tasted funny, according to the complainant. After several glasses, the complainant saw the defendant pour vodka into his glass of pop, and started feeling dizzy, hot, sweaty and light-headed. The defendant instructed the complainant to urinate into a bottle because he did not want his parents

awakened by use of the upstairs bathroom. The defendant at some point told the complainant that he (the complainant) was drunk and should take off his shirt and pants so he would not get them dirty if he got sick. The complainant did so and lay on the bed. The defendant started fondling him and asked that he do the same to the defendant, and eventually the complainant performed oral sex on the defendant. The complainant testified that he felt dizzy and light-headed when he performed oral sex on the defendant. The defendant challenged the sufficiency of the evidence.

The *Reid* Court concluded there was sufficient evidence to conclude that the defendant was in a position of authority over the complainant, as the defendant had told the complainant's father that he had been a counselor at a church and both of the complainant's parents testified that their understanding was that the defendant was spending time with their son to counsel him. On the issue whether there was sufficient evidence to support a finding that the defendant used that position of authority to coerce the complainant to submit to the charged acts, this Court noted:

> It is important to bear in mind that, "[f]orce or coercion is not limited to physical violence but is instead determined in light of all the circumstances." *People v Brown*, 197 Mich App 448, 450; 495 NW2d 812 (1992).
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> While not exactly on point because they did not expressly involve an allegation of use of a position of authority to coerce a victim to submit, two previous opinions from this Court regarding what constitutes coercion are highly instructive: *People v Regts*, 219 Mich App 294; 555 NW2d 896 (1996), and *People v Premo*, 213 Mich App 406; 540 NW2d 715 (1995). In *Premo*, at 410-411, quoting Black's Law Dictionary (5^{th} ed), 234, the panel stated that coercion " ' may be actual, direct, positive, as where physical force is used to compel act [sic] against one's will, *or implied, legal or constructive, as where one party is constrained by subjugation to other to do what his free will would refuse*.'" (Emphasis supplied.) In *Regts, supra* at 295-296, this Court, noting the discussion of "implied, legal or constructive" coercion in *Premo*, stated:
>
> > In the case at bar, defendant, as the victim's psychotherapist, manipulated therapy sessions to establish a relationship that would permit his sexual advances to be accepted without protest. That is, he subjugated the victim into submitting to his sexual advances against her free will. Accordingly, the circuit court properly reinstated charges with respect to all "coercion" theories.
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> Viewing the evidence in the light most favorable to the prosecution, defendant placed himself, with regard to the complainant, in a role highly analogous for present purposes to that of a psychotherapist with a patient. . . . Having established a position of trust with the complainant's parents, defendant invited the complainant to spend the night at the house of defendant's parents. . . . A reasonable jury could infer from this evidence that defendant manipulated his "counseling" role with the complainant—"a position of authority"—in order to have the complainant alone where defendant could sexually assault him.

> According to the complainant, on the night of the incidents, defendant, while acting in this position of authority over the complainant, gave the complainant beverages that he "spiked" with alcohol and had the complainant consume these beverages to the point of becoming heavily intoxicated. A reasonable jury could infer that this was done with the intent to reduce the complainant's inclination or ability to resist engaging in sexual activity with defendant. The complainant's testimony strongly reflects that he was disoriented at the time of the acts of fellatio and that he was, in large part, mechanically following the commands of defendant with regard to his actions or lack of resistance. He described himself as feeling as if he were in a "bad dream" during the encounter. Viewing the evidence most favorably to the prosecution in light of all the circumstances . . . defendant used a position of authority over the complainant to engineer a quite elaborate series of events to place the complainant in a confused and disoriented condition and then took advantage of the complainant's condition to perform fellatio on the complainant and to instruct successfully the complainant to perform fellatio on him. This is sufficient evidence for a rational factfinder to conclude that the complainant was "constrained by subjugation," *Premo, supra* at 411, and, thus, coerced into submitting to these acts of sexual penetration by defendant through use of his position of authority over the complainant.
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> * * *
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> In this regard, a common feature of the situation with the teacher in *Premo* and the psychotherapist in *Regts* is that the victims were in a position of special vulnerability with respect to the defendants. Similarly, in this case, a reasonable jury could have found that defendant exploited the special vulnerability attendant to his relationship with the complainant to abuse him sexually. [*Reid*, 233 Mich App at 468-473.]

In *Premo*, the defendant appealed the circuit court's denial of his motion to quash charges of 4th degree CSC. Three young women testified at the preliminary examination that in three separate incidents the defendant, a teacher at Ferndale High School, pinched their buttocks while they were in the school. The defendant was charged under then MCL 750.520e(1)(a), which provides that a person is guilty of CSC in the 4th degree if he engages in sexual contact with another and "force or coercion is used to accomplish the sexual contact." The defendant contended that pinching the victims' buttocks was insufficient to satisfy the requirement that force or coercion be used to accomplish sexual contact.

This Court affirmed, holding that the defendant's conduct "constitutes both force and coercion." Regarding "force," this Court concluded that the act of pinching requires the actual application of physical force, and thus satisfied MCL 750.520b(1)(f)(i), which at that time was incorporated by reference in the 4th degree CSC statute, MCL 750.520e(1)(a). See n 2, *infra.*

The *Premo* Court also concluded that the defendant's conduct constituted coercion under MCL 750.520e(1)(a):

> As an alternative basis to affirm the circuit court's denial of defendant's motion to quash, we also conclude that defendant's conduct constituted coercion under

MCL 750.520e(1)(a). . . The district court determined that defendant's conduct constituted coercion because defendant was in a position of authority over his victims. Apparently, the district considered defendant to be in a position of authority because he was a teacher and the victims were students. Although the circuit court did not address whether defendant's conduct constitutes coercion, we conclude that it does. Defendant's conduct was not included in the enumerated examples of coercion in MCL 750.520b(1)(f)(i)-(iv)[[2]]. . . However, the Legislature did not limit the definition of force or coercion to the enumerated examples in the statute. MCL 750.520e(1)(a). . . Furthermore, the existence of force or coercion is to be determined in light of all the circumstances and is not limited to acts of physical violence. *People v Malkowski*, 198 Mich App 610, 613; 499 NW2d 450 (1993)[, overruled on other grounds *People v Edgett*, 220 Mich App 686; 560 NW2d 360 (1996)]. Coercion

> may be actual, direct, or positive, as where physical force is used to compel act against one's will, or implied, legal or constructive, as where one party is constrained by subjugation to other to do what his free will would refuse. [Black's Law Dictionary (5th ed), 234.]

We believe that defendant's actions constituted implied, legal, or constructive coercion because, as a teacher, defendant was in a position of authority over the student victims and the incidents occurred on school property. Defendant's conduct was unprofessional, irresponsible, and an abuse of his authority as a teacher. Accordingly, we conclude that defendant's conduct in this case is

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[2] At the time *Premo* was decided, MCL 750.520b(1)(f)(i)-(iv) provided:

> Force or coercion includes but is not limited to any of the following circumstances:
>
> > (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.

> sufficient to constitute coercion under MCL 750.520e(1)(a) . . . [*Premo,* 213 Mich App at 410-411.]

The final two paragraphs quoted immediately *supra* were quoted with approval in *Reid, supra.*

Reid was also quoted with approval in *People v Knapp,* 244 Mich App 361, 369; 624 NW2d 227 (2001), a CSC II case in which the defendant, a Reiki instructor, was convicted of sexual contact with one of his students, who was between 13 and 16 years old. In *Knapp,* as in the instant case, the prosecution was required to prove that the defendant was " in a position of authority over the victim and [] used this authority to coerce the victim to submit." MCL 750.520c(1)(b)(iii). The *Knapp* Court noted:

> Here, we address the identical question of what constitutes coercion, but unlike *Reid,* we must answer this question for purposes of the CSC II statute, an issue that has not been reviewed by our courts in a published opinion. We believe that the holding in *Reid* is persuasive and equally applicable to CSC II. Therefore we similarly hold that a defendant's conduct constitutes coercion where, as here, the defendant abuses his position of authority to constrain a vulnerable victim by subjugation to submit to sexual contact.
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> * * *
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> In *Reid,* this Court specifically held that coercion by a person in a position of authority does not require a showing of physical violence but can be shown through evidence of the exploitation of a victim's special vulnerability. *Reid, supra* at 472. The Court concluded that the defendant placed himself in a position of acting as a therapist by offering to counsel the complainant about his problems. *Id.* at 470. This Court also found that the defendant spent time with the complainant on the night of the sexual conduct in order to further that counseling relationship and manipulated that role in order to assault the complainant. *Id.* The court observed that the defendant's relationship with the complainant was similar to a teacher-student relationship in which the victim is "in a position of special vulnerability" with the defendant and that the "defendant exploited the special vulnerability to his relationship with the complainant to abuse him sexually." *Id.* at 472.
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> * * *
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> As noted above, the characteristic dominant and subordinate roles in any teacher-student relationship places the student in a position of special vulnerability. We find the circumstances of this case particularly illustrative of this point. Complainant was the only young adolescent in a class taught and attended by adults. Given his age, the unconventional nature of the "curriculum," and the trust defendant fostered with complainant's mother, complainant was highly susceptible to abuse. Under these circumstances, we find that defendant exploited and abused his position of authority to compel an extremely vulnerable youth to engage in sexual contact. This clearly constitutes coercion for purposes of this section of the CSC II statute. [*Knapp,* 244 Mich App at 360-361.]

Thus, this Court has held that coercion is to be determined in light of all the circumstances, is not limited to physical violence, and can be "implied, legal or constructive, as where one party is constrained by subjugation to do what his free will would refuse." *Reid, supra; Premo, supra* at 410-411. In light of these cases, we conclude that the prosecution presented sufficient evidence to support that defendant was in a position of authority and used that authority to coerce the victim to submit.

B

There was evidence that defendant was in a position of authority over the victim. He was the only adult, picked the girls up and was with them the entire evening, instructed them not to use the computer dust in the car, provided food for them by taking them to dinner, provided the alcohol, and purported to take care of the complainant when she was sick. The issue, then, is whether there was adequate evidence that he used this authority to coerce the victim to submit.

"Subjugate" is defined:

> 1. to bring under complete control or subjection; conquer; master. 2. to make submissive or subservient; enslave. [*Random House Webster's College Dictionary* (1995).]

There was evidence that defendant gave the complainant at least three double shots of Peppermint Schnapps, telling her that it would help her stomach. He then let the victim lay on his bed so that she would be in an air-conditioned room, and rubbed her legs. Apparently, while she was sleeping, he suggested that the other girls leave the room, and eventually physically moved his daughter into a different room while she was sleeping. The complainant awoke to both incidents occurring. We conclude that although the complainant was not awake when the penetrations occurred, there was evidence that her submission was coerced in the sense that she became drunk and passed out due in part to the alcohol provided by defendant pursuant to his authority as the adult host, and was isolated in defendant's bedroom due to defendant having exercised his authority as the adult to exclude his daughter and position himself next to the complainant.[3]

Thus, the trial court erred in concluding that there was insufficient evidence to find coercion sufficient to support CSC I convictions.

II

The prosecution also contends that it presented sufficient evidence on the "mental anguish" theory of guilt of CSC I, and that the trial court thus erred by finding insufficient evidence of CSC I. We agree.

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[3] We observe that the prosecution correctly notes that the Legislature provided under subsection (h), MCL 750.520b(1)(h), that a physically helpless victim (which includes a sleeping victim) may be coerced into submission by virtue of a defendant's abuse of authority, although, logically, someone who is physically helpless does not "give in to a show of authority."

The third alternative theory of CSC I the prosecution advanced at trial was MCL 750.520b(1)(g), which requires that the defendant "causes personal injury to the victim, and the actor knows or has reason to know that the victim is . . . physically helpless." There is no dispute that the complainant was "physically helpless," as the statute defines that term to include being asleep. MCL 750.520a(l). The statute defines "personal injury" as bodily injury, disfigurement, mental anguish, chronic pain, pregnancy, disease, or loss of impairment of a sexual or reproductive organ. MCL 750.520a(m). The prosecution maintains that it presented sufficient evidence of mental anguish, and does not argue it presented evidence of any other "personal injury" under the statute.

"Mental anguish" is not defined in the statute, but has been held to mean "extreme or excruciating pain, distress or suffering of the mind." See Gillespie, 4 Michigan Criminal Law and Procedure, § 131A:26, citing *People v Swinford*, 150 Mich App 507; 389 NW2d 462 (1986). CJI2d 20.10, under which this jury was instructed almost verbatim provides:

> (2) Personal injury means bodily injury . . . or mental anguish. Mental anguish means extreme pain, extreme distress, or extreme suffering, either at the time of the event or later as a result of it.

Complainant testified that she was disgusted by defendant's conduct, and humiliated, and that after the incidents and while still at defendant's apartment, she was afraid and did not feel safe being in the house with him. She testified that what happened to her was upsetting. She cried on the stand when she testified that as defendant was having sex with her he said to her "go ahead and come, you know you deserve it," and when asked how that remark made her feel she answered "completely disgusted." She testified that having to undergo a rape examination was humiliating, and that after she got home, she called her boyfriend and that when she answered the door to let him in, she started crying. She testified that she was unable to maintain her friendship with defendant's daughter because she looks too much like defendant, and that it was difficult to talk about what happened that night.

The court properly instructed the jury on the issue,[4] and taking into account the jury's ability to observe the complainant's demeanor while testifying, we conclude there was sufficient evidence to establish personal injury through mental anguish.

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[4] The trial court stated:

> Personal injury means bodily injury, disfigurement, chronic pain, pregnancy, disease, loss or impairment of a sexual or reproductive organ or mental anguish. Mental anguish means extreme pain, extreme distress or extreme suffering, either at the time of the event or later as a result of it.
>
> Here are some of the things you may think about in deciding whether [the complainant] suffered mental anguish:
>
> Was [the complainant] upset, crying or hysterical during or after the event?

(continued…)

III

Defendant's Cross-Appeal

Defendant asserts that the trial court committed error requiring reversal in instructing the jury regarding coercion that it "may find conduct that is irresponsible and an abuse of authority to be coercive."[5] Defendant raised this issue in his motion for new trial, and the trial court concluded that it did not plainly err in giving the unobjected-to instruction.[6]

(…continued)

Did she need psychological treatment?

Did the incident interfere with [the complainant's] ability to work or lead a normal life?

Was [the complainant] afraid that she or someone else would be hurt or killed?

Did she feel angry or humiliated?

Did [the complainant] need medication for anxiety, insomnia or other symptoms?

Did the emotional effect of the incident last a long time?

Did [the complainant] feel scared afterward about the possibility of being attacked again?

There are not the only things you should think about. No single factor is necessary. You must think about all the facts and circumstances to decide whether [the complainant] suffered mental anguish.

[5] The trial court instructed the jury:

THE COURT: Alternative theories:

The Defendant is charged with two counts of criminal sexual conduct in the first degree. The prosecution has charged the Defendant under three alternative theories. That means that there are three different ways of looking at the evidence that could result in a conviction for criminal sexual conduct in the first degree.

An example of this is the use of three different recipes to make chocolate cookies. Although slightly different ingredients are used and the three batches of cookies may taste a little different, they are all still chocolate chip cookies.

You should consider each of the alternative theories separately to determine if the prosecution has proven all of the elements of that theory beyond a reasonable doubt. You do not have to all agree on which of the three theories that the

(continued…)

(…continued)

prosecution has proven beyond a reasonable doubt. Just all agree that the prosecution has proven all of the elements of one of the three alternative theories beyond a reasonable doubt.

[1st theory-750.520b(1)(b)(iii)]

The Defendant is charged with the crime of first-degree criminal sexual conduct. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

First, that the Defendant engaged in a sexual act that involved entry into [the complainant]'s genital opening by the Defendant's penis and/or finger. Any entry, no matter how slight, is enough. It does not matter whether the sexual act was completed or whether semen was ejaculated.

Second, that [the complainant] was 13, 14 or 15 years old at the time of the alleged act.

Third, that at the time of the alleged act, the Defendant was in a position of authority over [the complainant] and used this authority to coerce [the complainant] to submit to the sexual act alleged. It is for you to decide whether, under the facts and circumstances of this case, the Defendant was in a position of authority.

Coercion exists where one is made to do something their free will would not ordinarily let them do. You may find conduct that is irresponsible and an abuse of authority to be coercive.

[2d alternative theory – MCL 750.520b(1)(g)]

The Defendant is charged with the crime of first-degree criminal sexual conduct. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

First, that the Defendant engaged in a sexual act that involved entry into [the complainant]'s genital opening by the Defendant's penis and/or finger. Any entry, no matter how slight, is enough. It does not matter whether the sexual act was completed or whether semen was ejaculated.

Second, that the Defendant caused personal injury to [the complainant].

Third, the prosecutor must prove that [the complainant] was mentally incapable or physically helpless at the time of the alleged act. Mentally incapable means that [the complainant] was suffering from a mental disease or defect that made her unable to understand what she was doing. Physically helpless means

(continued…)

(…continued)

that [the complainant] was unconscious, asleep or physically unable to communicate that she didn't want to take part in the alleged act.

Fourth, that the Defendant knew or should have known that [the complainant] was mentally incapable or physically helpless at the time of the alleged act.

[3d alternative theory-MCL 750.520b(1)(h)(ii)]

The Defendant is charged with the crime of first-degree criminal sexual conduct. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

First, that the Defendant engaged in a sexual act that involved entry into [the complainant]'s genital opening by the Defendant's penis and/or finger. Any entry, no matter how slight, is enough. It does not matter whether the sexual act was completed or whether semen was ejaculated.

Second, the prosecutor must prove that [the complainant] was mentally incapable or physically helpless at the time of the alleged act. Mentally incapable means that [the complainant] was suffering from a mental disease or defect that made her unable to understand what she was doing. Physically helpless means that [the complainant] was unconscious, asleep or physically unable to communicate that she didn't' want to take part in the alleged act.

Third, that the Defendant knew or should have known that [the complainant] was mentally incapable or physically helpless at the time of the alleged act.

Fourth, that at the time of the alleged act, the Defendant was in a position of authority over [the complainant] and used his authority to coerce [the complainant] to submit to the sexual act alleged. It is for you to decide whether under the facts and circumstances of this case, the Defendant was in a position of authority.

Coercion exists where one is made to do something their free will would not ordinarily let them do. You may find conduct that is irresponsible and an abuse of authority to be coercive.

[6] We note that the prosecutor in closing argument echoed the trial court's instruction, without defense objection:

What does that mean, coerce? Here's what coercion is. Coercion exists where one is made to do something, their free will would not ordinarily let them do. You may find conduct this [sic that] is unprofessional, irresponsible and an abuse of authority to be coercive.

Unpreserved claims of constitutional error are reviewed for plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999); MCL 768.29. This Court reviews de novo issues of law arising from jury instructions. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). Jury instructions must include all of the elements of the crime charged. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). Generally, juries are presumed to have followed instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), however, if both a correct and an incorrect instruction are given, this Court will presume that the jury followed the incorrect charge, *People v Hess*, 214 Mich App 33, 37; 543 NW2d 332 (1995).

The prosecution asserts that because defendant's trial counsel approved the jury instructions, any error was extinguished and defendant may not now raise this instructional challenge, citing *People v Carter*, 462 Mich 206; 612 NW2d 144 (2000). In *Carter*, the Supreme Court considered "whether defendant's convictions must be reversed because the trial court refused the jury's request for the testimony of four witnesses, in violation of MCR 6.414(H)." *Id.* at 208. MCR 6.414(H) requires a trial court "to exercise its discretion to ensure fairness and to refuse unreasonable requests [to review testimony or evidence], but it may not refuse a reasonable request," and may not foreclose the possibility of having the testimony reviewed at a later time. The *Carter* Court held that although the trial court violated MCR 6.414(H) by foreclosing the possibility of later reviewing the requested testimony, defendant had waived his rights under the court rule and thereby extinguished any error because "defense counsel specifically approved the trial court's refusal of the jury's request and the court's subsequent instruction to the jury." *Id.* at 208-209, 220.

Unlike in *Carter*, in the instant case defendant raises a constitutional challenge—one of due process--to the instruction on coercion, asserting that the instruction removed a contested element from jury consideration that the jury was otherwise required to decide, and thus constituted a directed verdict on the element. "The Fifth and Sixth Amendments of the United States Constitution 'require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged beyond a reasonable doubt." *Carines*, 460 Mich at 761, quoting *United States v Gaudin*, 515 US 506, 510; 115 S Ct 2310; 132 L Ed 2d 444 (1995). An error in omitting an element of a crime would be an error of constitutional magnitude. *Carines*, 460 Mich at 761.

Defendant asserts that the CSC I statute does not define coercion, thus the dictionary definition should be looked to. The prosecutor argues that the challenged instruction on coercion was taken "straight from precedent" relying on *Premo*, and *Reid*. *Premo*, 213 Mich App at 410-411, sets forth a definition of coercion from Black's Law Dictionary:

> Coercion
>
> > may be actual, direct, or positive, as where physical force is used to compel act against one's will, or implied, legal or constructive, as where one party is constrained by subjugation to other to do what his free will would refuse. [Black's Law Dictionary (5th ed), 234.]

The *Premo* Court continued:

> We believe that defendant's actions constituted implied, legal, or constructive coercion because, as a teacher, defendant was in a position of authority over the student victims and the incidents occurred on school property. *Defendant's conduct was unprofessional, irresponsible, and an abuse of his authority as a teacher*. Accordingly, we conclude that defendant's conduct in this case is sufficient to constitute coercion under MCL 750.520e(1)(a) . . . [*Premo*, 213 Mich App at 410-411. Emphasis added.]

We recognize that the prosecution offered, and the trial court and defense counsel accepted, language taken directly from this Court's opinion in *Premo*. However, this language from *Premo* must be understood in context, and does not purport to provide a definition of coercion.[7] Nevertheless, the trial court's instruction must be evaluated in its entirety, and so read, presents no error of constitutional dimensions. The court instructed the jury that it must find:

> Fourth, that at the time of the alleged act, the Defendant was in a position of authority over [complainant] and used his authority to coerce [complainant] to submit to the sexual act alleged. It is for you to decide whether under the facts and circumstances of this case, the Defendant was in a position of authority.
>
> Coercion exists where one is made to do something their free will would not ordinarily let them do. You may find conduct that is irresponsible and an abuse of authority to be coercive.

Taken as a whole, the instruction required the jury to find that defendant abused his authority and that that abuse caused the complainant to submit to the sexual act, while her free will would not ordinarily have let her do so. We find no plain error.

Defendant also asserts that trial counsel's failure to challenge the instruction constituted ineffective assistance of counsel. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Generally, to establish a claim of ineffective assistance of counsel defendant must show 1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; 2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and 3) that the resultant proceedings were fundamentally unfair or unreliable. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007); *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

Because the instruction as a whole adequately informed the jury of the elements of the offense, defendant has failed to make the required showing.

[7] Because this language does not provide a useful definition of "coerce," it should not be used in instructing on this offense.

I

Defendant asserts that he was denied a fair trial by the admission of evidence concerning unrelated bad acts. Preserved error in the admission of prior acts evidence does not require reversal unless it affirmatively appears that it is more probable than not the error was outcome determinative. The defendant bears the burden of establishing that, more probably than not, a miscarriage of justice occurred. *Knapp, supra,* 244 Mich App at 378.

A

Defendant's pre-trial motion in limine to preclude other acts evidence anticipated the prosecutor's motion to permit other acts evidence:

> The other acts evidence of false allegations of Mr. Buysse's [previously] inviting his daughter and her 13 year-old friends over for a sleep-over, renting sexually explicit movies, allowing them to use inhalants, drink alcohol and speak about sexually explicit topics are irrelevant to an issue or fact of consequence at trial.

The prosecution filed its notice of intent to admit evidence of defendant's other acts on the first day of trial, stating in pertinent part:

> 4. On several prior occasions during the same summer the defendant would invite his daughter and her 13-year-old friends for sleepovers at his home. He would rent sexually explicit movies involving teenagers including Poison Ivy 2 and Cruel Intentions. He would also allow the children to use inhalants, would supply alcohol, and speak about sexually explicit topics.
>
> 5. In cases involving sexual exploitation of children it is common for the offender to use such activities to allow the child to become less inhibited and allow escalating levels of physical intimacy. This behavior is commonly called "grooming."
>
> 6. Under People v. DerMartex, 390 Mich. 410 (1973), both antecedent and precedent sexual intimacies between defendant and the victim are admissible in prosecution for sex offenses where the antecedent and precedent acts tend to show similar familiarity between defendant and the person with he [sic] allegedly committed the charged offense.
>
> * * *
>
> 12. The People intend to introduce, at defendant's trial, evidence of his other acts performed during the commission of these other crimes to prove motive, lack of mistake, part of a common plan and scheme, and as part of the offense charged.
>
> MRE 404(b)(1) provides:
>
> (b) Other crimes, wrongs, or acts.

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

Use of prior acts as evidence of character is excluded, except as allowed by MRE 404(b), to avoid the danger of conviction based on a defendant's history of other misconduct. *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998). To be admissible under MRE 404(b), generally prior acts evidence 1) must be offered for a proper purpose, 2) must be relevant, and 3) its probative value may not be substantially outweighed by potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). Evidence of misconduct similar to that charged is logically relevant to show that the charged act occurred if the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they were manifestations of a common plan, scheme, or system. *People v Dobek*, 274 Mich App 58, 85; 732 NW2d 546 (2007).

Even assuming error, it is not more probable than not that admission of the prior acts evidence was outcome determinative. Although the prosecutor made much of the prior acts evidence in opening statement, the trial testimony in large part did not live up to the prosecutor's claims.

As to defendant's alleged allowing of inhalant use: Complainant testified that the night in question was the first time she had brought inhalants to defendant's apartment, and his daughter testified at trial that she had never huffed at defendant's apartment before the night in question, and had first "huffed" the day before, with complainant. Regarding defendant's alleged allowing the minor girls to drink alcohol, complainant testified that she had spent the night at defendant's house one time before the incident in question, earlier that summer, and neither defendant nor she drank alcohol. Defendant's daughter testified:

> *Q.* Now had he ever done that before when you had friends over? Did he ever bring alcohol out?
>
> *A.* Yes, but it was for him, but he let us have some.
>
> *Q.* How was it different this time that it made you uncomfortable?
>
> *A.* Because he was asking my friends if they wanted a drink.

After the daughter testified that she had peppermint Schnapps at her father's on the night in question, the prosecutor asked:

> *Q.* Had you ever had that kind of liquor at your dad's house before?

She answered no, and the prosecutor then asked:

Q. What kind of liquor did you have before?

A. Like Pucker and Mike's Hard Lemonade, stuff like that.

Although less than clear, a fact-finder could infer from the daughter's testimony that on the four or so prior occasions that she had had sleepovers at her father's, defendant drank himself and allowed her and her friends to drink non-hard liquor, e.g., Mike's Hard Lemonade, when they so requested.

Regarding defendant's alleged rental of sexually explicit movies, there was no testimony that defendant had input into the choice of movies rented on the night in question; rather the three girls testified at trial that the three or some combination thereof chose the movies on the night in question.

In sum, the trial testimony regarding prior acts was unlikely to have swayed the jury that defendant had sexually abused the complainant. Because any error in admission of the prior acts was not more probable than not outcome determinative, reversal is not warranted. *Knapp, supra* at 378.

B

Defendant also contends that the prosecutor offered the prior acts evidence under false pretenses. Defendant raised this issue in his motion for new trial. We review the trial court's determination to deny defendant's motion for new trial for an abuse of discretion. *People v Cress,* 468 Mich 678, 691; 664 NW2d 174 (2003). It is not evident to us that the prosecutor intentionally misrepresented the other acts to which he expected the girls to testify at trial, thus we conclude the trial court did not abuse its discretion in denying defendant's motion for new trial on this basis.

C

Defendant also challenges the prosecutor's display to the jury of DVD covers, and playing several minutes of one DVD. Defendant did not object at trial, but raised this issue in his motion for new trial. The trial court's determination to deny a new trial is reviewed for an abuse of discretion. *Cress, supra* at 691.

Neither the DVD covers (Poison Ivy, Cruel Intentions III) nor the DVD clip played (Cruel Intentions III) by the prosecutor during closing argument had been admitted in evidence. Assuming their use constituted plain error, we conclude because their display was brief, their use cannot be said to have resulted in the conviction of an innocent person, or seriously affected the fairness, integrity or public reputation of the proceedings, given the complainant's testimony and the extent to which her rendition of events, apart from the actual sexual abuse, was corroborated by the other girls.

D

Defendant next asserts that the trial court improperly precluded questioning of Dr. Richard Rech, who had been qualified by the court as an expert in neuropsychopharmacology.

Defendant did not object at trial, but raised this issue in his motion for new trial. This Court reviews the trial court's denial of defendant's motion for new trial for an abuse of discretion. *Cress, supra* at 691.

When defense counsel asked Dr. Rech about the relation of drug use to hallucination and its behavioral effects, the very area in which Dr. Rech was qualified as an expert, the prosecutor objected and the trial court sustained the objection:

> *Q*. Now does – when a person has this memory of a hallucination that they believe to be real, do they express it has [sic as] being something that happened, or do they express it always that this it is something that I know happened, do they – in what particular way do they express that –
>
> MR. CLARKE: Your Honor, if I may?
>
> THE COURT: Yes.
>
> MR. CLARKE: At this point we're talking about memory cognitive function and the nature of of [sic] hallucination, I think that is separate, in a separate field of expertise than the area of pharmo – whatever it is, toxicology. Oh I'm sorry psycho –
>
> THE COURT: Neuropsychopharmology [sic].
>
> MR. CLARKE: Neuropsychopharmology [sic]. Thank you, your Honor. Is far outside the scope of neuropsychopharmicology [sic], which is specifically regarding the effects of drugs on the central nervous system.
>
> THE COURT: Response?
>
> MR. GREENWOOD: I would say that the affect [sic] of the drugs is, besides feeling it, might be how you express what happened when you have, in fact, a hallucination. If you tell somebody about it, that's an effect.
>
> THE COURT: Doctor Rech has been qualified in the area of neuropsychopharmicology [sic], which is an area of expertise agreed to by both attorneys of experts test [sic]. We will qualify him as an expert in that area. His testimony, therefore, has to be predicated on the questions within the area of his expertise, Mr. Greenwood. And I think that the question and the answer being elicited exceeds [sic] the scope of what he's been qualified for. I'll sustain the objection.
>
> MR. CLARKE: Thank you, your Honor.

On re-direct, Dr. Rech gave a very long answer which included testimony answering defense counsel's earlier question:

> *Q*. Now I think you testified earlier regarding in terms of hallucinations. That a hallucination is something that occurs in the use of this particular substance.

That is an affect [sic] of it, that a hallucination will last longer than two hours? Or what exactly were you – what's the difference between the literature and what you stated previously?

A. Hallucinations can occur in a few minutes, they can occur over maybe twenty or thirty minutes, as long as twenty or thirty minutes. They can be multiple hallucinatory experiences, usually with the usual pattern of use with difluoroaethane with a single hit here and then you'll may be semi unconscious. Then you'll come out in a minute or two or three or five, and you do it again.

When you have an hallucination it will be over a short period of time relatively in a few minutes perhaps. And that is not expressed at that time usually, because a person is not competent to make that expression. But it is put in memory at that time. * * * *

That is the hallucination is laid down, and then later on it can be hours later on, that they'll recover that. They'll be able to recall that because the sensorium clears enough for that to happen. Then when it comes back into the memory, it seems to have the force of reality.

Q. Okay.

A. And they usually have no real concept of when that occurred. Temporal factors are very poorly described in terms of when things occurred, and how long they occur or particular details of hallucinatory experience will not be forthcoming.

We conclude that although the trial court initially precluded the testimony, Dr. Rech later provided the testimony defense counsel sought to elicit initially. Thus, even if the trial court abused its discretion in sustaining the prosecutor's objection, defendant cannot show he was prejudiced and there is no basis for reversal on this issue.

E

Defendant also asserts that he was prejudiced by the prosecutor's display to the jury of a photo of defendant with the caption "PARENT'S WORST NIGHTMARE," which came from no witness, was not something the police found, but rather was a graphic made by the prosecutor and a direct attack on defendant's character.

Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994), but he is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case,

People v Bahoda, 448 Mich 261, 282; 531 NW2d 659 (1995). He need not use the least prejudicial evidence available to establish a fact at issue, nor must he state the inferences in the blandest possible terms. *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995). A prosecutor's good-faith effort to admit evidence does not constitute misconduct. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). Opening statement is the appropriate time to state the facts that will be proven at trial. When a prosecutor states that evidence will be presented that later is not presented, reversal is not required if the prosecutor acted in good faith and the defendant was not prejudiced by the statement. *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991), *People v Wolverton*, 227 Mich App 72, 77; 574 NW2d 703 (1997).

Although trial counsel did not object to the prosecutor's references in opening statement and rebuttal to the incidents being "every parent's worst nightmare," and to the prosecutor's displaying to the jury a photograph of defendant with that phrase as a caption, these claims were raised in defendant's motion for new trial. The trial court's determination to deny defendant's motion for new trial is reviewed for an abuse of discretion. *Cress, supra* at 691. An abuse of discretion occurs when the result is outside the range of principled outcomes. *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007).

The prosecutor's opening statement began with

> What happened on July 12th, 2004, was every parent's worst nightmare. It began with a violation of trust and ended with a sexual assault of a 14-year-old . . . .

After summarizing what the testimony would show, the prosecutor again used the term:

> This was a parent's worst nightmare. My 13- or 14-year old daughter is going to spend the night. You trust that the man in authority, the person responsible, Mr. Buyssee [sic], would protect them. In this case, he did not only not protect them, he preyed on them, he created the environment to allow this to happen. He knew what would happen by letting them use these inhalants. He knew what would happen while letting them watch these movies. He created an environment where everything's okay at the Buyssee [sic] home. Everything's okay at the Buyssee home including the sexual assault.

In closing argument, the prosecutor displayed to the jury a photograph of defendant with the caption, placed by the prosecution, reading "Parent's Worst Nightmare," which was not admitted in evidence. In rebuttal closing argument, the prosecutor stated:

> We began this trial, we talked about a parent's worst nightmare, trusting someone to watch your kids. Trusting someone to protect your kids. And your kids are not protected.

We conclude that although the prosecutor's conduct was indeed improper, the trial court did not abuse its discretion in denying defendant's motion for new trial on this basis. The display of defendant's photograph to the jury and repeated use of the theme "parent's worst nightmare," was unlikely to have prejudiced defendant significantly in light of the complainant's testimony regarding the sexual abuse, and the extent to which her version of events on the night in question was corroborated by the other girls.

F

Defendant maintains that the trial court improperly denied his motion to preclude reference to the complainant as "the victim." Defendant's motion in limine to preclude prior similar acts requested that the prosecutor be precluded from referring to the complainant as the victim. This Court reviews the trial court's denial of defendant's motion for an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000). Defendant also raised this issue in his motion for new trial. The trial court's determination to deny a new trial on this issue is reviewed for an abuse of discretion. *Cress, supra* at 691.

As the prosecution asserts, the CSC statute's definitional section provides that "the victim" is the "person alleging to have been subjected to criminal sexual conduct." MCL 750.520a(q). The theories under which defendant was charged with CSC I use the term "victim," MCL 750.520b(1)(b)(iii), 750.520b(1)(g), 750.520b(1)(h)(ii), as well. We thus conclude there was no abuse of discretion in permitting the use of this term.

G

Defendant next asserts that the prosecutor improperly took over examination of witnesses by the defense. Defendant did not object at trial, but raised this issue in his motion for new trial. This Court reviews the trial court's determination to deny a new trial on this basis for an abuse of discretion. *Cress, supra* at 691.

The prosecutor's unobjected-to interruption of defense counsel's direct examination of Dr. Hage is quoted below:

> *Q.* So does it [inhaling, and in addition, drinking alcohol] make the memory or delusion stronger or weaker or stay about the same?
>
> *A.* It could go either way. I would not be able to tell.
>
> *Q.* Does it affect the duration of the --
>
> MR. CLARKE [sic] [*prosecutor*]: Wait a minute Judge, I didn't understand that. He said that the alcohol could make you less likely or more likely to have hallucination [sic], it could go either way, is that what you said, Doctor?
>
> THE WITNESS: No.
>
> I said—he was asking three things. And so I said it would be no effect or have a worse effect, it won't help in not having it happen.
>
> MR. CLARKE [sic]: So it could have no effect, or it possibly could have an effect, but you really couldn't tell?
>
> THE WITNESS: Right. I would say that, yes.

Although the prosecutor should have sought clarification on cross-examination rather than interrupt defendant's expert, the interruption was very brief, and was unobjected to. Under these circumstances, we cannot conclude the trial court abused its discretion in denying defendant's motion for new trial on this basis. *Cress, supra.*

H

Defendant also contends that he was prejudiced by medication problems that made him unable to testify. Defendant raised this issue in his motion for new trial, the denial of which this Court reviews for an abuse of discretion. *Cress, supra* at 691. In support of his motion, defendant submitted an affidavit, as did defendant's trial counsel, Jennipher Colthirst. Defendant's affidavit stated in pertinent part:

> 3. I was housed in jail pending trial. I am a long term sufferer of Attention Deficit Hyperactivity Disorder (ADHD). In connection with this, before going to jail I was prescribed and took the drugs Effexor and Dexedrine. After I got to jail I was not allowed to have these medications. The result was that I became disoriented and short-tempered, had memory problems and anxiety, and found it difficult to concentrate and to answer the attorney's questions. I complained often to the jail officials, but they refused to take action. After the trial started, attorney Colthirst made a complaint to the judge, who arranged for me to resume getting my medication. However, although I did get Effexor, the jail refused to provide Dexedrine, but provided a substitute which did not work as the Dexedrine did. By the time I would have had to testify, I was still suffering from the symptoms of ADHD. I discussed this with attorneys Colthirst and Greenwood, and they decided that because of my condition I could not safely testify. I accepted and agreed with their judgment and did not testify.

Trial counsel Colthirst's affidavit stated in pertinent part:

> 4. In the morning of the second day of trial, Mr. Buysse complained to me about the Wayne County Jail Staff's failure to give him his required medication prior to his court appearance, and which resulted in Mr. Buysse feeling highly aggravated and agitated. I immediately apprised the Court of this matter, the Court postponed the continuation of the trial until Mr. Buysse was not only able to get his medication, but also waited until Mr. Buysse advised me that he felt well enough to continue with his trial. There was no discussion of his testifying, for our trial strategy had always been for him to remain silent, and that was based on our pre-trial consultations, investigations and preparation. It was our conclusion after pre-trial preparation, that his testifying would not be in his best interest. Therefore, Mr. Buysse's decision not to take the stand was based on prior trial strategies and tactics.

An extended colloquy at the hearing on defendant's motion for new trial took place on the medication issue, the sum and substance of which is that the trial court noted, and defense counsel agreed, that it had granted defendant's trial counsel a continuance for her to procure defendant's medication (for ADHD), and the trial court later inquired whether defendant was

receiving his medication, and defense counsel responded affirmatively. The record supports that that is what took place.

We conclude under these circumstances that the trial court did not abuse its discretion in denying defendant an evidentiary hearing on this issue, as requested in his motion for new trial. *Cress, supra* at 691.

I

Defendant's next argument is that trial counsel rendered ineffective assistance by failing to object to and move for a mistrial regarding the prosecutor's introduction of the photo of defendant captioned "Parent's Worst Nightmare," by failing to object to the DVD covers discussed above and to the prosecutor's hijacking of witness examination, and failing by to object and move for a new trial or adjournment because defendant was in no shape to testify due to medication problems. Defendant further asserts that by having attorney Greenwood do closing argument, the defense was put in an untenable position, since Greenwood could not effectively argue about what happened at trial before he got there. Greenwood missed Mary and Elise's testimony, which was the main testimony against defendant. A reasonable jury could not have taken seriously Greenwood's arguments, when they knew he had not been at trial to see and hear that evidence.

Defendant raised this issue in his motion for new trial, the denial of which this Court reviews for an abuse of discretion. *Cress, supra* at 691. In support of his motion, defendant submitted an affidavit, as did defendant's trial counsel, Jennipher Colthirst. Defendant's affidavit stated in pertinent part:

> 2. During the trial Attorney Colthirst informed me that she felt assistance from another attorney would be useful. I therefore accepted her recommendation to have attorney Henry Greenwood join her as cocounsel on the case. Neither attorney advised me of any dangers that taking this action would expose me to.
>
> * * *
>
> 4. The matter of whether to raise objections or file motions at trial was left to my attorneys and I played no role in that.

Trial counsel Colthirst's affidavit stated in pertinent part:

> 2. I advised Mr. Buysse that the defense team added Mr. Greenwood, for he was not only an experienced attorney with whom I had numerous prior pre-trial interactive exchanges of ideas of trial tactics and strategies concerning his case, but also because he, like Mr. Buysse, had a personal understanding and history of Adult Attention Deficit Disorder.
>
> 3. During the prosecutor's closing argument, and while I was writing key points to share with co-counsel to address in his closing, I inadvertently missed the prosecution's presentation of what was described to be an enlarged photo of Mr. Buysse with the caption, "Parent's Worst Nightmare." The prosecutor failed to

announce he would do that, and because I did not notice same, I did not object at the time of said presentation.

5. Co-Counsel Greenwood and I agreed that he would handle the examination of the defense expert witnesses as well as the objections arising therefrom.

* * *

8. I do not have an independent recollection of the prosecutor's presentation of a DVD cover from the movie "Poison Ivy II".

Assuming arguendo that these were errors, we are not convinced that there is a reasonable probability that, but for these errors, the result of the proceedings would have been different, nor are we convinced that the resultant proceedings were fundamentally unfair or unreliable. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007); *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Defendant's ineffective assistance claims fail.

J

Defendant's final argument is that the trial court acted unconstitutionally by making findings of fact to raise the sentencing guidelines, not based on a finding by a jury or a confession by defendant. As defendant concedes, *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). Defendant's challenge to his sentences for CSC III fails.

In Docket No. 274748, we reverse the trial court's order vacating defendant's CSC I convictions and reducing them to CSC III, and remand for reinstatement of the convictions and re-sentencing. Further, we reject defendant's cross-appeal. We affirm in Docket No. 267469.

/s/ Brian K. Zahra
/s/ Helene N. White
/s/ Peter D. O'Connell